



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11909

Hearing Date: March 20, 2023
Decision Issued: July 7, 2023

PROCEDURAL HISTORY

On March 4, 2022, Grievant was transferred from one campus to another campus for patrol duties following an investigation. On August 11, 2022, Grievant filed a grievance to challenge the University's action. On November 23, 2022, the Office of Employment Dispute Resolution issued Ruling 2023-5478 qualifying the grievance for hearing. EDR ruled that the University's action was disciplinary in nature.

On December 6, 2022, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 20, 2023, a hearing was held by remote conference.

APPEARANCES

Grievant
Grievant's Counsel
University Party Designee
University Counsel
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior alleged by the University?
2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy?
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 University to show by a preponderance of the evidence that the results of the Internal Affairs investigation and its impact were warranted and appropriate. 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:

George Mason University employs Grievant as a Sergeant at one of its locations. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant reported to the Lieutenant. Deputy Chief 1 was also in Grievant's chain of command.

The Student sent an email to the financial aid office stating, "May I ask what happens to the debt I owe if I kill myself. Not a joke, just curious."¹ After learning of the email, Deputy Chief 1 and Deputy Chief 3 notified the Lieutenant of the email. The Lieutenant believed an emergency existed.

On February 11, 2022, Grievant was at his home preparing to go to work. At 2:57 p.m., the Lieutenant sent Grievant a text message stating that the Lieutenant had a "suicidal subject" at the Manassas campus and for Grievant to "grab your body camera and mine and come ASAP." Grievant went to his police vehicle, activated his emergency equipment, and responded to the Lieutenant's request for assistance. Although the

¹ University Exhibit p. 11.

Lieutenant did not instruct Grievant to activate his emergency equipment and travel to the campus, the Lieutenant later told an Investigator that he believed an emergency existed that would have justified Grievant in using his emergency equipment.

Grievant and the Lieutenant went to a classroom and met with a Student who confirmed having suicidal thoughts. The Student was calm and compliant. After speaking with the Student, Grievant and the Lieutenant did not believe the Student met the criteria for an Emergency Custody Order (ECO) because the Student was not a danger to himself or others. They believed a voluntary commitment to a local Hospital was a more appropriate option. Grievant drove the Student to the Hospital.

Deputy Chief 1 spoke with the Chief and the Chief told Deputy Chief 1 to ensure that Grievant handled the ECO properly because Grievant had problems with an ECO in the past.

Deputy Chief 1 called Grievant and the Lieutenant separately. Deputy Chief 1 told Grievant he did not know what he was doing and ordered Grievant to obtain an ECO for the Student. Deputy Chief 1 ordered Grievant to timestamp² the ECO over the radio. Grievant argued with Deputy Chief 1 about the need for an ECO. Deputy Chief 1 repeatedly told Grievant to timestamp the ECO. Deputy Chief 1 told Grievant that Grievant needed to get the ECO correct because he had made a mistake on the last one. Grievant said he wanted to call someone regarding the ECO process and that he was waiting for a lady to call back.³ Deputy Chief 1 told Grievant time was important and to go ahead with the ECO. Grievant “could not get a word in edgewise” during the conversation. Grievant had to get off the phone to call the Community Services Board. Nurses in the Hospital could hear Deputy Chief 1 through the telephone and were looking at Grievant. Grievant told Deputy Chief 1 several times he had to get off the phone to do what Deputy Chief 1 was asking him to do. Grievant abruptly “hung up” the telephone call in order to comply with Deputy Chief 1’s order and prevent a nurse from hearing the conversation.

Grievant was upset by the way Deputy Chief 1 had spoken to him.

Grievant and Deputy Chief 1 began discussing the matter through text messages. Grievant wrote:

[Deputy Chief 1] there is no need to say negative things when I am actually listening to you. Why don’t you do that to officers that don’t listen. I told you several times I will do what you said but you proceeded to talk and insult for no reason. This isn’t even my call.⁴ ***

² Timestamp would occur when Grievant used his radio to notify the Dispatcher of the ECO.

³ Grievant wanted to speak with an employee at a local Community Services Board.

⁴ University Exhibit p. 23.

I told you repeatedly I will do what you say but I had to get off the phone.⁵

How can I get on the radio when you keep asking questions. ***

I told you several times I will do what you say. I had the situation under control and he and I are already here at the [Hospital]. I know the routine for ECO.⁶

In response to this text message from Grievant, Deputy Chief 1 wrote:

YOU TOLD [ME] THAT NOT GOING TO GET ON THE RADIO UNTIL YOU CALL [SOME] LADY THAT WHEN I TOLD YOU THAT YOU NEEDED TO DO THE TIME STAMP FOR ECO ASAP BECAUSE THAT IS REQUIRED BY LAW.

Grievant wrote that the Deputy Chief 1 was forgetting Grievant was much older than Deputy Chief 1. Deputy Chief 1 replied:

WHAT HAVE TO DO WITH AGE??

