



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11772 / 11789

Hearing Date: October 3, 2022
Decision Issued: November 10, 2022

PROCEDURAL HISTORY

On August 25, 2021, Grievant was issued a Group I Written Notice of disciplinary action for insubordination and violation of Operating Procedure 145.3. On November 17, 2021, Grievant was issued a Group III Written Notice of disciplinary action with disciplinary transfer, demotion, and pay reduction for lack of civility in the workplace.

On September 23, 2021, Grievant timely filed a grievance to challenge the Agency's Group I Written Notice. On December 7, 2021, Grievant timely filed a grievance to challenge the Agency's Group III Written Notice. The Office of Employment Dispute Resolution issued Ruling 2022-5342 consolidating these matters for hearing. On January 18, 2022, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 3, 2022, a hearing was held by remote conference.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's 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 the Chief of Housing and Programs (CHAP) at one of its locations prior to her demotion, transfer, and disciplinary pay reduction. She began working for the Agency on August 17, 1998. She began working at the Facility in 2016. Grievant was demoted to the position of Casework Counselor as part of the disciplinary action. No evidence of prior active disciplinary action was introduced during the hearing.

The Facility had male inmates including sexual offenders. Women employees were prohibited by policy from dressing inappropriately which the Agency considered to be any dress that might attract unnecessary attention from inmates.

Ms. M began working at the Facility in December 2020. She was within Grievant's chain of command. The Warden observed Ms. M at work and asked Grievant to speak with Ms. M about what the Warden considered inappropriate dress. Grievant did so. The Warden did not want to speak with Ms. M because he is male and Ms. M is female. Based

on the Warden's request with respect to Ms. M, Grievant believed she was authorized to inform female employees if their manner of dress was inappropriate.

On December 14, 2020, Grievant sent her subordinates an email advising them to maintain professional dress while at work. She cautioned against wearing clothing with pictures or words that could be considered offensive. She advised against wearing clothing with statements making a political or religious stand.

On March 15, 2021, the Warden sent employees a memorandum about "Staff Dress Code."

On June 22, 2021, the Assistant Warden met with Grievant and told Grievant that Grievant would no longer be asking female non-security staff to wear long sweaters or to tie a sweater around their waist.¹ He said the responsibility for whether an outfit is appropriate falls on front entry officer. He told Grievant she needed to be more professional when she addressed staff. Grievant told the Assistant Warden she understood him. The meeting was prompted because Grievant was making female staff wear sweaters when the weather outside was 90 degrees.

On July 26, 2021, Ms. M submitted a complaint to the Agency alleging Grievant created a hostile work environment for her. Ms. M alleged Grievant criticized her about her dress, weight, and hair. Ms. M worked as a Counselor and reported directly to Grievant until June 2021 and remained within Grievant's chain of command after June 2021.

On one occasion in July 2021, Ms. M was standing next to an inmate. Grievant said Ms. M's pants were so tight she could see Ms. M's vagina. Grievant's comment made Ms. M feel embarrassed and belittled in front of the inmate. Ms. M went to the Assistant Warden and asked the Assistant Warden if there was anything he could point out that was wrong with her appearance. The Assistant Warden said "No" and that she looked professional. When Ms. M encountered inmates during the following week, they joked about Ms. M because of Grievant's comment.

On another occasion, Grievant met with Ms. M to discuss her appearance. Ms. M had begun wearing a larger pant size. Grievant recommended Ms. M get liposuction. Grievant then recommended Ms. M get a belt and said she wished getting a belt would make her butt look like Ms. M's butt. Ms. M was offended by Grievant's comment.

Ms. M was wearing new shoes, and Grievant told Ms. M that her sneaker looked "too fresh." Grievant said Ms. M should not wear those shoes.

¹ Grievant testified that the Assistant Warden "made up" the June 22, 2021 meeting. In Grievant's due process response, however, she confirms that the Assistant Warden told her, "I get that but they don't need to be walking around in 90 degrees weather with a sweater on." Agency Exhibit p. 38.

