



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

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 11812**

Hearing Date: July 18, 2022  
Decision Issued: August 8, 2022

**PROCEDURAL HISTORY**

On February 2, 2022, Grievant was issued a Group II Written Notice of disciplinary action for lacking civility in the workplace. On February 2, 2022, Grievant was issued a Group III Written Notice of disciplinary action with removal for engaging in a sexual relationship with a subordinate staff member.

On February 23, 2022, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On March 14, 2022, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 18, 2022, a hearing was held by remote conference. Grievant was notified of the hearing date and time but did not participate in the hearing.

**APPEARANCES**

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 Sergeant at one of its facilities. He began working for the Agency in September 2018. No evidence of prior active disciplinary action was introduced during the hearing.

Officer S reported to Grievant when they worked on the same shift at the Facility. Grievant reported to the Lieutenant when they were working the same shift at the Facility.

Officer S had a sexual relationship with Grievant from June 2020 through November 25, 2020 while Grievant and Officer S worked at the same Facility. Officer S left the Facility and began working at another Facility. The relationship ended when Officer S left the Facility on November 25, 2021. It resumed in June 2021 while Officer S was at the other facility and continued when Officer S returned to the Facility where Grievant worked on August 25, 2021. The relationship stopped in October 2021 when the Agency's investigation began.

On September 20, 2020, the Lieutenant sent Officer S several messages using Facebook Messenger. He was attempting to initiate a personal relationship with Officer S. The Lieutenant wrote:

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. \*\*\*

You know what [Officer S] when you get tired of f—kn with boys you know where to find a man, not a one time ni—a, a man.

Officer S was offended by the Lieutenant's use of the N-word. She showed the messages to Grievant and told Grievant she was offended by the Lieutenant's behavior. Grievant believed the Lieutenant was referring to Grievant when using the N-word. Grievant was angry at the Lieutenant. Grievant later told other employees including Sergeant D, Officer H, and Officer A about the Lieutenant's behavior. Grievant's action undermined morale between the Lieutenant and three employees reporting to the Lieutenant.

## 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."<sup>1</sup>

### Group II Written Notice

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

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.

Managers and/or supervisors who fail to take appropriate action upon becoming aware of the behavior shall be subject to disciplinary action, up to and including termination, under Policy 1.60, Standards of Conduct.

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<sup>1</sup> See, Virginia Department of Corrections Operating Procedure 135.1.

The Policy Guide for DHRM Policy 2.35 describes prohibited conduct to include:

- Making culturally insensitive remarks; displaying culturally insensitive objects, images, or messages;
- Making demeaning/prejudicial comments/slurs or attributing certain characteristics to targeted persons based on the group, class, or category to which they belong;

Group II 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 II offense, depending upon the nature of the violation)<sup>2</sup>

The Lieutenant made culturally insensitive racial slurs to Officer S contrary to DHRM Policy 2.35. She was offended by the Lieutenant's behavior. Grievant learned of the slurs but did not report the Lieutenant's behavior to Agency managers. Instead, Grievant informed co-workers of the Lieutenant's behavior. Grievant undermined team cohesion between the Lieutenant and those employees. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

### Group III Written Notice

Operating Procedure 135.3 governs Standards of Ethics and Conflict of Interest. Section VIII(B) provides that, "[a]ll employees are responsible for compliance with this operating procedure regarding consensual romantic or sexual relationships with coworkers." Section VIII(F)(5) provides:

Supervisors are strictly prohibited from dating or engaging in romantic or sexual relationships with subordinates. A subordinate includes anyone in a supervisor's direct chain-of-command.

Section VIII(F)(7) provides:

Initiation of, or engagement in an intimate romantic or sexual relationship with a subordinate is a violation of Operating Procedure 135.1, Standards of Conduct, and will be treated as a Group I, Group II, or Group III offense depending on the impact on the work environment.

Group III offenses include:

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

Violation of Operating Procedure 135.3, Standards of Ethics and Conflict of Interest, relating to Consensual Personal Relationships/Sexual Harassment in the Workplace, including but not limited to failing to report an intimate romantic or sexual relationship with a subordinate.<sup>3</sup>

Grievant engaged in a prohibited sexual relationship with Officer S. He failed to report that relationship. Grievant held superior rank to Officer S. The Agency has presented 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, the Agency's decision to remove Grievant must be upheld.

### Grievant's Defenses

As part of his written grievance, Grievant denied many of the facts alleged by the Agency and disagreed with issuance of the disciplinary action. Grievant asserted the Agency's disciplinary action was retaliatory. Grievant did not testify or present any evidence during the hearing because he did not appear. The Agency's factual allegations are supported by the evidence presented. The Hearing Officer does not believe the Agency disciplined Grievant as a form of retaliation.

### 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 ...."<sup>4</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 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**.

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<sup>3</sup> See, Virginia Department of Corrections Operating Procedure 135.1.

<sup>4</sup> *Va. Code § 2.2-3005*.

## 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 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.