

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

Office of Employment Dispute Resolution

DECISION OF HEARING OFFICER

**In re:
Case Number: 11901**

Hearing Date: May 11, 2023
Decision Issued: May 25, 2023

PROCEDURAL HISTORY

The Hearing Officer was appointed effective December 27, 2022. Upon being appointed, a pre-hearing telephone conference was conducted on January 6, 2023 and the Grievance Hearing was scheduled for March 14, 2023, with a copy of all exhibits and list of witnesses to be provided no later than March 7, 2023.

On March 14, 2023, the Grievant, the Agency Advocates and the Hearing Officer appeared for the Grievance Hearing as earlier agreed. Due to a family medical emergency of the Agency Representative, a motion to continue was granted by the Hearing Officer. Each of the parties had provided to the other and to the Hearing Officer the exhibit notebooks and list of witnesses in a timely fashion.

Due to the emergency, the Grievance Hearing was rescheduled for May 11, 2023 beginning at 9:30 a.m. The Agency Advocate provided documentation of the family medical emergency which occurred on March 14, 2023.

The Grievance Hearing was conducted on May 11, 2023 as scheduled.

The Grievance Hearing addressed the Written Notice issued on August 9, 2022, citing offense dates of 2/23/22-7/5/22, designating a Group II offense with offense codes of: 13. Failure to follow instructions and/or policy; 33. Violation of DHRM Policy 2.05, Equal Employment Opportunity; 39. Violation of DHRM Policy 2.35, Civility in the workplace; and 78. Interference with state operations.

The Agency Advocate in opening statements pointed out that the Group II Written Notice and during the grievance process was mitigated to a Group I offense.

APPEARANCES

Grievant

Agency Party Designee
Agency's Advocates

ISSUES

1. Did the Agency's evidence prove by a preponderance of the evidence that the Grievant's conduct was in violation of the alleged policy, procedure or directive?
2. Whether any such violation was a Group I violation under the standards of conduct?
3. Whether the Agency considered mitigating and aggravating factors?
4. Whether the Written Notice as mitigated to a Group I Written Notice was consistent with law and policy?

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 Grievant 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) section 5.8. a preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM section 9.

EXHIBITS

The Agency Exhibits admitted into evidence are contained in one notebook with tabs 1-23.

The Grievant's exhibits admitted into evidence are contained in one notebook with tabs A-D.

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 Agency employed Grievant as a Program Support Tech with such employment governed by the following:

- DHRM Policy 1.60
- Operating Procedure 135.1 (Standards of Conduct)
- Operating Procedure 135.3 (Standards of Ethics and Conflicts of Interest)
- Operating Procedure 135.5 (Workplace Violence)
- Operating Procedure 145.3 (Equal Employment Opportunity, Anti-Harassment and Workplace Civility)

The Agency's first witness testified as to the contents of the email the witness sent to the Grievant's supervisor as set out at Agency Exhibit 18. The witness's complaint regarding the interaction with the Grievant was three-fold. First, the witness alleged that on July 5, 2022 the Grievant instructed the witness not to follow the instructions which had been given to the witness by the witness's supervisor. Second, on another day the Grievant told the witness to "go walk to relieve my nervous." Third, on July 6, 2022, the witness testified that while working with the Grievant, the witness left to use the restroom and upon returning found that the Grievant had sprayed the room with Lysol which required the witness to use an inhaler and increased the witness's cough. When asked by the Grievant if the witness was afraid of the Grievant, the witness responded, "I felt uncomfortable."

The Agency's second witness referred to the witness's email dated July 6, 2022 addressed to the Grievant's supervisor. (Agency Exhibit 16) The witness alleged that the Grievant on July 5, 2022 was "very loud" and "aggressive" in Grievant's interaction with the Agency's first witness.

The Agency's third witness testified as to the events of June 15, 2022 as set out at Agency Exhibit 10. The witness testified that June 15, 2022 was the witness's first interaction with the Grievant. The witness testified that while being trained by the Grievant on June 15, the Grievant was "very condescending...very rude." The witness testified that the Grievant was sarcastic, intimidating and negative "...to the point I felt like I was bothering (the Grievant)" and I was no longer able to focus. Respectfully, at this point I do not want (the Grievant) to train my anymore. I feel uncomfortable... I would prefer for someone else to train me, because I am eager to learn...".

The Agency's final witness was the Grievant's supervisor. The supervisor testified that

on February 23, 2022, the supervisor was conducting a staff meeting (which included the Grievant) at which the supervisor stated that if there were any questions, hold the questions until after the meeting concluded. The supervisor testified that the Grievant said something to the effect of “here we go again.” Supervisor testified that the supervisor ended the meeting due to the Grievant and a co-worker interrupting and being disruptive and “poisoning” the environment for new employees. The supervisor testified that the Grievant’s conduct was reported to the witness’s supervisor.

Grievant’s supervisor proceeded to review the following evidence:

- Agency Exhibit 11 regarding another staff member interacting with the Grievant on June 15, 2022 during which the Grievant commented on the other employee rolling their own chair into a work area, telling the Grievant that the employee preferred to sit in the employee’s own chair and then the Grievant stating “wow we have people and their butt’s stink.” The employee stated that the employee believed the Grievant’s comment was “rude, disrespectful and unprofessional.”
- Agency Exhibit 12 regarding an interaction on June 21, 2022 that the same employee (as Agency Exhibit 11) had with the Grievant. The witness testified that as the witness walked by the area where the Grievant and two other employees were located the witness heard the Grievant say “something smells like corn chips.” The witness kept walking but a few minutes later was told by another employee that the statement was about the witness. The witness felt that the Grievant’s statement was disrespectful and inappropriate.
- Agency Exhibit 13 was an email directed to Grievant’s supervisor from the employee confirming that the Grievant’s statement regarding the “corn chips” smell was directed at the complaining employee from Exhibit 12.
- Agency Exhibit 14 was an email directed to Grievant’s supervisor from another employee who confirmed that Grievant on June 16, 2022 made a comment “pertaining to body odor and something about smelling/sniffing butt”. The statement said that the employee could not be sure at whom the comment was directed.
- Agency Exhibit 17 was an email directed to the Grievant’s supervisor again setting out the events of July 5, 2022 in which it is stated that the Grievant was loud and rude toward another employee.

