



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11624

Hearing Date: February 12, 2021
Decision Issued: March 4, 2021

PROCEDURAL HISTORY

On October 27, 2020, Grievant was issued a Group III Written Notice of disciplinary action with removal for failure to follow policy and sleeping during work hours.

On October 29, 2020, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On November 16, 2020, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 12, 2021, a hearing was held by remote conference.

APPEARANCES

Grievant
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. Grievant had prior active disciplinary action. He received a Group I Written Notice on February 8, 2019 for unsatisfactory work performance.

On February 9, 2020 at approximately 6:50 a.m., Grievant was working in a pod delivering food trays to inmates when he was approached by the Inmate. The Inmate wanted a second tray to give to his bunk-mate. Grievant denied the Inmate's request. The Inmate became angry and pointed his finger at Grievant as he began cursing at Grievant. Grievant said it was not okay to get another tray and it was too early in the morning to be arguing. The Inmate told Grievant that Grievant gave out trays to everyone and "f—k you." Grievant said, "f—k you" to the Inmate and the Inmate went back to his bed area. After Grievant finished serving trays, the Inmate returned to confront Grievant. The Inmate called Grievant a "p—sy" and "b—ch." Grievant began conducting key door checks at 7:05 a.m. As Grievant approached the back door to side A, the Inmate approached Grievant and said Grievant should say everything to his face. The Inmate got close to Grievant making Grievant feel threatened. Grievant jumped back. Grievant squared off with the Inmate and assumed a fighting stance. His fists were positioned as if to punch the Inmate. Grievant realized the Inmate was attempting to get Grievant to hit him. The Inmate would jump at Grievant to try to cause Grievant to hit the Inmate. Grievant tried to walk around the Inmate. The Inmate would block Grievant's movement. The Inmate

attempted to bump Grievant to get Grievant to hit the Inmate. Grievant did not call for assistance when the Inmate confronted Grievant. Another corrections officer observed the conflict and notified other staff to report to Grievant's location.

On August 21, 2020, Grievant was responsible for maintaining a key logbook. He was to record each time a key was issued. The Agency used a "chit" system where an employee provided Grievant with a chit in return for a key. At approximately 9:45 a.m., the Unit Manager reviewed the key log and observed that Grievant had not made any entries in the key logbook even though keys had been issued.

At approximately 4 p.m. on August 21, 2020, Grievant was working in the Control Booth. He was supposed to remain alert and communicate with other officers as needed. The Lieutenant approached the Control Booth and attempted to get Grievant's attention. Grievant did not respond. The Lieutenant could see that Grievant was asleep. The Lieutenant walked to the Unit Manager's officer and said that Grievant was asleep in the Control Booth and Grievant was not responding to the Lieutenant's attempts to get Grievant's attention.

The Unit Manager walked to the Control Booth. The Unit Manager observed Grievant seated in a chair with his head leaning to the left side against the back of the chair. The Unit Manager could see Grievant's eyes and observed that Grievant's eyes were shut.

The Unit Manager walked back to the Unit Manager's officer to obtain a camera to take a picture of Grievant asleep. After obtaining a camera, the Unit Manager walked back to the Control Booth and observed Grievant in the same position with his eyes closed. While the Unit Manager was attempting to take a picture, Grievant awoke and observed the Unit Manager attempting to take his picture. Grievant told the Unit Manager, "[Unit Manager] I am not doing this with you, you are petty." Grievant was angry that the Unit Manager was attempting to take a picture of him.

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."¹

Group I offenses include, "[u]se of obscene or abusive language (considered a Group I depending on the severity, harshness, and impact of the language.)"

¹ See, Virginia Department of Corrections Operating Procedure 135.1.

“[I]nadequate or unsatisfactory job performance” is a Group I offense.² In order to prove inadequate or unsatisfactory job performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

On August 9, 2020, Grievant said “f—k you” to an Inmate. Grievant used obscene language contrary to the Standards of Conduct.

Grievant squared off in a fighting stance instead of using his radio to request assistance. Grievant’s actions were unsatisfactory work performance.

Grievant squared off with the Inmate because he felt threatened and believed the Inmate intended to fight him. Grievant was entitled to protect himself from an imminent attack by an Inmate, but he was obligated to call for assistance because he had sufficient opportunity to ask others to help him.

On August 21, 2020, Grievant was responsible for recording in a logbook each time he issued a key to an employee. Grievant failed to perform this task. Thus, his actions were unsatisfactory to the Agency.

“Sleeping during working hours” is a Group III offense.³ On August 21, 2020 at approximately 4 p.m., Grievant was working in the Control Booth. He was seated in a chair with his head back and to the side with his eyes closed. His eyes remained closed for several minutes. Grievant was asleep. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for sleeping during working hours. 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 he was not sleeping but was in fact listening to YouTube videos for meditation.⁴ The evidence showed that Grievant was observed by two employees with his eyes closed for several minutes. The evidence is sufficient to show that Grievant was asleep during working hours.

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”⁵ Under the *Rules for Conducting Grievance Hearings*, “[a] hearing officer must give

² Virginia Department of Corrections Operating Procedure 135.1(V)(B)(4).

³ See, Operating Procedure 135.1, Standards of Conduct.

⁴ The Agency alleged but did not establish that Grievant violated policy by streaming YouTube videos. The Agency did not establish the amount of time Grievant streamed the videos and other relevant details.

⁵ Va. Code § 2.2-3005.

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.

Please address your request to:

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

or, send by e-mail to 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.^[1]

[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

Carl Wilson Schmidt, Esq.
Hearing Officer

^[1] Agencies must request and receive prior approval from EDR before filing a notice of appeal.