Grievant and Ms. M did not have personal relationship or one that would otherwise justify Grievant making comments about Ms. M's appearance other than in furtherance of her work duties.

The Institutional Program Manager worked at the Facility and reported to Grievant. He is African American. He spoke with Grievant in July 2021. The IPM was wearing a button up shirt and pants. Grievant told the IPM that, "It looked like he was going to pull cotton." He felt humiliated by Grievant's comment. Grievant was not smiling or joking when she made her comment to the IPM.

In July 2021, an issue arose regarding the placement of a time clock inside the Facility. Grievant wanted the clock in a certain location. The Assistant Warden had influence regarding where the clock would be placed. Grievant told Ms. W, "I need you to convince [Assistant Warden] to have the time clock for the counselors back here." Ms. W suggested that opinion should come from Grievant. Grievant began blinking seductively and said to Ms. W, "You know what I mean, you are just so close to him, go blink them eyelashes at him and you know."² Grievant told Ms. W she was "cool" with the Assistant Warden. Ms. W told Grievant she was insinuating something that was untrue. Ms. W felt uncomfortable and disrespected by Grievant's comments. Ms. W felt belittled and angry because of Grievant's comment.

On one occasion, Grievant asked Ms. W if she had been working out. Ms. W said, "No." Grievant said that Ms. W looked pregnant. Ms. W was not pregnant at that time.

Ms. W felt uncomfortable being around Grievant. She would sometimes walk the "long way around" to avoid walking near Grievant's office.

Ms. B was a Psychology Associate working at the Facility. She was not in Grievant's chain of command. On July 21, 2021, Ms. B met with an Inmate in a security office. The office had a panic button to allow someone inside the office to notify corrections officers of an emergency. Ms. B felt threatened by the inmate's behavior but did not push the panic button. Ms. B wrote a charge on the Inmate. On July 22, 2021, Grievant asked Ms. B what happened with the charge against the Inmate. Grievant's attitude according to Ms. B was that Ms. B may have misread the situation and not have been threatened by the Inmate because Ms. B did not push the panic button in the room. Grievant told Ms. B she should not have underestimated the floor corrections officer and the next time Ms. B needed to push the panic button. Ms. B was upset and annoyed that Grievant questioned her response to the Inmate's behavior.

On August 25, 2021, the Warden met with Grievant and issued her the Group I Written Notice. He told her she was free to grieve his decision.

² Grievant wrote that she said, "Girl go on in there and bat those lashes you know how close you are to the AW." Agency Exhibit p. 37.

On September 7, 2021, Grievant alleged that the Assistant Warden threatened to retaliate against her if she filed a grievance regarding the Group I Written Notice. Grievant claimed that the Assistant Warden told her if she filed a grievance it would not be good for her career and things would get worse for her.

In September 2021, the Warden told Grievant she would begin reporting to the Warden and no longer report to the Assistant Warden.

On September 29, 2021, Grievant told the Warden she observed the Assistant Warden kiss Ms. W on the neck and cheek. Grievant claimed: (1) she saw the Assistant Warden behind Ms. W's desk kissing on Ms. W's neck and cheek, (2) Grievant entered the office and said, "Wow", (3) Ms. W looked up and started moving as if it was unwanted, (4) the Assistant Warden looked at Grievant and said he suffered a bee sting, (5) the Assistant Warden asked Ms. W if she had a band aid, (6) Ms. W looked in her drawer and said "No", and (7) Grievant said to put some tobacco on it.

Ms. W denied kissing the Assistant Warden.

During the investigation, Ms. W denied that the Assistant Warden was any closer to her than 4 feet away. She confirmed some of Grievant's comments. Ms. W said Grievant said "Wow" and that Grievant and the Assistant Warden started discussing bee stings and that the Assistant Warden should put tobacco on it.

The Assistant Warden denied kissing Ms. W.

