

Issues: Group II Written Notice (failure to follow policy), and Termination due to accumulation; Hearing Date: 12/14/18; Decision Issued: 01/08/18; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 11109; Outcome: No Relief – Agency Upheld.



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

**OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 11109**

Hearing Date: December 14, 2017  
Decision Issued: January 8, 2018

**PROCEDURAL HISTORY**

On August 30, 2017, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow policy. Grievant was removed from employment based on the accumulation of disciplinary action.

On September 22, 2017, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On October 12, 2017, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On December 14, 2017, a hearing was held at the Agency's office.

**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 locations. Grievant had prior active disciplinary action. On February 4, 2015, Grievant received a Group III Written Notice with a two work day suspension for failure to follow policy. On February 12, 2016, Grievant received a Group II Written Notice for failure to follow policy.

Grievant worked in the Facility's Armory. She was responsible for distributing weapons and ammunition to corrections officers working various posts throughout the Facility. She was responsible for receiving weapons and ammunition from corrections officers who had finished their assignments.

On July 27, 2017, at approximately 5:30 a.m., Grievant assumed her post at the Facility's Armory. At approximately 10:30 a.m., Grievant gave Officer C a shotgun and 10 rounds of ammunition. Four of the rounds were handed to Officer C. Six of the rounds were on a sleeve attached to the shotgun.

Once Officer C completed his work shift, he was supposed to take his weapon and ammunition with him from the post. Officer C left one of the rounds in Vehicle 11.

At approximately 6 p.m., Officer C returned to the armory and gave the shotgun to Grievant. Officer C returned only nine of the 10 rounds. Grievant did not notice that one of the rounds was missing from the shotgun sleeve.

On July 28, 2017, the Lieutenant discovered that one of the rounds was missing from the shotgun sleeve. The Agency conducted an extensive search of Facility. The Sergeant found a shotgun round in the back seat of Vehicle 11.

## **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.”<sup>1</sup> 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.”<sup>2</sup> Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”<sup>3</sup>

Grievant was obligated to comply with Post Order 24. This Post Order provided:

When all equipment and weapons are found to be present and satisfactory, sign the inventory sheet. Staff must sign in and out of the armory log book when relieved that all weapons, ammo and equipment is present and/or accounted for. \*\*\*

You are not to leave the post until all equipment is accounted for. In the event of missing or damaged equipment the Watch Commander is to be notified immediately.<sup>4</sup>

“Failure to follow a supervisor’s instructions, perform assigned work, or otherwise comply with applicable established written policy” is a Group II offense.<sup>5</sup> On July 27, 2017, Grievant issued a shotgun with ten rounds of ammunition to Officer C. When Officer C returned the shotgun to Grievant, he returned only nine rounds. Grievant failed to notice that one round was missing. Grievant left her post without ensuring that all equipment was in the Armory’s inventory. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

---

<sup>1</sup> Virginia Department of Corrections Operating Procedure 135.1(VI)(B).

<sup>2</sup> Virginia Department of Corrections Operating Procedure 135.1(VI)(C).

<sup>3</sup> Virginia Department of Corrections Operating Procedure 135.1(VI)(D).

<sup>4</sup> Agency Exhibit 4.

<sup>5</sup> Virginia Department of Corrections Operating Procedure 135.1(V)(C)(2)(a).

Upon the accumulation of two Group II Written Notices, an agency may remove an employee. Grievant has accumulated two Group II Written Notices thereby supporting the Agency's decision to remove her from employment.

Grievant argued that she was denied procedural due process. She points out that some dates on the Written Notice are inaccurate and she was not given enough time to respond to the Agency's allegations. The Agency provided Grievant with adequate procedural due process. She was informed of the allegations against her prior to the hearing. She had the opportunity to present her defenses as part of the hearing. To the extent the Agency may have denied her procedural due process, the grievance hearing process cured any defects of procedural due process.

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>6</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 II Written Notice of disciplinary action with removal is **upheld**.

## APPEAL RIGHTS

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

Please address your request to:

Office of Equal Employment and Dispute Resolution

---

<sup>6</sup> Va. Code § 2.2-3005.

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 EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

*/s/ Carl Wilson Schmidt*

---

Carl Wilson Schmidt, Esq.  
Hearing Officer

---

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