



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11814 / 11867

Hearing Date: August 17, 2022
Decision Issued: September 6, 2022

PROCEDURAL HISTORY

On September 20, 2021, Grievant was issued a Group III Written Notice of disciplinary action with demotion, transfer, and disciplinary pay reduction for lack of civility in the workplace. On June 22, 2022, Grievant was issued a Group III Written Notice with removal for sharing sensitive business-related information to someone who was not an Agency employee.

On October 14, 2021, Grievant timely filed a grievance to challenge the Agency's Group III Written Notice with demotion, transfer, and disciplinary pay reduction. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On July 5, 2022, Grievant appealed the second Group III Written Notice. On July 19, 2022, the two disciplinary actions were consolidated by Ruling 2023-5433. The Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 17, 2022, a hearing was held by remote conference.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's Counsel
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 Lieutenant at one of its facilities. He began working for the Agency in 1998. He was demoted to a Sergeant and transferred to another facility effective September 24, 2021. Grievant received an overall rating of "Exceeds Contributor" on his 2019 annual performance evaluation.

Officer M began reporting to Grievant on January 9, 2021. Ms. G was Officer M's cousin.

Grievant had a Facebook account. He had a unique log in and password for the account. He could use Facebook Messenger to communicate with his Facebook friends.

Officer M sent Grievant a Facebook friend request. On January 11, 2021, Grievant and Officer M became Facebook Friends.

On January 11, 2021, Grievant and Officer M spoke by telephone.

Grievant and Officer M began communicating through Facebook. Their messages included:

Jan 13, 2021

[Grievant]: "To be honest I still want some, you get your truck bac"

[Officer M]: "Yeah it's on the way now"

[Grievant]: (gives the thumbs up symbol)

Jan 14, 2021

[Grievant]: "Wyd?"

Jan 15, 2021

[Grievant]: "Good morning"

[Officer M]: "Morning"

[Grievant]: "Morning, can I call?"

[Officer M]: "Yeah"

Jan 20, 2021 10:01 PM

[Grievant]: "Make a ni--a hungry"

Jan 21, 10:01PM

[Grievant]: "You should just let me try it; I ain't gonna trip"

[Officer M]: "I'm not currently looking for someone to just f*ck right now just being honest"

[Grievant]: "Me too; I get a room and everything"

[Officer M]: "I got a lot of working on myself to do right now and you know I tested positive been depressed with everything that keep going on with/around me"

[Grievant]: "Call me"

[Grievant]: "To be honest I been wanting to taste you for a while"

[Grievant]: "And I will bring you no drama"

[Grievant]: "I seen the video"

Jan 27, 2021 6:26 AM

[Grievant]: "And where were you last night"

[Officer M]: "I don't come back till the 28th"

[Grievant]: "Okay Boo Boo"

Jan 28, 2021 7:36 AM

[Grievant]: "I'm upset"

[Officer M]: "Why?"

[Grievant]: "Because I can't have that friendly f--k with you"

[Officer M]: "It's no such thing!"

[Grievant]: "So I can?"

[Officer M]: "No, I said it's no such thing as a friendly f--k"

[Grievant]: "It is"

January 29, 2021 7:59 AM

[Grievant]: "Let me get a sample"

January 29, 2021 3:55 PM

[Grievant]: "Not to be nasty but I honestly would just like to relax your mind by giving you some head, I believe you deserve to be pleased with no questions asked"

Jan 31, 2021 2:21 PM

[Officer M]: "Ima go ahead and drive it's not looking too bad good looking though"

Unknown date

[Grievant]: "Good morning sexy"

Feb 17, 2021 8:24 AM

[Officer M]: "Good morning"

[Grievant]: "Wyd?"

Feb 18, 2021 8:27 AM

[Grievant]: "I want some; I'm not goin tell"

Feb 19, 2021 7:44 PM

[Grievant]: "Looking good Boo Boo"

Mar 4, 2021 6:42 PM

[Grievant]: "I want some"

Mar 7, 2021 11:08 PM

[Grievant]: "Looking yummy Boo Boo"

Mar 13, 2021 3:54 PM

[Officer M]: "I know u tryna send someone home early tonight; since we have extra person"

Mar 16, 2021 10:45 AM

[Officer M]: "Yeah I went back to sleep but that's what he posted LOL of all people"

[Grievant]: "Really"

Mar 21, 2021 12:27 AM

[Grievant]: "Go to bed"

April 8, 2021 8:10 AM

[Grievant]: "Looking good in that yellow"

April 23, 2021 3:15 PM

[Officer M]: "Do we have muster?"

[Grievant]: "Why BO BO"

May 16, 2021 5:49 AM

[Grievant]: "I must say you are beautiful too BO BO"

Unknown date

[Grievant]: "Not really, I'm figuring out who I am and what I want. Until then I'm just going to enjoy myself. You should too, you are a beautiful young woman and you got a lot to look forward to, just enjoy yourself and be watchful of fake ass people"

On May 31, 2021, Officer M alleged that Grievant changed her assignment from a floor officer to an officer in the main building to retaliate against her for rejecting his sexual advances. The Agency investigated Officer M's allegation of retaliation and concluded it was unfounded. The Agency also concluded Grievant engaged sexual harassment of Officer M. During the investigation, Grievant alleged he was being retaliated against by the Major. The Agency concluded Grievant's allegation of retaliation by the Major was unfounded.

On June 1, 2021, the Captain sent an email and copied Grievant stating that Officer M was "no call / no show, she will need to be referred for disciplinary action under 135.1 so I will need a disciplinary referral on her."¹ On June 3, 2021, the Captain sent an email to Grievant with a copy to the Major and Superintendent:

Officer [M] called in today for the rest of the week, she has already exhausted all of her sick time for the year, and she is showing a pattern of beginning of the week, or weekends when calling in, both occurrences per OP 110.1, she must have documentation for, check and see if she has documentation or if any was submitted to HR, she failed to call in for her draft this past week also in which she is in need of disciplinary action, she has now exhausted all of her sick time just before this most recent call in, she will also require disciplinary actions for this as well.²

On June 13, 2021, Officer M resigned from the Facility. Her reasoning included not wanting to work with Grievant and be subject to unwanted requests for sex. She told the

¹ Agency Exhibit p. 60.

² Agency Exhibit p. 62.

Major about her conversations with Grievant. Officer M later decided to remain working for the Agency but she no longer reported to Grievant.

On August 20, 2021, the Investigator sent Grievant a letter stating, in part:

In addition, please be mindful this complaint and the findings are to be kept strictly confidential and should not be discussed with others within the DOC except on a need-to-know basis only.³

On or about September 13, 2021, Grievant used Facebook to contact Officer M's cousin, Ms. G. Grievant wanted Ms. G to know that Officer M was "mad at the wrong person." Grievant told Ms. G that the "Major put [Officer M] up to it to get at me. I lied to her and told her he didn't know why I was writing her up and he did because [the Captain] told me to. I want her to know the truth, they using her to punish me for doing my job." To prove his point, Grievant sent Ms. G a copy of the June 3, 2021 email he received from the Captain. Grievant encouraged Ms. G to "[f]orward it to her." The email mentioned possible disciplinary action against Officer M. From that Facebook communication, Ms. G learned that the Captain thought Officer M "was in need of disciplinary action."⁴ Ms. G sent a screen shot of Grievant's message to Officer M who informed the Agency of the incident.

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."⁵

Group III Written Notice - Sexual Harassment

DOC Operating Procedure 135.3 governs Standards of Ethics and Conflict of Interest. This policy provides:

C. 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,

³ Agency Exhibit p. 19.

⁴ Agency Exhibit p. 21.

⁵ See, Virginia Department of Corrections Operating Procedure 135.1.

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.

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

a. 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.

b. The evidence to substantiate the adverse effect on the work environment to support the issuance of a written notice must be documented.

DHRM Policy 2.35 governs Civility in the Workplace. Prohibited conduct under DHRM Policy 2.35 includes:

1. Harassment, Bullying, Workplace Violence:

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.

2. Retaliation:

The Commonwealth will not tolerate any form of retaliation directed against an employee or third party who, in good faith, either reports these prohibited behaviors or participates in any investigation concerning such behaviors.

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).

DHRM Policy 2.35 defines hostile work environment as:

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.

Under DHRM Policy 2.35:

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. ***

Violations occurring outside the workplace may be grounds for disciplinary actions, up to and including termination. In these situations, the agency must demonstrate that the conduct committed has a sufficient nexus to the workplace or the agency's operations, services, or reputation to be addressed by this policy.