After issuing the Group I Written Notice to Grievant, Agency Managers decided to arrange for a "Dialogue" at the Facility. On October 8, 2021, the Agency conducted a "Dialogue" at the Facility using Dialogue Intervention Specialists. The Dialogue Intervention Specialists did not work at the Facility and were expected to remain neutral. Operating Procedure 010.5, Dialogue, provides:

Dialogic Mission

1. Dialogue provides the language, environment, and structure that encourages and supports open two-way communication as people think together in order to develop a shared meaning, create mutual respect, and establish effective and cost-efficient systems and processes.
 - a. It is through dialogue that new ideas are developed, problems are solved, a Healing Environment is created, best practices are implemented, and operating procedures are generated.
 - b. Mutual respect ensure[s] that supervisors and line staff feel supported, encouraged, and motivated in their work towards lasting public safety.

Facility managers including Grievant were not permitted to participate in the Dialogue. The Dialogue was not aimed or focused on Grievant. The Dialogue was

intended as a “safe space to talk.” It presented questions about communication at the Facility.

Approximately 60 employees participated in the Dialogue. Ms. M, Ms. W, and the IPM made comments as part of the Dialogue. The results of the Dialogue were presented to Agency managers. The names of employees making comments were not given to Agency managers.

One of the questions in the Dialogue was, “[w]hat is your current work environment now?”³ Of the 56 responses to the question, 26 were negative comments about Grievant. A few of these comments were:

When the CHAP is here there is negative vibe.
Comments from the CHAP have been unprofessional and inappropriate.
CHAP asked an employee why she wears two bras.
I have tried to have a one on one conversation with [Grievant] and she continues to be unprofessional.
The treatment team is a family and we work together without the CHAP as a whole.
CHAP has made demeaning comments, when I came in, referring to my clothing, “What are you going to pick cotton today?”
CHAP creates an anti-healing environment stress by contributing to the stress and toxic environment.
I do not trust the CHAP, she has shared private information with subordinates and has sided with inmates over staff.
CHAP always has an ulterior motive she is never genuine or sincere.
Treatment staff avoid the office as the treatment hall is so tense due to the CHAP.
Supervisors have had staff come in the office physically emotional and crying about interactions with CHAP.
There’s one common denominator – CHAP.

The Warden learned of Grievant’s comment about picking cotton from the Dialogue results.

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.”⁴

³ Agency Exhibit p. 69.

⁴ See, Virginia Department of Corrections Operating Procedure 135.1.

Group I offenses include:

Violation of DHRM Policy 2.30 Workplace Harassment or Operating Procedure 145.3, Equal Employment Opportunity, (considered a Group I offense depending upon the nature of the violation)

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)

Operating Procedure 145.3 governs Equal Employment Opportunity, Anti-harassment, and Workplace Civility. This policy includes definitions:

Bullying - Disrespectful, intimidating, aggressive, and unwanted behavior toward a person that is intended to force the person to do what one wants, or to denigrate or marginalize the targeted person.

Workplace Harassment - Any unwelcome verbal, written or physical conduct that denigrates or shows hostility or aversion towards a person that:

- Has the purpose or effect of creating an intimidating, hostile or offensive work environment
- Has the purpose or effect of unreasonably interfering with an employee's work performance
- Affects an employee's employment, opportunities, or compensation.

Workplace harassment on the basis of race (including traits historically associated with race including hair texture, hair type, and protective hairstyles such as braids, locks, and twists), sex (including sexual harassment, pregnancy, lactation or expression of breastmilk, and marital status), color, national origin, religion, sexual orientation, gender identity, age, political affiliation, veteran status, or against otherwise qualified persons with disabilities is illegal. Workplace harassment not involving protected areas is in violation of DOC operating procedures.

Section I(F) provides:

The DOC specifically prohibits employment discrimination, harassment to include sexual harassment, bullying behaviors, threatening or violent behaviors, retaliation for participating in a protected activity, or other displays of inappropriate behavior toward any employee, applicant for employment, vendor, contractor, or volunteer. ***

1. Behaviors that undermine team cohesion, employee morale, individual self-worth, productivity, and/or safety are not acceptable.

