

Issue: Group II Written Notice (failure to work overtime as required); Hearing Date: 12/03/18; Decision Issued: 02/19/19; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 11275; Outcome: No Relief – Agency Upheld; **Administrative Review Ruling Request received 02/27/19; EDR Ruling No. 2019-4876 issued 03/20/19; Outcome: AHO's decision affirmed.**



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11275

Hearing Date: December 3, 2018

Decision Issued: February 19, 2019

PROCEDURAL HISTORY

On April 3, 2018, Grievant was issued a Group II Written Notice of disciplinary action for refusal to work overtime as required.

On May 9, 2018, Grievant filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On October 8, 2018, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On December 3, 2018, 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 employs Grievant as a Corrections Officer at Facility One. No evidence of prior active disciplinary action was introduced during the hearing. Grievant received annual performance evaluations of "exceeds contributor."

Facility Two experienced staffing shortages and needed to obtain staff from other facilities to ensure Facility Two could be operated safely. The Agency decided to assign some of its staff to work at Facility Two for two cycles.

On February 12, 2018, the Major, Captain, and Lieutenant met with Grievant in the conference room of Facility One. Grievant was told that his name had been selected as one of the corrections officers obligated to report for duty at Facility Two on March 4, 2018 for two cycles. The Agency would provide him housing near Facility Two. Grievant said he did not want to go to Facility Two because he had been there in several years ago. Grievant said that the housing near Facility Two was filthy. Grievant said Facility Two did not allow him to work in a control booth or go into a control booth when he worked there. Grievant was advised he would be working a "7/7 schedule" while at Facility Two.

Grievant said he would not go to Facility Two. He stated, "We always gotta work on the floor there and we weren't even allowed to go in the booth to ask a question." The Major told Grievant that if he refused to report to Facility Two he could receive

disciplinary action under the Standards of Conduct. Grievant was advised that his name could be drawn again in the future if Facility One was needed to provide support to Facility Two. Grievant again said he would not go to Facility Two. The meeting concluded.

Grievant later asked the Major what would be the disciplinary action for refusing to work at Facility Two. The Major said refusing to work at Facility Two could result in issuance of a Group II Written Notice. Grievant said he would be grieving the disciplinary action.

The Assistant Warden met with Grievant and told him the Assistant Warden had spoken with the Regional Administrator and that the Assistant Warden had been assured that Grievant would not be treated badly at Facility Two. Grievant continued to refuse to work at Facility Two.

The Agency issued Group II Written Notices to other employees refusing to work at Facility Two.

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

“Failure to follow a supervisor’s instructions, perform assigned work, or otherwise comply with applicable established written policy” is a Group II offense.⁴ Grievant’s name was selected as one of the employees to be reassigned temporarily to Facility Two. There is no evidence showing the selection process was improper.⁵ Grievant was instructed by a supervisor to report to Facility Two on March 4, 2018. Although the

¹ Virginia Department of Corrections Operating Procedure 135.1(VI)(B).

² Virginia Department of Corrections Operating Procedure 135.1(VI)(C).

³ Virginia Department of Corrections Operating Procedure 135.1(VI)(D).

⁴ Virginia Department of Corrections Operating Procedure 135.1(V)(C)(2)(a). The Agency incorrectly styled the Written Notice as a refusal to work overtime. Working the same number of hours at a different facility is not working overtime. The Agency’s February 18, 2018 due process memorandum informed Grievant that he was being charged with failure to follow a supervisor’s instructions.

⁵ Grievant asserted but did not establish that other employees had not yet been assigned to Facility Two.

instruction created a hardship on Grievant because he did not want to work at Facility Two, the Agency was within its authority to instruct Grievant to report to Facility Two. Grievant declined to work at Facility Two. He was informed he might receive disciplinary action yet he refused to report to Facility Two. The Agency has presented sufficient evidence to show that Grievant failed to follow a supervisor's instructions thereby justifying the issuance of a Group II Written Notice.

Grievant argued that the level of disciplinary action was too harsh. The Agency could have issued a lesser level of disciplinary action and adequately corrected Grievant's behavior. It was not obligated to do so, however. The level of discipline selected by the Agency is consistent with how it treated other employees engaging in similar behavior and was within its authority under the Standards of Conduct. There is no basis to reduce the disciplinary action because Grievant asserts it is too harsh.

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"⁶ 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 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:

⁶ Va. Code § 2.2-3005.

Office of Equal Employment and 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 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

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