



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11870 / 11871

Hearing Date: March 13, 2023
Decision Issued: April 5, 2023

PROCEDURAL HISTORY

On April 22, 2022, Grievant was issued a Group II Written Notice of disciplinary action for lacking civility in the workplace. On April 22, 2022, Grievant was issued a Group III Written Notice with removal for harassment.

Grievant timely filed grievances to challenge the Agency's actions. The matter advanced to hearing. On August 4, 2022, the Office of Employment Dispute Resolution issued Ruling 2023-5440 consolidating the matters for hearing. On August 8, 2022, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 13, 2023, a hearing was held by remote conference.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's 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 Lieutenant at one of its facilities. He began working for the Agency in April 2013. His performance evaluations were satisfactory to the Agency.

On October 14, 2021, Grievant entered the training room with several employees.¹ Grievant said that having long hair is unprofessional. Grievant approached OIT D. Grievant asked OIT D if he thought he needed a haircut. OIT D said that he intended to get one this weekend. Grievant then pulled OIT D's hair. Grievant then told OIT D to shave his beard and hair. Other employees in the room observed Grievant's behavior. OIT D filed a complaint with Agency managers about Grievant's behavior. OIT D told the Warden that Grievant, "then grabb[e]d my hair and pulled it. I did not like that he pulled my hair."²

¹ Grievant testified he began short term disability leave on October 20, 2021.

² Agency Exhibit p. 39.

The OIT began working for the Agency on February 10, 2022. She did not know Grievant prior to joining the Agency.

On March 15, 2022, Grievant began speaking to the OIT. At first the conversation was work related, then it changed to Grievant talking about his past relationships and asking the OIT about her past relationships. Grievant asked the OIT for her name. Grievant later sent the OIT a friend request on Facebook. The OIT accepted the request and they were able to communicate through Facebook.

Grievant began sending the OIT messages using Facebook messenger. Grievant's messages were "normal" at first. Then he put messenger in vanish mode which meant that the recipient could read the messages but the messages disappeared when the recipient closed the messenger application. Grievant asked the OIT to keep the messages secret because he did not want drama at the prison. The OIT said "ok" because she was scared if she refused Grievant would treat her badly at work. Grievant then began messaging about his former girlfriend and how she wanted to have sex with him. Grievant sent the OIT a picture of his ex-girlfriend nude. Grievant asked the OIT if she sent nude pictures to her ex-boyfriend. Grievant asked the OIT if she would send nude pictures to him. She told him "no" because he was much older than her and her boss. Grievant made the OIT feel extremely uncomfortable. The OIT said she just turned 18 and Grievant replied he liked younger women. Grievant said his penis was a large size and sent the OIT a picture of him in his underwear showing the outline of his penis. Grievant said he wanted to hang out with her just to get into her pants. Grievant continued to message the OIT even after she began ignoring him.

The OIT reported Grievant's behavior to HR staff on the following day. The OIT understood she needed evidence of Grievant's behavior so she began taking screen shots of Grievant's text messages before they vanished. Grievant wrote:

"Listen I wanna to be your friend Your close friend and trust you are you ok with that?"

The OIT replied, "'I guess"

Grievant said, "I guess we are adults if we f—k We just f—k."

The OIT replied, "We are not f—king." ***

Grievant wrote, "You didn't believe my d--k was 10 inches either."

The OIT replied, "I mean yeah, but I didn't wanna see it." ***

Grievant wrote, "You think I'm old lol?"

The OIT replied, "Too old for me."

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.”³

Group II offenses and Group III offenses include violation of DHRM Policy 2.35, Civility in the Workplace, depending on the nature of the offense.⁴

Group II Written Notice

DHRM Policy 2.35 provides:

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

Bullying is defined as:

Disrespectful, intimidating, aggressive and unwanted behavior toward a person that is intended to force the person to do what one wants, or to denigrate or marginalize the targeted person.