2. If any of these prohibited behaviors occur, the employee(s) or third parties should report the matter to a person of authority through the established complaint protocol in the Complaint Procedure section of this operating procedure.

Section IV provides:

Expectations and Prohibited Conduct

A. It is the responsibility of all employees, applicants, vendors, contractors and volunteers to maintain a non-hostile, bias-free working environment, and to ensure that employment practices are free from workplace harassment of any kind, cyber-bullying, bullying, retaliation, or other inappropriate behavior; see Attachment 1, Guidance on Prohibited Conduct. ***

D. Any employee who engages in conduct determined to be harassment, discrimination, retaliation, cyber-bullying, bullying, and/or other inappropriate behavior, or who encourages or ignores such conduct by others will be subject to disciplinary action under Operating Procedure 135.1, Standards of Conduct, which may include termination from employment.

DHRM Policy 2.35 governs Civility in the Workplace. Under this policy:

Any state employee found in violation of this policy shall be subject to appropriate disciplinary action.

Under DHRM Policy 2.35, Non-Discriminatory Workplace Harassment [Harassment not Based on Protected Classes] is defined as:

Any targeted or directed unwelcome verbal, written, social, or physical conduct that either denigrates or shows hostility or aversion towards a person not predicated on the person's protected class.

The Policy Guide for DHRM Policy 2.35 lists prohibited conduct including:

- Subjecting others to communication or innuendoes of a sexual nature;
- 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;
- Making disparaging remarks, spreading rumors, or making innuendos about others in the workplace; ***

- Humiliating others; making public statements with the intent of embarrassing a targeted person; impugning one's reputation through gossip;
- Making unwelcome or suggestive comments or jokes; ***
- 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 I Written Notice

The Group I Written Notice was based on Grievant's comments to three employees (Ms. M, Ms. W, and Ms. B) and Grievant's comments to another employee about the Assistant Warden.

The Agency alleged Grievant engaged in insubordination with respect to the Assistant Warden. The Assistant Warden testified Grievant did not disobey any of the Assistant Warden's orders. The Agency has not established that Grievant was insubordinate towards the Assistant Warden.⁵

The Agency has established that Grievant's comments to Ms. M were inappropriate. In July 2021, Grievant told Ms. M her pants were too tight and that Grievant could see Ms. M's vagina. Ms. M asked the Assistant Warden if there was anything wrong with her dress and he indicated there was nothing wrong with Ms. M's appearance. On another occasion, Grievant told Ms. M she should get liposuction. Ms. M was offended by Grievant's comments.

Grievant argued that she had been authorized by the Warden to correct employees violating the dress code and Ms. M frequently violated the dress code. If the Hearing Officer assumes this argument to be true, there remains a sufficient basis to discipline Grievant. Grievant corrected Ms. M in front of an Inmate. That fact alone contributed to making Ms. M feel embarrassed and belittled. In addition, suggesting Ms. M get liposuction would not be a comment about how Ms. M dressed.

The Agency established that Grievant's comments to Ms. W were inappropriate and lacked civility. Grievant made a sexual innuendo to Ms. W about her batting her eyelashes to persuade the Assistant Warden.

During the hearing, Grievant denied telling Ms. W "to bat her eyes" and that "the time clock did not involve [Ms. W]". In Grievant's due process response, however, she described several counselors and psychologists discussing the new time clock who asked

⁵ The Agency asserted Grievant cautioned Ms. M to stay away from the Assistant Warden. This is not insubordination because Grievant was displaying contempt for the Assistant Warden's character, not for his rank of Assistant Warden. Grievant did not make her comments to the Assistant Warden.

what Grievant thought. Grievant said, "Girl go on in there and bat those lashes, you know how close you are to the AW."⁶

Grievant argued she was joking with Ms. W when Grievant referred to Ms. W's eyelashes. Grievant said they all laughed at her comment. Even if Grievant intended her comments to be a "joke", they were offensive and not appropriate in the workplace.

