



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11844

Hearing Date: February 3, 2023
Decision Issued: February 22, 2023

PROCEDURAL HISTORY

On April 28, 2022, Grievant was issued a Group III Written Notice of disciplinary action with removal for lacking civility in the workplace. On April 28, 2022, Grievant was issued a Group II Written Notice of disciplinary action with removal for leaving the workplace without permission during work hours.

On April 29, 2022, Grievant timely filed a grievance to challenge the Agency's actions. The matter advanced to hearing. On June 21, 2022, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The hearing was scheduled for October 7, 2022 but continued for just cause based on the Agency's request for continuance. On November 4, 2022, a hearing was held by remote conference. On November 15, 2022, the OEDR Director reopened the hearing. On February 3, 2023, 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 Officer at one of its facilities. She began working for the Agency on March 16, 2020. Grievant had prior active disciplinary action. On July 26, 2021, Grievant received a Group III Written Notice with a 23 hour suspension for violation of workplace harassment. On September 20, 2021, Grievant received a Group I Written Notice for unsatisfactory performance.

On December 25, 2021 at approximately 2:30 p.m., Grievant entered the Watch Commander's Office and approached the Lieutenant. Grievant asked the Lieutenant if she was the only one there. The Lieutenant said, "Yes." Grievant walked to the desk where the Lieutenant was sitting. Grievant said to the Lieutenant, "I bet I can eat your coochie better than your boyfriend can."¹ The Lieutenant said that there were certain things that she was cool about, but Grievant's statement was not one of them. The Lieutenant instructed Grievant to leave the Watch Office. Grievant then asked, "I can't sit

¹ Grievant's comment was slang for performing a sex act.

in here with you?" The Lieutenant said, "No" and again instructed Grievant to leave the office. Grievant asked the Lieutenant if there were any recording devices in the office and asked the Lieutenant not to report her because "we go way back." The Lieutenant said that just because they went to high school together does not give Grievant permission to approach the Lieutenant in that manner and make statements such as that.

The Lieutenant was offended by Grievant's statement and considered it to be of a sexual nature. Grievant and the Lieutenant had attended the same high school but did not have any relationship other than of being co-workers at the Facility. The Lieutenant took no actions towards Grievant that would cause Grievant to believe that the Lieutenant would welcome Grievant's statement.

On Saturday, March 19, 2022, Grievant's daughter was scheduled to play in a basketball game. Grievant coached the team. Grievant wanted to attend the game but had not requested and received leave to be away from work.

On March 19, 2022, Grievant was scheduled to report to work at 5:45 a.m. and work until 6:15 p.m. At 5:40 a.m., Grievant called the Watch Office and spoke with Major M. Grievant said she needed to report for duty late and would be at the Facility by 11 a.m. Major M asked Grievant why she would be late and Grievant said her child had a basketball game. Major M told Grievant that her absence would be unexcused.

Grievant reported to work at 6:18 a.m.

Grievant was entitled to take a one hour lunch break. Grievant asked Major M if she could take a two hour lunch to go watch her daughter's game. Major M said, "No" and explained that the Facility was short-staffed that day.

At 9:40 a.m., Grievant spoke with Major M and said that Grievant's mother called and said there was an emergency with Grievant's child. Major M said that if Grievant had to leave, Grievant was to return with a doctor's note dated March 19, 2022. While exiting the Facility, Grievant told Major T that she was going to watch her daughter's ball game. Major T asked Grievant if she had permission to go and Grievant said, "No." Major T advised Grievant to seek permission before leaving. Grievant left the Facility.

Major M "clocked out" Grievant from the Facility.

After 11 a.m., Grievant called the Facility and spoke with the Lieutenant who transferred the call to Major M. Major M told Grievant that Grievant had been "clocked out". Grievant said that since she had been "clocked out" she did not intend to return to the Facility for the remainder of her shift.

Grievant did not present a doctor's note excusing her absence on March 19, 2022.

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.”²

Group III Written Notice

Group III offenses include, “Violation of DHRM Policy 2.35 Civility in the Workplace or Operating Procedure 145.3, Equal Employment Opportunity, Anti-Harassment, and Workplace Civility, (considered a Group III offense, depending upon the nature of the violation).”³

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

The Commonwealth strictly forbids harassment (including sexual harassment), bullying behaviors, and threatening or violent behaviors of employees, applicants for employment, customers, clients, contract workers, volunteers, and other third parties in the workplace.

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.

DHRM Policy 2.35 defines Sexual Harassment as:

Any unwelcome sexual advance, request for sexual favors, or verbal, written or physical conduct of a sexual nature by a manager, supervisor, co-workers or non-employee (third party).

The Policy Guide to DHRM Policy 2.35 lists prohibited conduct including:

- Subjecting others to communication or innuendoes of a sexual nature;
- Demonstrating behavior that is rude, inappropriate, discourteous, unprofessional, unethical, or dishonest;

² See, Virginia Department of Corrections Operating Procedure 135.1.

³ See, Virginia Department of Corrections Operating Procedure 135.1.

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

On December 25, 2021, Grievant approached the Lieutenant and said, “I bet I can eat your coochie better than your boyfriend can.” Grievant made an unwelcome and unwanted request for a sexual favor. Her comment was inappropriate and unprofessional. Grievant significantly distressed and offended the Lieutenant. Her behavior rose to the level of a Group III offense. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for lacking civility in the workplace. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, the Agency’s decision to remove Grievant must be upheld.

Grievant argued that she did not make the statement alleged. She claimed she entered the Watch Office to obtain service paperwork and that the Lieutenant told Grievant to come back to speak with the Major. Grievant claimed she said “Ok” and asked the Lieutenant if she had a boyfriend and said that, “I bet I could make her feel better than him.”⁴

The Lieutenant’s testimony was credible. She reported the incident within 45 minutes after it occurred and in detail. Grievant’s statement confirms portions of the Lieutenant’s statement, namely that a conversation occurred on December 25, 2021 and included reference to the Lieutenant having a boyfriend and making the Lieutenant feel better. The Agency has presented sufficient evidence to support the issuance of the Group III Written Notice.

Group II Written Notice

“Leaving the work site during working hours without permission” is a Group II offense.⁵ On March 19, 2022, Grievant was scheduled to work from 5:45 a.m. until 6:15 p.m. Grievant reported to work late. She asked to leave the Facility for two hours to watch her child’s ball game. Major M denied Grievant’s request. Grievant left the Facility to attend her child’s ball game while claiming her child had an emergency. Grievant did not present a doctor’s note excusing her absence from work on March 19, 2022. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for leaving the work site during working hours without permission. Grievant had a prior active Group III Written Notice supporting the Agency’s decision to remove Grievant based on the accumulation of disciplinary action.

Grievant argued that she did not leave the Facility without permission. Grievant had permission to take a one hour lunch break during which she could leave the Facility. Grievant, however, did not have permission to leave the Facility for an extended lunch

⁴ Agency Exhibit p. 7.

⁵ See, Virginia Department of Corrections Operating Procedure 135.1.

break of two hours. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

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. 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 III Written Notice of disciplinary action with removal is **upheld**. 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 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.

⁶ Va. Code § 2.2-3005.

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

Carl Wilson Schmidt, Esq.
Hearing Officer

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