



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11791 / 11792

Hearing Date: June 6, 2022
Decision Issued: June 27, 2022

PROCEDURAL HISTORY

On December 9, 2021, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow policy. On December 9, 2021, Grievant was issued a Group III Written Notice of disciplinary action with removal for lack of workplace civility.

On December 29, 2021, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On February 1, 2022, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 6, 2022, 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 Notices?

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 Lieutenant at one of its facilities. The Agency's Warden considered Grievant to be a "very good employee." No evidence of prior active disciplinary action was introduced during the hearing.

In September 2020, Grievant and Officer S worked at the Facility. Officer S is African American. Grievant was a Sergeant in September 2020. Grievant and Officer S worked on different shifts. It was possible for Grievant to have supervised Officer S if he and Officer S were moved to the same shift.

Several of Grievant's favorite comedians and musical artists use the N-word ending in "a" often in their expressions. Grievant did not consider such usage as "negative or racist."

On September 20, 2020, Grievant sent Officer S several messages using Facebook Messenger. Neither Grievant nor Officer S were at work while they were communicating.

Grievant wrote:

Girl if I was younger I would carry you in my arms so you never got yo feet dirty. You woulda been a f—kn queen, I would've bowed to you and fought to defend you.

Officer S replied:

see a lot of people say that but don't really mean it Lol.

Grievant wrote:

That's cuz you f—kn with punk ass ni—as, I suggest you f—k with a real man, everybody else wants to f—k, you need a man to please you. Think about it! That's what mofos do. Get there's and walk away.

Read it twice [Officer S].

Two minutes later Grievant wrote:

[Officer S] you are f—king frustrating.

Officer S replied:

How lol

Grievant wrote:

I told your spoiled ass, you need a f—kn man, not some kid a f—kin man, walk to my kitchen [at the Facility] or my building and you will see a man.

So you wanna let a man f—kn carry you for a while?

You takin too long [Officer S]!

Frustrating!!!

Officer S replied:

My bad.

Grievant wrote:

You know what [Officer S] when you get tired of f—kn with boys you know where to find a man, not a one time ni—a, a man.

You want that but want to wait for your knight, you've seen your share they chasn you for a notch on they belt. A real life man is there and you play games.

[Officer S] what does that mean?

Talk please

Again frustrating!!

Officer S wrote:

Lol I'm going to sleep.

Officer S was offended by Grievant's use of the N-word so she attempted to end the conversation by saying she was going to sleep.

On September 21, 2020, Grievant sent Officer S a message:

Sorry for last night I got stupid, don't hold it against me.

Officer S replied:

I figured lol, It's all good.

Officer S thought it was "weird" that Grievant was using the N-word. Officer S told Sergeant W about Grievant's use of the N-word, "just to serve as a warning" of Grievant's character.

In 2021, Sergeant W asked Officer S for screen shots of Officer S's conversation with Grievant. She provided the screen shots to 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 II Written Notice

¹ See, Virginia Department of Corrections Operating Procedure 135.1.

Operating Procedure 135.3 governs Standards of Ethics and Conflict of Interest. Section VIII(F)(7) provides:

Initiation of, or engagement in an intimate romantic or sexual relationship with a subordinate is a violation of Operating Procedure 135.1, Standards of Conduct and will be treated as a Group I, Group II, or Group III offense depending on the impact on the work environment.

Grievant did not engage in a romantic or sexual relationship with Officer S. The question is whether he initiated a romantic or sexual relationship with Officer S.

Grievant's behavior is best described as flirting with Officer S. He was suggesting he was a good candidate for dating. He did not go on a date with Officer S. He did not suggest or schedule a time for them to meet outside of work. Grievant did not continue flirting with Officer S after September 20, 2020. Grievant's flirting was not sufficient to show that there was "[i]nitiation of" a romantic or sexual relationship with Officer S. The evidence is not sufficient to establish that Grievant violated Operating Procedure 135.3. The Group II Written Notice must be reversed.