The Agency alleged Grievant inappropriately criticized Ms. B's actions towards an Inmate. Ms. B charged the Inmate with threatening behavior but an internal Hearings Officer reduced the charge without concluding the Inmate threatened Ms. B. Video footage presented to the internal Hearings Officer showed Ms. B having a heated discussion with the Inmate after the event. Although Ms. B was not within Grievant's chain of command, the Inmate's cell was inside Grievant's housing unit and his treatment would be a matter of her concern. Grievant had the authority to speak about how inmates were treated by staff.

Although the Agency has established a basis for issuance of the Group I Written Notice, this discipline must be reversed as discussed below.

Group III Written Notice

Va. Code § 2.2-3000 provides:

A. It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints. To that end, employees shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management

Va. Code § 2.2-3000 gives protection to certain complaints made by employees.

The Agency alleged Grievant falsely reported on September 7, 2021 that the Assistant Warden threatened consequences to her if she filed a Grievance the Group I Written Notice. The Assistant Warden denied doing so. He claimed he was not aware Grievant had received a Group I Written Notice and was filing a grievance.

The pending disciplinary action against Grievant was a pending problem or complaint for her. Her report to the Agency that she was being retaliated against by the Assistant Warden was protected. The Agency could not take disciplinary action against her for making the report unless the Agency could prove malicious intent. In this case, the Agency has presented evidence showing that the Assistant Warden did not threaten to retaliate against Grievant. It has not shown that her report was false and malicious.

⁶ Grievant asserted she made the comment to Ms. Wi and not Ms. W. Grievant's admission, however, is sufficient to confirm the Agency's assertions regarding Grievant's behavior.

The Agency alleged Grievant falsely claimed the Assistant Warden kissed Ms. W. The Assistant Warden and Ms. W denied Grievant's assertion. Agency policy prohibits undisclosed romantic relationships between certain staff at a corrections facility. If Grievant observed a violation of policy, she was obligated to report it to Agency managers. Ms. W confirmed several significant parts of her interaction with the Assistant Warden that Grievant observed. The Hearing Officer cannot conclude that Grievant's report to Agency managers was false or malicious. There is no basis to take disciplinary action with respect to this incident.

Grievant's comment to the IPM about picking cotton was racially offensive and inappropriate in the workplace. Grievant's comment showed a lack of civility expected of State employees.

The results from the Agency's Dialogue show Grievant engaged in workplace harassment. She showed a pattern of unwelcome verbal conduct that denigrated or shows hostility or aversion towards other staff at the Facility. The Dialogue results are persuasive because the Dialogue was not about a specific person yet a significant portion of the comments were about Grievant's behavior. Most of those comments reflected inappropriate behavior by Grievant that created an offensive work environment for others. Although the comments following the Dialogue were anonymous, they confirmed the Agency's concern that Grievant "created considerable disruption and mistrust in the workplace." The Hearing Officer considers the anonymous comments persuasive because of the number of employees participating in the Dialogue, the percent of negative comments about Grievant verses other Facility managers, and that numerous comments were confirmed by Ms. M, Ms. W, and the IPM. The pattern of Grievant's behavior and nature of her comments are sufficient 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 or in lieu of removal demote, transfer, and impose a disciplinary pay reduction. Accordingly, the Agency's decision to demote, transfer, and impose a disciplinary pay reduction must be upheld.

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"⁷ 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

⁷ Va. Code § 2.2-3005.

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

The Agency relied on the complaints of Ms. M and Ms. W to support issuance of the Group I Written Notice. Ms. M and Ms. W participated in the Dialogue and appear to have restated their comments during the Dialogue. The Agency again relied on statements from Ms. M and Ms. W and applied the same policy to support issuance of the Group III Written Notice. In essence, the Agency is issuing Grievant two written notices for some of the same behavior and policy violation. Accordingly, the Group I Written Notice must be reversed.

In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the Group III Written Notice of disciplinary action.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action is **rescinded**. 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**.

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.