



# ***COMMONWEALTH of VIRGINIA***

## ***Department of Human Resource Management***

### **OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

#### **DECISION OF HEARING OFFICER**

In re:

**Case Number: 11821**

Hearing Date: August 12, 2022

Decision Issued: August 31, 2022

#### **PROCEDURAL HISTORY**

On March 9, 2022, Grievant was issued a Group III Written Notice of disciplinary action with removal for sexually harassing a subordinate.

On April 6, 2022, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On April 18, 2022, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 12, 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 Virginia Department of Corrections employed Grievant as a Unit Manager at one of its facilities. He received an overall rating of "Extraordinary Contributor" on his November 2021 annual performance evaluation.

The Counselor worked at the Facility from June 2021 through December 2021. The Counselor reported to Grievant. Grievant and the Counselor lived in the same apartment complex. The Counselor lived in an apartment below Grievant's apartment. They encountered each other at work and also when they were going to and from their homes.

Grievant and the Counselor exchanged cell phone numbers and communicated by text message. On June 11, 2021, Grievant sent the Counselor a text message, "I'm tight right now. Wyd." The Counselor replied, "Why? I'm in the bath lol." Grievant responded, "I'm cumin through." Several minutes later, Grievant asked, "Have u got out the tub Yet." The Counselor wrote, "Yes lol." Grievant wrote, "Make room for me."

On June 17, 2021, Grievant sent the Counselor a text message, "Is your ass [as] phat as it looks or is it just me." The Counselor replied, "I don't know come look I'm back outside [three laughing emoji's]." Grievant said, "Send me a pick or snap." Grievant wrote, "U want some company in the morning???" The Counselor replied, "Lmaoooo nooooo."

Grievant asked, "Why not???" The Counselor said, "Because we can't Lmao." Grievant wrote, "No strings attached." Grievant asked the Counselor about who was in the interview panel for a job interview she had at another facility. The Counselor told him the names and Grievant replied, "And u don't have a thong on." The Counselor replied, "yes I do." Grievant wrote, "I want to see it."

On August 23, 2021 at 6:19 a.m., Grievant sent the Counselor text messages asking if she was awake and dressed. He added, "Want some company." The Counselor replied, "Lmao no. I'm trying to fix my hair and wake up." Grievant said, "I need to release some stress. \*\*\* Do you want to help me out." The Counselor said, "No lol I'm leaving for work." The Counselor understood Grievant's comment to refer to having sex to release some stress.

On November 3, 2021, Grievant sent the Counselor a text, "Did you have under garment on today."

Grievant and the Counselor spoke at work. On several occasions, Grievant told the Counselor, "Your ass looks fat today," "I see you do have boobs, I didn't think you did", and "I'm gonna blow your back out soon, just wait for it."

The Counselor believed that Grievant was having a bad day and asked him if he was okay and if there was any work she could do to assist him. Grievant said, "No, the only thing you can do it sit on this pole when the time come and relieve this pressure." Grievant used the word "pressure" to refer to sex.

Grievant knew the Counselor was seeking a promotion at another facility. On June 11, 2021 after the Counselor was interviewed for a position, Grievant told her, "Okay, I guess I can try to make this happen for you. If this goes through you can thank me later." The Counselor understood Grievant's comment to mean she was to reward him with sex for assisting her with her career.

On December 6, 2021, the Counselor wrote a statement to Agency managers that she was being sexually harassed by Grievant. She expressed concern for her safety and career. She wrote that, "when I realized this is something I could not handle any more and was looking to leave DOC as a whole."

On December 9, 2021, the Counselor left the Facility to work at another agency.

### **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>

Operating Procedure 135.3 governs Standards of Ethics and Conflict of Interest. Section VIII(C) provides:

Romantic or sexual relationships between supervisors and subordinates undermines the respect for supervisors with the other employees, undermines the supervisor’s ability to make objective decisions, may result in favoritism or perceived favoritism, may lower morale among co-workers, or open supervisors to future charges of harassment or retaliation claims. Additionally, supervisory/subordinate relationships may bring about complaints from co-workers and create a liability for the DOC.

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.

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).”

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

It is the policy of the Commonwealth to foster a culture that demonstrates the principles of civility, diversity, equity, and inclusion. In keeping with this commitment, workplace harassment (including sexual harassment), bullying (including cyber-bullying), and workplace violence of any kind are prohibited in state government agencies.

This policy addresses prohibited conduct:

- 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.

DHRM Policy 2.35 defines Hostile Work Environment as:

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

A form of sexual harassment when a victim is subjected to unwelcome and severe or pervasive repeated sexual comments, innuendos, touching, or other conduct of a sexual nature that creates an intimidating or offensive place for the employees to work.

Grievant created a hostile work environment for the Counselor. From June 2021 to December 2021, Grievant made pervasive repeated sexual comments and innuendos of a sexual nature to the Counselor. He suggested she make room for him while she was taking a bath. He suggested she have him as company with “no strings attached.” Grievant referred to the Counselor’s body appearance and undergarments. He suggested having sex to relieve stress and “pressure.” The Counselor did not welcome Grievant’s sexual innuendo. Grievant caused her workplace to become so offensive she desired to leave the Facility. The Agency has presented sufficient 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 argued he did not ask the Counselor for intercourse. The evidence showed that Grievant’s request for sex was by innuendo which is sufficient to establish a hostile work environment for the Counselor.

Grievant argued that the Counselor initiated the conversations and that his words were taken out of context. The evidence showed that although the Counselor may have engaged in what she perceived a joking banter, the nature of her conversation was not of such a degree as to mislead Grievant into thinking his comments were appropriate or welcomed. The Counselor’s testimony regarding her interactions with Grievant was credible and consistent with Grievant’s text messages. Grievant attempted to initiate and engage in a sexual relationship with the Counselor. His behavior was contrary to Operating Procedure 135.3. Even if Grievant actually believed his behavior towards the Counselor was welcomed, his behavior was contrary to policy.

*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>2</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

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<sup>2</sup> Va. Code § 2.2-3005.

applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive.

Grievant argued that the Agency inconsistently applied disciplinary action. Grievant presented evidence of an employee who made inappropriate comments to a subordinate but received only a Group II with demotion, transfer, and disciplinary pay reduction based on the accumulation of disciplinary action. The Written Notice states that the employee's discipline was mitigated because the employee had over 30+ years of satisfactory work performance with no prior disciplinary action. Grievant has not been employed by the Agency for over 30 years. Grievant presented evidence of a Warden who was disciplined for making racially offensive comments. Grievant was not disciplined for making racially offensive comments. His behavior differed from the Warden's behavior. Grievant presented evidence of a Warden who was disciplined without removal for giving false answers during an investigation. Grievant was not disciplined for giving false answers. The Hearing Officer does not believe Grievant was singled-out for disciplinary action. In light of the standard set forth in the Rules, 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 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.