Group III Written Notice

Group III offenses include violation of DHRM Policy 2.35, Civility in the Workplace, and DOC Operating Procedure 145.3, Equal Employment Opportunity, Anti-harassment, and Workplace Civility.²

DHRM Policy 2.35 governs Civility in the Workplace.³ This policy provides:

Behaviors that undermine team cohesion, staff morale, individual self-worth, productivity, and safety are not acceptable.

Any employee who engages in conduct prohibited under this policy or who encourages or ignores such conduct by others shall be subject to corrective action, up to and including termination, under Policy 1.60, Standards of Conduct.

Non-Discriminatory Workplace Harassment [Harassment not Based on Protected Classes] is defined as:

² See, Virginia Department of Corrections Operating Procedure 135.1.

³ DOC Operating Procedure 145.3 and its Attachment 1 are similar to DHRM Policy 2.35 and its Policy Guide.

Any targeted or directed unwelcome verbal, written, social, or physical conduct that either denigrates or shows hostility or aversion towards a person not predicated on the person's protected class.

The Policy Guide for DHRM Policy 2.35 provides:

Non-discriminatory conduct is demeaning, intimidating, or insensitive behavior that is not targeted specifically toward individuals based on their characteristics or affiliation with a particular group, class, or category.

The context of the behaviors, nature of the relationship between the parties, frequency of associated behaviors, and the specific circumstances must be considered in determining if the behavior is prohibited. A "reasonable person" standard is applied when assessing if behaviors should be considered offensive or inappropriate.

Prohibited Conduct includes:

Behaving in a manner that displays a lack of regard for others and significantly distresses, disturbs, and/or offends others. ***

Making culturally insensitive remarks; displaying culturally insensitive objects, images, or messages.

Making demeaning/prejudicial comments/slurs or attributing certain characteristics to targeted persons based on the group, class, or category to which they belong.

The N-word is the most offensive word in the English language. Merriam-Webster's online dictionary defines this term as:

Definition of [N-word]

1 *offensive*, [see usage paragraph below](#) —used as a pronunciation spelling of [N-word ending in "er"].]

2 *sometimes offensive*, [see usage paragraph below](#) —used by some Black people to refer to themselves or to another Black person in a neutral or positive way

Usage of [N-word]

[N-word] originated as a variant of the infamous racial slur [N-word ending in "er"], reflecting one of its pronunciations, and for many people it is an equally offensive word. In the late 20th century, however, the two forms began to diverge in use among some African Americans, with [N-

word] becoming the preferred term for neutral and positive self-referential uses. Despite their prevalence in hip-hop, a highly influential music and cultural movement of African American origin whose millions of fans now span the globe, these uses of [N-word] are themselves controversial and the use of [N-word] by a person who is not Black—in any context—is considered highly offensive.

Grievant was not calling any particular person the N-word. He used the term when speaking to an African American who was offended by his use of the word. Grievant was “[m]aking demeaning/prejudicial comments/slurs” contrary to DHRM Policy 2.35. The Warden testified the Agency had zero tolerance for use of the N-word among staff because its usage could cause division among staff. The evidence showed that Grievant’s comments were later spread among staff at the Facility and may have undermined staffs’ perception of Grievant’s ability to lead. 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, Grievant’s removal must be upheld.

Grievant argued that he used the N-word outside of work using Facebook Messenger which he did not consider to be social media. Grievant argued he “never [had] any intention to offend, upset, demean, diminish, or hurt anyone.”

Although Grievant did not intend to use offensive language, he should have recognized that others could be offended by its use. DHRM Policy 2.35 applies to behavior occurring outside of work hours:

- Violations occurring outside the workplace may be grounds for disciplinary actions, up to and including termination.
- In these situations, the agency must demonstrate that the conduct committed has a sufficient nexus to the workplace or the agency’s operations, services, or reputation to be addressed by this policy.

It is not necessary for the Agency to show that Facebook Messenger is “social media” in order to establish a violation of DHRM Policy 2.35. Grievant’s words were offensive regardless of his means of communication.

Mitigation

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”⁴ 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

⁴ *Va. Code § 2.2-3005.*

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 **rescinded**. The Agency's issuance to the Grievant of a Group III Written Notice 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]

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

[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