



# **COMMONWEALTH of VIRGINIA**

*Department of Human Resource Management*

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

## **DECISION OF HEARING OFFICER**

In re:

**Case Number: 11852**

Hearing Date: November 28, 2022

Decision Issued: December 19, 2022

### **PROCEDURAL HISTORY**

On February 17, 2022, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow policy, failing to maintain civility in the workplace, and conduct unbecoming a corrections officer.

On March 2, 2022, Grievant timely 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 July 18, 2022, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 28, 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 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 Sergeant at one of its facilities. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant worked with Sergeant S and Sergeant W at the Facility. They all reported to the Lieutenant. Sergeant S and Sergeant W were involved in a sexual relationship. Grievant did not know about the relationship.

The Lieutenant attempted to establish a romantic relationship with Sergeant S. The Lieutenant sent Sergeant S a series of messages including:

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.

Sergeant S showed the Lieutenant's messages to Sergeant W. Although the Lieutenant did not name Sergeant W, Sergeant W concluded that the Lieutenant was

referring to him. Grievant did not know at that time about the Lieutenant's messages to Sergeant S.

Grievant had difficulty working with the Lieutenant because of the Lieutenant's abrasive management style.

While Grievant and Sergeant W were leaving work one day, Sergeant W told Grievant that the Lieutenant was messaging Sergeant S and during that conversation called Sergeant W a "ni—er." Sergeant W told Grievant that Sergeant W had a screenshot of the conversation. This conversation occurred more than two weeks prior to October 19, 2021. Grievant did not consider Sergeant W to be a person of "good standing or [one] you can trust."

On October 19, 2021, the Captain approached Grievant at a Building doorway and asked Grievant why he was late. Grievant told the Captain that he was not feeling well and ran 10 minutes late and then had to be "Antigen tested." The Captain said he felt he had to "play buffer" when it comes to the Lieutenant when Grievant is late. Grievant told the Captain that the Captain should not feel like that because the Lieutenant will talk about anyone and everyone when he is stressed. Grievant told the Captain that the Lieutenant needs to watch what he says and who he says it to when he gets in these moods. Grievant explained that to his understanding based on what Sergeant W told Grievant, the Lieutenant was talking to Sergeant S on Facebook and called Sergeant W a "ni—er."

Grievant later wrote, "I spoke to [the Captain] candidly about what I had heard because the topic of discussion was [the Lieutenant] and how he manages staff when he is under pressure. [The Captain] and I have had conversations prior to this one about [the Lieutenant] and how he treats myself and [Sergeant W]."<sup>1</sup>

On October 19, 2021, the Captain spoke to Sergeant W and asked about the message he received from the Lieutenant. Sergeant W confirmed receiving the message from the Lieutenant.

The Agency also disciplined Sergeant S for engaging in an improper relationship and failing to report the Lieutenant's offensive language.

## **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."

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<sup>1</sup> Agency Exhibit p. 16.

Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”<sup>2</sup>

Operating Procedure 145.3 governs Equal Employment Opportunity, Anti-harassment, and Workplace Civility. Section IV provides:

B. Managers, supervisors, and other persons of authority have a duty to promptly take action to eliminate harassment, bullying, discrimination, threatening or violent behaviors, retaliation, and other displays of inappropriate behavior from the work environment once a situation comes to their attention by doing the following: \*\*\*

2. Report the complaint or observed conduct in violation of this procedure to the Human Resource Officer, the DOC EEO Unit, or the Director of Human Resources for monitoring, investigation, advice, or assistance. If the investigation determines the complaint has merit, immediate, appropriate corrective action must be taken.\*\*\*

C. Managers and supervisors ... who failed to take appropriate action upon becoming aware of a complaint or prohibited behavior will be subject to disciplinary action under Operating Procedure 135.1, Standards of Conduct, up to and including termination.<sup>3</sup>

Violation of DHRM Policy 2.35 Civility in the Workplace or Operating Procedure 145.3, Equal Employment Opportunity, Anti-Harassment, and Workplace Civility can be a Group I, Group II, or Group III offense depending on the nature of the violation.

Grievant had a duty to promptly take action to eliminate inappropriate behavior. Grievant recognized that the Lieutenant calling Sergeant W a racial slur was inappropriate behavior. The action necessary to eliminate the Lieutenant’s inappropriate behavior was for Grievant to report the behavior to Agency managers so that they could conduct an investigation. The Agency has presented sufficient evidence to support the issuance of disciplinary action. That disciplinary action, however, only rises to the level of a Group I offense for several reasons. First, Grievant reported the Lieutenant’s behavior. Grievant’s behavior is better described as a delay in reporting inappropriate conduct. Second, the Agency appears to have applied the standard of “as soon as possible after the incident occurs.”<sup>4</sup> The policy required Grievant “to promptly take action.” “Promptly” and “as soon as possible” are not necessarily the same. The Agency did not present evidence regarding how it defined “promptly.”<sup>5</sup> Third, Grievant’s delay in reporting the behavior was

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<sup>2</sup> See, Virginia Department of Corrections Operating Procedure 135.1.

<sup>3</sup> Agency Exhibit p. 73.

<sup>4</sup> Agency Exhibit p. 12.

<sup>5</sup> Nevertheless, Grievant testified that “I do not contest the fact that I should have reported it sooner.”

in part because of his concerns about the reliability of Sergeant W as a source of information. In other words, Grievant was not certain the comment had been made to Sergeant W. Fourth, the Agency did not present any evidence showing the delay had a material impact on its operations. Fifth, Va. Code § 2.2-3000 provides, “It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints. To that end, employees shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management.” Grievant was trying to address with the Captain his concerns about the Lieutenant. The Agency’s disciplinary action deters Grievant’s right to freely discuss his concerns. Grievant testified he did not have “faith in the reporting process.”

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 ....”<sup>6</sup> 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 further 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 **reduced** to a Group I Written Notice of disciplinary action.

## 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

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<sup>6</sup> Va. Code § 2.2-3005.

101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto: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.<sup>[1]</sup>

[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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>[1]</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.



**COMMONWEALTH of VIRGINIA**  
**Office of Employment Dispute Resolution**

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case No: 11852-R**

Reconsideration Decision Issued: February 2, 2023

**RECONSIDERATION DECISION**

On December 19, 2022, the Hearing Officer issued the Original Decision in this matter reducing the disciplinary action from a Group II to a Group I Written Notice.

On January 25, 2023, the Office of Employment Dispute Resolution issued Ruling 2023-5496 remanding this matter to the Hearing Officer.

Upon consideration of OEDR's ruling, the disciplinary action issued to Grievant on February 17, 2022 is **upheld** as a Group II Written Notice.

**APPEAL RIGHTS**

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit

court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

*/s/ Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer