



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11826

Hearing Date: September 16, 2022
Decision Issued: October 5, 2022

PROCEDURAL HISTORY

On February 14, 2022, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow policy.

On March 12, 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 May 9, 2022, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 16, 2022, a hearing was held by remote conference.

APPEARANCES

Grievant
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 Behavioral Health and Developmental Services employs Grievant as a Security Officer III at one of its facilities. His duties included transporting food throughout the Facility. Some of his duties included de-escalating conflicts. No evidence of prior active disciplinary action was introduced during the hearing.

Mr. B was a cook who worked in the Facility's kitchen. Ms. H also worked in the kitchen. She is Grievant's brother.

On January 19, 2022, Grievant and his sister, Ms. H, were in a main hallway talking. Grievant was carrying a cooler in one hand. Mr. B walked out of the kitchen doorway and into the main hallway. He walked past Ms. H and entered the walk-in freezer in the main hallway. He walked out of the freezer and towards the kitchen door. Ms. H had her back to Mr. B as she spoke to Grievant. Mr. B turned his face towards Ms. H, glanced down, and said, "dumb ass" to Ms. H.¹ Grievant heard Mr. B say "dumb ass", but Grievant asked Ms. H "What did he say?" Ms. H said that Mr. B called her that all the time. Grievant was shocked by Mr. B's language. Grievant thought that it "did not feel

¹ Mr. B may have said "stupid ass" or some words containing the phrase "dumb ass." Mr. B intended to insult Ms. H.

right.” Grievant told his sister, “He’s not going to disrespect” like that. He opened the door to enter the kitchen hallway to confront Mr. B. Ms. H walked behind him.

After returning to the kitchen, Mr. B walked to a refrigerator and opened it. A metal table was between him and the kitchen hallway. After having opened the kitchen door and walked down the kitchen hallway, Grievant approached Mr. B. Grievant stood on one side of the metal table and Mr. B stood on the other side. Grievant said to Mr. B, “What did you say?” Grievant’s voice and tone were not elevated. Mr. B pointed his finger at Grievant’s face. Mr. B said, “You don’t want none of this.” Grievant said, “What did you say to me?” Grievant took a short step to his left. This positioned him closer to the table’s edge and closer to walking around the table, but Grievant remained on his side of the metal table. Mr. B took a short step to his right and then two steps forward. He passed his side of the table and stood one or two feet in front of Grievant in order to confront Grievant. Mr. B screamed and cursed at Grievant. Grievant argued with Mr. B but did not raise his voice or curse at Mr. B.

Mr. G was also in the kitchen at another kitchen table but on the same side of the table as Mr. B. Mr. G observed Mr. B and Grievant arguing. Mr. G walked five steps towards Grievant and Mr. B and began screaming and threatening Grievant.

The Food Service Supervisor, Ms. D, was in the kitchen and she observed the conflict. Ms. D observed Mr. B position himself in front of Grievant. Ms. D believed Grievant and Mr. B were getting ready to fight. She stepped between Grievant and Mr. B and began pushing Mr. B backwards. Mr. B moved backwards and Grievant and Mr. B kept arguing with each other. Ms. D yelled to Ms. H1 to call an emergency. Ms. D asked Grievant to leave the kitchen. Grievant turned around and began walking through the kitchen hallway and towards the kitchen door.

After Grievant was out of the kitchen, Mr. B continued to yell at Grievant even though Grievant had walked down the kitchen hallway. A male employee got in front of Mr. B and began moving him backwards to stop Mr. B from following Grievant. Mr. B took four or five steps towards the kitchen door while pushing the employee. The employee was able to stop Mr. B and pushed Mr. B back behind the metal table.

Mr. B briefly resumed his work duties by taking a tray to another part of the kitchen. He then returned to the metal table and began yelling down the hallway towards Grievant. The other employee again had to restrain Mr. B. Mr. B pushed the other employee several steps towards the kitchen door as the other employee attempted to stop Mr. B’s advance. Mr. B then resumed his work duties.

Ms. H1 used her radio to announce an emergency in the kitchen. Officer G was part of the Facility’s Emergency Response Team and he began walking to the kitchen where he believed a fight was in progress.

After Grievant walked through the kitchen hallway he attempted to exit the kitchen area. Officer G told Grievant to go with him to the kitchen because an emergency had

been announced over the radio and there was a fight in the kitchen.² Officer G did not know that Grievant was a participant in that emergency. Grievant began walking back to the kitchen and stopped at the end of the kitchen hallway away from Mr. B's location. Grievant would not have returned to the kitchen if Officer G had not indicated Grievant should do so.

Mr. G began walking in the kitchen hallway towards Grievant's location. Mr. G was attempting to confront Grievant. Mr. G pulled down his mask and said, "Remember this face, you don't want none of this, mother—ker, we can meet in the parking lot." Ms. D observed Mr. G approaching and she approached him to stop his advance. She attempted to turn Mr. G around to cause him to return to the main kitchen area. A security officer grabbed Grievant's right shoulder and began to turn him in the direction of a doorway to exit the kitchen hallway. Grievant backed to his side to avoid the security officer. Grievant then placed his left hand on the security officer's right shoulder in order to brush the security officer to the side so he could move towards Mr. G. Mr. G remained in the kitchen hallway yelling at Grievant. Another security officer began assisting to move Grievant out of the kitchen hallway. Grievant left the kitchen hallway and the incident concluded. Officer G did not hear Grievant threaten anyone.