The Policy Guide describes inappropriate behavior to include:

Demonstrating behavior that is rude, inappropriate, discourteous, unprofessional, unethical, or dishonest;

On October 14, 2021, Grievant pulled the hair of another employee as part of his criticism of that employee. Grievant’s behavior was disrespectful, rude, inappropriate, discourteous, and unprofessional. The employee disliked Grievant’s behavior. Grievant undermined team cohesion. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for violation of DHRM Policy 2.35.

Group III Written Notice

Operating Procedure 135.3 governs Standards of Ethics and Conflicts of Interest. Section VIII(A) provides, “[t]he DOC strictly prohibits acts of sexual harassment,

³ See, Virginia Department of Corrections Operating Procedure 135.1.

⁴ See, Operating Procedure 135.1.

retaliation or inappropriate behavior by any employee.” Section VIII(F)(5) provides, “[s]upervisors are strictly prohibited from dating or engaging in a romantic or sexual relationship with subordinates.”

Operating Procedure 135.6 governs Use of Social Media. This policy prohibits employees from using social media to communicate content that could constitute sexual harassment.

Operating Procedure 145.3 governs Workplace Civility. This policy defines sexual harassment as:

Unsolicited, unwelcome behavior of a sexual nature including, but not limited to sexual advances, requests for sexual favors, or verbal, written or physical conduct of a sexual nature by a manager, supervisor, co-worker(s), or non-employee (third party).

DHRM Policy 2.35 provides:

The Commonwealth strictly forbids harassment (including sexual harassment)” ***

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.

Grievant engaged in sexual harassment of the OIT. He sent the OIT pictures of his ex-girlfriend in the nude. He asked the OIT for pictures of herself nude and suggested they should have sex. None of Grievant’s comments were welcomed by the OIT. She did not have a prior relationship with Grievant. 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’s Disability

Before joining the Agency, Grievant had a successful and impressive military career. He served in three combat zones and had seen some of his fellow soldiers wounded or killed. After joining the Agency, Grievant was involved in over 50 cell extractions. He was assaulted at least four times during those extractions. Unfortunately, his experiences in the military and some of his experiences while working for the Agency caused him to have post traumatic stress disorder. On April 11, 2022, Grievant sent the Agency a letter stating, “I have recently been diagnosed with chronic Post Traumatic Stress Disorder, high anxiety, major depression disorder and attention deficit hyperactivity

disorder. I would like to request job accommodations through the Americans with Disabilities Act.”⁵

Grievant argued that his disability caused his behavior giving rise to disciplinary action. EEOC guidance for applying performance and conduct standards to employees provides:

9. If an employee’s disability causes violation of a conduct rule, may the employer discipline the individual?

Yes, if the conduct rule is job-related and consistent with business necessity and other employees are held to the same standard. The ADA does not protect employees from the consequences of violating conduct requirements even where the conduct is caused by the disability.

Grievant’s disability does not provide a basis to reverse the Agency’s disciplinary action.

Due Process

Grievant argued he was denied procedural due process. The evidence showed that Grievant received two written notices alleging the nature of the offenses against him. He was given an opportunity to present evidence to contest those notices. The Agency afforded Grievant adequate procedural due process.

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”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.

Grievant contends the disciplinary action should be mitigated based on the inconsistent application of disciplinary action. Grievant presented examples of other

⁵ Grievant Exhibit p. 28. Grievant testified he was first diagnosed with PTSD in November 2021.

⁶ *Va. Code § 2.2-3005.*

employees who were disciplined but not removed from employment. None of those examples, however, showed an employee soliciting sex from a subordinate within a few days of befriending the employee.⁷ The Hearing Officer does not believe that the Agency singled out Grievant for disciplinary action. In light of the standard set forth in the Rules, 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**. 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.

⁷ Grievant presented evidence of a former assistant warden who was convicted for having sex with inmates at his facility. Grievant asserted that employee was permitted to retire. It is not clear that Grievant is seeking to be permitted to retire in lieu of disciplinary action.

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.