The Grievant’s supervisor concluded testimony by stating that the Agency has a zero tolerance for bullying and stating that the Group II Written Notice issued to the Grievant had already been mitigated to a Group I (Agency Exhibit 7). The Grievant cross-examined the Supervisor, during which the supervisor made the following statements:

- The supervisor did not consult with the Grievant before issuing the Written Notice in order “to avoid a shouting match with you”.
- The supervisor believed that the Grievant and three other employees were “teaming up” against the supervisor.
- The supervisor believed that the Grievant had a bad attitude and that “no one wanted to work with (the Grievant)”.

The Grievant’s first witness was a former employee who no longer works for the Agency but who attended the meeting of February 23, 2022. The witness testified that the Grievant’s supervisor (and the witness’s supervisor at that time) cut them off anytime they tried to speak and were told that if they didn’t want to be in the unit they could be transferred. The witness testified that even though neither the Grievant nor the witness were disrespectful to the supervisor, they were spoken to by the supervisor as if they were children. The witness testified that after leaving the meeting the witness went to HR and reported the supervisor’s behavior.

The witness proceeded to testify that the witness never saw the Grievant bullying anyone; denied ever having any “private meetings” with other employees; and denied that other employees didn’t want to work with the Grievant. The witness further testified that the supervisor’s boss was aware of the problems that they had with the supervisor and coordinated having a dialog with five employees who all felt that “(the Grievant) was targeted” by the supervisor.

During cross-examination the Grievant’s witness admitted that the witness and the Grievant are social friends but did not know each other prior to working together. The witness also admitted that the supervisor was not invited to gathering outside the workplace, which included bowling and other social interaction.

The Grievant’s second witness was another employee who was in the meeting of February 23, 2022 and confirmed that the supervisor said “no questions.” The witness also said that the Grievant’s statement about smelling corn chips was directed at the witness and not the person who complained to the supervisor. The witness testified regarding the context of the Grievant’s “corn chip statement” and that the witness was not offended. The witness also testified that the supervisor asked the witness a couple of times if the Grievant was “causing any problems.” The witness also stated that the witness who provided the email at Exhibit 13 regarding the corn chips was not accurate and that the same employee who wrote the email (Agency Exhibit 13) stated that the supervisor was “my bread and butter” regarding overtime.

The Grievant briefly testified, including the following:

- Grievant denied saying in the 2/23/22 meeting “here we go again”
- Grievant denied having a “close group that was conspiring against the supervisor

- The Grievant emphasized the Grievant's good work record prior to the Supervisor who issued the Written Notice becoming the Grievant's supervisor

CONCLUSIONS

Unacceptable behaviors are divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action." Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination." (Standard of Conduct)

Virginia Code Section 2.2-3005.1 authorizes Hearing Officer's to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "accordance with rules established by the Department of Human Resource Management...". Under the rules for Conducting Grievance Hearings "[a] hearing officer must give deference to the agency's consideration in the 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.

The Commonwealth of Virginia provides certain protections to employees Chapter 30 of Title 2.2 of the Code of Virginia. Among these protections is the right to grieve formal disciplinary action. The Department of Equal Employment and Dispute Resolution has developed Grievance Procedure Manual (GPM). This manual sets forth the applicable standards for this type of proceeding. Section 5.8 of the GPM provides that in disciplinary grievances the Agency has the burden of going forth with the evidence. It also has the burden of proving, by preponderance of the evidence that its actions were warranted and appropriate. The GPM is supplemented by a separate set of standards promulgated by the Department of Employment Dispute Resolution, *Rules For Conducting Grievance Hearings*. These Rules state that on a disciplinary grievance a Hearing Officer shall review the facts *de novo* and determine:

- A. Whether the employee engaged in the behavior described in the written notice;
- B. Whether the behavior constituted misconduct;
- C. Whether the discipline was consistent with law and policy; and
- D. Whether there were mitigating circumstances justifying the reduction or removal of

the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances.

The Agency proved by a preponderance of the evidence that on June 15, 2022 and on July 5, 2022 the Grievant's conduct violated DOC OP 145.3 regarding workplace civility.

The Hearing Officer further concludes that the Agency did not prove by a preponderance of the evidence the remaining allegations.

In reaching the Hearing Officer's conclusions and decision, the Hearing Officer gave consideration to the arguments of the Agency's Advocate and the Grievant.

DECISION

For the reasons stated herein, the Agency's issuance of the Written Notice, as mitigated to a Group I Written Notice, is upheld as consistent with law and policy and may not be further mitigated under the record evidence in that the discipline does not exceed the limits of reasonableness.

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
Department of Human Resources 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.

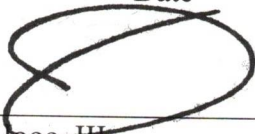
A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in

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].

ENTERED: 5/25/2023
Date



John R. Hooe, III
Hearing Officer

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