Throughout the incident, Grievant continued to hold a cooler in one of his hands.

Mr. G was a probationary employee. The Agency removed Mr. G from employment. The Agency did not take disciplinary action against Mr. B. The Agency counseled Mr. B.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action."³ Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

DHRM Policy 2.35 governs Workplace Civility and it prohibits work place violence. The policy defines workplace violence as:

Any physical assault, threatening behavior, or verbal abuse occurring in the workplace by employees or third parties. Threatening behaviors create a

² Grievant was not part of the Facility's Emergency Response Team.

³ The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

reasonable fear of injury to another person or damage to property or subject another individual to extreme emotional distress.

The Policy Guide for DHRM Policy 2.35 states that prohibited conduct includes:

Demonstrating behavior that is rude, inappropriate, discourteous, unprofessional, unethical, or dishonest;
Behaving in a manner that displays a lack of regard for others and significantly distresses, disturbs, and/or offends others; ***
Raising one's voice inappropriately or shouting at another person;

Grievant's response to Mr. B's comment should have been to report the matter to a supervisor for the Agency to investigate. Instead, he chose to confront Mr. B.

Grievant violated DHRM Policy 2.35 because he attempted to confront Mr. B instead of reporting the matter to a supervisor. Grievant's behavior was unprofessional and not appropriate in the workplace. Although Grievant did not scream at other employees, he raised his voice and argued with Mr. B and Mr. G. When Mr. G was in the kitchen hallway walking towards Grievant and threatening Grievant, Grievant attempted to brush aside a security officer to go towards Mr. G and confront him. Grievant's behavior was sufficient to justify the issuance of a Group II Written Notice.

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"⁴ 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.

Of the three employees, Mr. G's behavior was the worst. He approached Grievant with the intent to fight and expressed his intent to fight. The Agency removed Mr. G from employment. Mr. G and Grievant were not similarly situated because Mr. G was a probationary employee. The Agency could not issue a written notice to a probationary employee.

⁴ Va. Code § 2.2-3005.

Mr. B's behavior was worse than Grievant's behavior. Mr. B initiated the conflict by insulting Ms. H. Calling Ms. H a "dumb ass" was a violation of DHRM Policy 2.35.⁵ Grievant went into the kitchen to engage in a verbal conflict with Mr. B. Grievant was holding a cooler in one hand. If Grievant intended to fight, he would have dropped the cooler. Grievant moved slightly to his left but did not cross his side of the metal table. Grievant's movement was not a material action that could be constructed as positioning himself to fight. Grievant did not assume a "fighting stance." Mr. B pointed his finger to Grievant's face. Mr. B moved a full step to his right to pass the table's edge and then took a step forward to position himself squarely in front of Grievant. Mr. B changed what was a verbal confrontation into what could be a physical confrontation. Mr. B placed himself within one or two feet of Grievant so that he could physically fight Grievant while he yelled at Grievant. Ms. D observed Mr. B's aggressive behavior. When Ms. D attempted to separate the two employees, Ms. D pushed against Mr. B because he was the more aggressive of the two men. After Grievant turned and walked away, Mr. B had to be restrained by a male employee to prevent Mr. B from following Grievant as Grievant was walking away and the conflict should have ended. In short, Mr. B changed a verbal confrontation into the potential for a physical confrontation. He extended that confrontation even after Grievant had walked away which should have ended the conflict. His actions were far more dangerous to other staff at the facility than Grievant's actions. Mr. B should have received at least a Group II Written Notice for his workplace violence.⁶

Grievant and Mr. B were similarly situated employees. Mr. B engaged in behavior more egregious than Grievant's behavior. It is clear that the Agency inconsistently treated and inappropriately favored Mr. B with respect to the issuance of disciplinary action. The Agency singled-out Grievant for disciplinary action in this case. Grievant's Group II Written Notice should be mitigated to a counseling.

The Agency argued that Mr. B only said "excuse me" when he passed Ms. H. The Hearing Officer finds this assertion not persuasive. Grievant reacted to Mr. B only after Mr. B called Ms. H a "dumb ass." Mr. B called Ms. H a name after he left the walk-in freezer in the main hallway and walked to the kitchen door to open it and enter the kitchen.⁷ Only Grievant, Ms. H, and Mr. B were in the main hallway at that time.⁸

⁵ The Agency argued that the video did not have sound so it could not confirm what Mr. B said to Ms. H. The Agency's investigation should have revealed that Mr. B insulted Ms. H. In addition, there is no other reason why Grievant would enter the kitchen and ask Mr. B what he said if Mr. B had not said something offensive. Grievant did not know Mr. B and would have no other reason to speak to him.

⁶ Mr. B's behavior easily met the standard for the issuance of a Group III Written Notice.

⁷ Ms. H testified that Mr. B spoke his insult on while he was leaving the main hallway to enter the kitchen.

⁸ Ms. H was standing close to the kitchen door when Mr. B opened. She moved slightly to get out of his way. Mr. B may have said "excuse me" when he opened the kitchen door and first entered the main hallway. This would explain on Agency witness who testified Mr. B said, "excuse me." Mr. B's offensive comment was made after he existed the walk-in freezer and passed through the hall to enter the kitchen door.

The Agency argued that Grievant and Mr. B were different because Grievant had a duty to de-escalate conflict. The Hearing Officer agrees with this argument and, thus, will not completely rescind 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.

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]

^[1] Agencies must request and receive prior approval from EDR before filing a notice of appeal.

[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