Group III offenses include, "Violation of DHRM Policy 2.30 Workplace Harassment or Operating Procedure 145.3, Equal Employment Opportunity, (considered a Group III offense, depending upon the nature of the violation)." Grievant engaged in sexual harassment by creating a hostile work environment for Officer M. Grievant was prohibited by Operating Procedure 135.3 from having a sexual relationship with Officer M yet he propositioned her for sex. From January 13, 2021 through May 16, 2021, Grievant either explicitly or by innuendo told Officer M that he wanted to have sex with her. On January 21, 2021, Officer M told Grievant she was not interested in having sex with him but he continued his requests. As a result of Grievant's unwelcomed request for sex and her belief that Grievant was retaliated against her for rejecting his request, Officer M sought to resign from the Agency. She did not want to work with Grievant. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for violation of DHRM Policy 2.35. Upon the issuance of a Group III Written Notice, an agency may demote, transfer, and impose a disciplinary pay reduction in lieu of termination. Accordingly, the Agency's decision to demote Grievant to the position of Sergeant, transfer him to another facility, and impose a disciplinary pay reduction must be upheld.

Group III Written Notice – Disclosing the June 3, 2021 Email

Operating Procedure 310.2 governs Information Technology Security. Section F provides

The DOC email system and all email accounts and their associated messages and attached files, are the property of the COV and should be used for appropriate business purposes. ***

DOC email must not be forwarded to an external email address unless there is a documented business case provided to ITU Security by the Organizational Unit Head.

On or about September 13, 2021, Grievant sent Officer M's cousin, Ms. G, a Facebook message containing a June 3, 2021 email sent to Grievant by the Captain. The email contained confidential information about possible disciplinary action against Officer M. There was no business reason for Grievant to send the email to Ms. G. Grievant asked Ms. G to forward the email to Officer M to support his assertion that he was not the one behind taking disciplinary action against Officer M. Grievant was not authorized to send

the June 3, 2021 email and did not sent the email for an appropriate business purpose. The Agency has presented sufficient evidence to show that Grievant acted contrary to Operating Procedure 310.2.

Violation of policy typically is a Group II offense. Operating Procedure 135.1, however, provides:

Under certain circumstances, an offense typically associated with one offense category may be elevated to a higher level offense due to aggravating circumstances.

a. Aggravating circumstances include factors related to an offense, such as seriousness of the misconduct or previous record of the same type of offense, which indicate a higher or more severe level of disciplinary action is appropriate.

b. The DOC may consider any unique impact that a particular offense has or could have on the DOC, and the fact that the potential consequences of the performance or misconduct substantially exceeded agency norms.

The June 3, 2021 email contained confidential personnel information regarding Officer M. Sending confidential personnel information to someone not authorized to receive it is an aggravating circumstance. 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, Grievant's removal must be upheld.

Grievant's Defense of Hacking

Grievant denied sending inappropriate Facebook messages. Grievant alleged that sometime between December 2020 and January 2021 his Facebook account was hacked and someone else gained access to his account. He claimed he did not write the messages to Officer M that the Agency contends created a basis for disciplinary action. Grievant presented evidence that he sent a message to his Facebook friends:

Don't send accept any friend request from me. My account has been hacked.⁶

Mr. A testified he called Grievant in April 2021 to let Grievant know his Facebook account had been hacked. Grievant points out that a picture of him on several of his Facebook messages is from a different time period. Grievant claimed he was never Facebook friends with Ms. G.⁷

⁶ Grievant Exhibit p. 55.

⁷ Ms. G testified that she and Grievant were Facebook friends.

Grievant's argument that a hacker sent offensive Facebook messages to Officer M is not persuasive for several reasons. First, assuming Grievant's account was hacked, the hacking did not prohibit him from communicating with his friends. If he had been precluded from contacting his friends, he would have recognized that immediately after the hacking instead of being informed in April 2021 by Mr. A that his account may have been hacked. In other words, both could be true that Grievant's Facebook account was hacked and that he sent offensive messages to Officer M. Second, the person communicating with Officer M had a familiarity with Officer M such as knowing Officer M was away and asking, "Where were you last night?" Grievant could not identify the alleged hacker. An anonymous hacker would not have known to ask Ms. G to tell Officer M that Officer M was "mad at the wrong person." Third, in order for the alleged hacker to send Ms. G the Captain's June 3, 2021 email, the hacker would have had to not only hack Grievant's Facebook account but also hack into Grievant's DOC email account. The alleged hacker would have had to know the circumstances of Grievant's and Officer M's interaction and know that Officer M and Ms. G were related. The likelihood of all of these circumstances being true is doubtful. In addition, Ms. G testified that she spoke with Grievant via Facebook Messenger about the June 3, 2021 email. She recognized Grievant's voice. In conclusion, the Hearing Officer believes that Grievant and not a hacker sent the Facebook messages at issue in this case.

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"⁸ 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 demotion, transfer, and disciplinary pay reduction is **upheld**. The Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is **upheld**.

⁸ *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 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.

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.