



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11835

Hearing Date: October 19, 2022

Decision Issued: October 20, 2022

PROCEDURAL HISTORY

On May 5, 2022, Grievant was issued a Group III Written Notice of disciplinary action with removal for failing to maintain civility in the workplace.

On May 11, 2022, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On May 31, 2022, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 19, 2022, a hearing was held by remote conference. Grievant was advised 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 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 Corrections Officer at one of its facilities. Grievant had prior active disciplinary action. On August 1, 2018, Grievant received a Group III Written Notice for workplace violence.

Grievant and the Teacher worked at the Facility. The Teacher did not know Grievant prior to working at the Facility. She did not have any relationship with Grievant outside of the workplace.

When Grievant encountered the Teacher, he would sometimes make animal sounds such as meowing like a cat. He directed his sounds at the Teacher. She told him to stop making the sounds but he continued. He sometimes made cat sounds to the Teacher in front of inmates who heard him and then made comments to the Teacher about Grievant's behavior towards her. Grievant began this behavior in August 2021.

On February 3, 2022, Grievant was exiting Master Control and the Teacher was walking towards Master Control. Grievant said to the Teacher, "I hear you like to blade." The Teacher replied, "Excuse me?" Grievant said, "I heard you are wild; that you like to cut people." The Teacher turned and walked away. The Teacher was upset and offended by Grievant's comments. She was shocked by the interaction with Grievant. In the afternoon on February 3, 2022, the Teacher and Ms. P were walking past Grievant.

Grievant observed the Teacher and began making cat meowing sounds directed at the Teacher. The Teacher was annoyed and offended by Grievant's behavior.

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 Workplace Civility. 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.

The Policy Guide for DHRM Policy 2.35 specified prohibited behavior to include:

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;

On February 3, 2022, Grievant told the Teacher "I hear you like to blade" and "I heard you are wild; that you like to cut people." Grievant made rude, inappropriate, discourteous, and unprofessional comments. His behavior caused the Teacher to experience significant distress. She was disturbed and offended by Grievant's behavior.

Grievant did not appear at the hearing and did not present any evidence. During a due process meeting with the Warden, Grievant denied doing anything wrong. The evidence presented by the Agency, however, showed that Grievant engaged in the behavior alleged by the Agency and that the disciplinary action was appropriate.

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

¹ See, Virginia Department of Corrections Operating Procedure 135.1.

....”² 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.

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.

² Va. Code § 2.2-3005.

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.