



**COMMONWEALTH of VIRGINIA**  
*Department of Human Resource Management*

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 11620**

Hearing Date: March 1, 2021  
Decision Issued: March 22, 2021

**PROCEDURAL HISTORY**

On September 10, 2020, Grievant was issued a Group III Written Notice of disciplinary action with removal for fraternizing with an inmate.

On October 9, 2020, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On November 9, 2020, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 1, 2021, a hearing was held by remote conference.

**APPEARANCES**

Grievant  
Grievant's Representative  
Agency Party Designee  
Agency Representative  
Witnesses

**ISSUES**

1. Whether Grievant engaged in the behavior described in the Written Notice?

2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

### **BURDEN OF PROOF**

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

### **FINDINGS OF FACT**

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Department of Corrections employed Grievant as a Corrections Officer at one of its facilities. He had been employed by the Agency for approximately three years and six months. No evidence of prior active disciplinary action was introduced during the hearing.

Staff at the Facility received training that they should not give items to inmates because a "little favor" can lead to a "big favor" which compromises security. Facility supervisors frequently reminded security staff not to give special treatment to offenders.

The Facility had separate dining areas for staff and inmates. In August 2020, the Facility changed its practice of having inmates receive their meals in the inmate cafeteria. Instead, meals were taken to the inmate dorms and distributed there. Dinner meals were distributed beginning at 4 p.m.

On August 23, 2020, the Inmate was performing repairs around the Facility. He went into the staff dining area.

Grievant went to the staff dining area and observed the Inmate. Grievant did not know that the Inmate was not supposed to be in the staff dining area. Grievant had two

sandwiches made. Grievant ate one of the sandwiches and asked the server to wrap the other one so he could take it with him.

The Inmate had two sandwiches. He asked that one of the sandwiches be wrapped. The server wrapped the sandwich and placed it in a brown paper bag. Grievant also placed his wrapped sandwich in the brown paper bag. Grievant took the brown paper bag containing both sandwiches with him when he returned to the Unit.

Grievant entered the control booth with the brown paper bag. When Grievant noticed the Inmate, Grievant emptied the bag in front of the Control Booth Officer. The Control Booth Officer observed the two sandwiches and also two hard boiled eggs from breakfast. Grievant said, "I'm going to give this to [Inmate's name]". The Control Booth Officer knew that employees were not supposed to give food items to inmates. The Control Booth Officer asked, "Why are you going to give an offender food?" Grievant replied, "It's some old eggs and a sandwich. It's been out all morning and I'm not going to eat it." The Control Booth Officer shook her head and continued her work duties. Grievant placed the two sandwiches and the two eggs back into the bag. At approximately 3:21 p.m., Grievant passed the bag through the control booth slot to the Inmate who took the bag.

### **CONCLUSIONS OF POLICY**

Unacceptable behavior is divided into three groups, according to the severity of the behavior. Group I offenses "include types of behavior less severe in nature, but [which] require correction in the interest of maintaining a productive and well-managed work force." Group II offenses "include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal." Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."<sup>1</sup>

Group III offenses include "Violation of Operating Procedure 135.2 Rules of Conduct Governing Employees Relationships with Offenders." Operating Procedure 135.2 (IV)(A) states, "fraternization and non-professional relationships between employees and offenders are prohibited." Section IV(D) provides:

Special Privileges – Employees will not extend or promise an offender special privileges or favors not available to all persons similarly supervised, except as provided through DOC channels.

On August 23, 2020, Grievant provided special privileges to the Inmate. Grievant took the Inmate's sandwich with him from the staff dining area to the control booth. Grievant then gave the sandwich and two hard boiled eggs to the Inmate. Grievant's actions were contrary to his training and facility practice and amounted to giving the

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<sup>1</sup> See, Virginia Department of Corrections Operating Procedure 135.1.

Inmate special privileges. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, the Agency's decision to remove Grievant must be upheld.

Grievant argued that the punishment was excessive. The level of punishment in this case, however, was consistent with the Standards of Conduct. Although the Agency could have issued lesser disciplinary action, it was authorized to issue a Group III Written Notice with removal.

Grievant argued he was not hiding his behavior and he did not know what he was doing was wrong. The evidence showed that Grievant received sufficient training such that he should have known what he was doing was wrong.

Grievant objected to being ineligible for re-hire. The evidence showed that Grievant could be rehired at another DOC Facility depending on the managers at that Facility.

*Va. Code § 2.2-3005.1* authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Human Resource Management ..."<sup>2</sup> Under the *Rules for Conducting Grievance Hearings*, "[a] hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is **upheld**.

## APPEAL RIGHTS

You may request an administrative review by EDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EDR within 15 calendar days of the date the decision was issued.

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<sup>2</sup> Va. Code § 2.2-3005.

Please address your request to:

Office of Employment Dispute Resolution  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto:EDR@dhrm.virginia.gov), or by fax to (804) 786-1606.

You must also provide a copy of your appeal to the other party and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.<sup>[1]</sup>

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

*/s/ Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>[1]</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.