



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11811

Hearing Date: July 13, 2022
Decision Issued: August 2, 2022

PROCEDURAL HISTORY

On January 19, 2022, Grievant was issued a Group III Written Notice of disciplinary action with removal for displaying a lack of civility in the workplace.

Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On March 7, 2022, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 13, 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 employed Grievant as a Lieutenant at one of its facilities. He began working for the Agency in February 2014. No evidence of prior active disciplinary action was introduced during the hearing.

Sergeant B reported to Grievant when they were working the same shift.

On Friday, October 15, 2021, Grievant learned that inmate property for several inmates had been collected as if they were leaving the institution but the inmates had not been told when they would be leaving the institution. Grievant learned the inmates were scheduled to leave on the following Monday. Grievant believed Sergeant B had made an error by not informing the inmates. Grievant wanted to discuss the error with Sergeant B.

Lieutenant W was in the Shift Commander's Office taking count. Grievant and Sergeant B were also in the room talking. Grievant questioned Sergeant B about packing up offender property without letting the offenders know when they were leaving. The conversation became heated. Grievant did not believe Sergeant B was taking Grievant's comments seriously. Grievant told Sergeant B he was cutting Grievant off while Grievant was talking and for Sergeant B to "shut the f—k up!" Grievant asked Sergeant B to explain why he did not tell the inmates they were leaving. Sergeant B said he did not think it was a good idea. Grievant said, "[w]ell, you are just f—king stupid, why would you do that!"

Sergeant B said, "F—k you!" Grievant continued to belittle Sergeant B and call him an idiot. Sergeant B said he was not going to argue with Grievant and Grievant was not going to talk to Sergeant B like that.

Lieutenant W said he was trying to take count and could not hear. Sergeant B attempted to exit by walking past Grievant. Grievant yelled at Sergeant B to step back in the office because he had not finished talking to Sergeant B. Sergeant B said he was finished with the conversation and walked out of the office and entered the room where the copy machine was located. Grievant followed Sergeant B. Sergeant B met Grievant in the hallway. Grievant told Sergeant B to step back into the copier room so they could finish talking. Grievant and Sergeant B resumed arguing. Sergeant B said, "Hell no" and that he did not want to talk to Grievant because Grievant was demoralizing. Sergeant B said he was not doing this with him and he was leaving. Grievant put his hands on Sergeant B's shoulders to prevent Sergeant B from leaving. Sergeant B stepped back and told Grievant not to put his hands on Sergeant B. Sergeant B attempted again to leave the hallway. Grievant stepped in front of Sergeant B to prevent Sergeant B from leaving. Sergeant B stepped back and attempted to pass Grievant on Grievant's other side. Grievant stepped in front of Sergeant B again. Sergeant B stepped back again and attempted to pass Grievant on Grievant's other side. Grievant shoved Sergeant B backwards. Sergeant B got himself against the wall and then squeezed himself around Grievant. Grievant said, "Don't put your hands on me" as Sergeant B left the area.

A few hours after the incident, Sergeant B complained to the Major of workplace harassment by Grievant. Sergeant B also filed criminal charges against Grievant.

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

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.

¹ See, Virginia Department of Corrections Operating Procedure 135.1.

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 behavior may involve a real or perceived power imbalance between the aggressor and the targeted person. The behavior typically is severe or pervasive and persistent, creating a hostile work environment. ***

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.

Group III offenses include “[v]iolation of DHRM Policy 2.35, Civility in the Workplace ... (considered a Group III offense, depending on the nature of the violation).”²

On October 15, 2021, Grievant violated DHRM Policy 2.35 by failing to maintain civility during his interaction with Sergeant B. Grievant engaged in bullying by (1) telling Sergeant B to “shut the f—k up” and “you are just f—king stupid”, (2) blocking Sergeant B’s movement, and (3) shoving Sergeant B. Grievant’s behavior was unwanted and intended to force Sergeant B to do what Grievant wanted. Grievant held superior rank and intended to use his position of power to control Sergeant B. Grievant’s behavior was severe because he inappropriately touched Sergeant B. Grievant created a non-discriminatory hostile work environment for Sergeant B thereby justifying the issuance of a Group III Written Notice. 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 asserted that he said, “shut the f—k up” in a joking way. Grievant asserted that Sergeant B attempted to brush past him so Grievant put up his left hand so that Sergeant B’s left shoulder would not hit Grievant. Grievant argued that the gate behind Sergeant B was open and that Grievant was not preventing Sergeant B from leaving through that gate. Instead, Sergeant B kept pushing through Grievant. Grievant claimed his hands were on Sergeant B’s chest but Grievant did push Sergeant B – Grievant was simply trying to stop Sergeant B from “trying to muscle his way” through Grievant.

The Agency presented sufficient credible evidence to show that Grievant was not joking when he said to “shut the f—k up”, shoved Sergeant B, and blocked Sergeant B’s exit. Whether a gate behind Sergeant B was open is irrelevant since Sergeant B was

² See, Virginia Department of Corrections Operating Procedure 135.1.

entitled to leave the room through whatever exit he chose. Grievant presented witnesses regarding his work performance but did not testify.

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”³ 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**.

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.

³ Va. Code § 2.2-3005.

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].

/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.