Grievant replied:

Because you have no respect. None. All you do is down talk me the first chance you get. It's not right. *** I am one of the only people you know that listens so why talk to me like that? It makes no sense. You act like I wasn't going to do what you said. I am not staying in this department to be treated like that.

Grievant later told the Investigator that he and Deputy Chief 1 were friends and he was speaking to Deputy Chief 1 like friends.

The Lieutenant had returned to his office. Deputy Chief 1 called the Lieutenant and expressed his frustration with Grievant and the Lieutenant. Deputy Chief 1 said that they "did know what the f—k they were doing." Deputy Chief 1 said they needed to do an ECO then. The Lieutenant said they did not have enough information to do the ECO.

Grievant complied with the order to obtain an ECO for the Student. Grievant used the radio to time stamp that he was obtaining an ECO. Hospital staff later rescinded the ECO.

Grievant did not raise his voice or use profanity when talking to Deputy Chief 1.

⁵ University Exhibit p. 25.

⁶ University Exhibit p. 26.

Deputy Chief 1 believed Grievant was disrespectful to him and should not have tried to go around him to get a second opinion.

Deputy Chief 2 was not working on February 11, 2022. She received several calls from Grievant. The first call was brief. Grievant told Deputy Chief 2 that he was with the Lieutenant as they dealt with another suicidal student. Deputy Chief 2 told Grievant to obtain all pertinent information and use officer safety. She gave him a “pep talk.” During the second call, Grievant told Deputy Chief 2 that he disagreed with Deputy Chief 1’s order to obtain an ECO and did not like the way Deputy Chief 1 yelled at him and spoke to him. Deputy Chief 2 told Grievant he should follow Deputy Chief 1’s orders and that this was not the time to vent his frustrations. Deputy Chief 2 told Grievant it was time to focus on the Student and ensure that the Student was getting the mental health treatment needed. Deputy Chief 2 believed Grievant had disrespected his chain of command by questioning Deputy Chief 1’s order and calling her.

The Lieutenant did not hear the telephone conversation between Grievant and Deputy Chief 1. Grievant told the Lieutenant that Deputy Chief 1 had called him and was verbally abusive to Grievant.

The University’s Investigator wrote:

General Order 26, Paragraph 1, Standards of Conduct, sections a and b. Conduct towards others (Human Relations), states in part:

- A. Every employee is expected to perform his or her duties in an efficient, courteous, and orderly manner employing patience and good judgment at all times.
- B. Employees shall refrain from harsh, profane, insolent language and shall be courteous and civil in their dealings with others.

[Grievant’s] behavior during his conversation with [Deputy Chief 1] on February 11, 2022, was disrespectful towards [Deputy Chief 1]. [Grievant] obeyed [Deputy Chief 1’s] order to obtain the ECO; however, [Grievant] was argumentative and very short with [Deputy Chief 1]. During the conversation, [Grievant] was unable to differentiate between his professional and personal relationship with [Deputy Chief 1] regarding a work related incident. Therefore, I recommend the following determination in this case:

[Grievant]; General Order 26, Paragraph 1, Standards of Conduct, sections a and b. Conduct towards others (Human Relations): SUBSTANTIATED

Because the investigation was substantiated, Grievant was not eligible for promotion for one year if he chose to seek promotion.

CONCLUSIONS OF POLICY

Va. Code § 2.2-3000(A) provides:

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.

It is appropriate for an employee to question, debate, and seek clarification from a supervisor regarding that supervisor's order so long as the employee does so in a civil manner. Nothing of Grievant's behavior was contrary to DHRM Policy 2.35, Civility in the Workplace.

The fact that Grievant did not agree with Deputy Chief 1's order to obtain a ECO is not a basis for disciplinary action. Grievant's desire to express his disagreement to Deputy Chief 1 did not form a basis for disciplinary action. Grievant's manner of speaking to Deputy Chief 1 did not form a basis for disciplinary action because he did not raise his voice or curse at Deputy Chief 1.

With certain exceptions, an agency can compel an employee to express disagreement through a chain of command. An agency, however, cannot prohibit an employee from taking concerns up that chain of command especially if the concerns involve how the employee is being treated by a supervisor. When Grievant expressed to the Lieutenant and Deputy Chief 2 his dissatisfaction with Deputy Chief 1's decision and how Deputy Chief 1 spoke to him and treated him, Grievant did not engage in behavior giving rise to disciplinary action.

When Grievant abruptly hung up on Deputy Chief 1, he was justified in doing so because Deputy Chief 1 was yelling at Grievant and the conversation could be heard by others in the Hospital. Grievant needed to immediately comply with Deputy Chief 1's order. Within the context of the behavior of Deputy Chief 1, Grievant's action to hang up the telephone on Deputy Chief 1 was not material and did not form a basis for disciplinary action.

Grievant sent Deputy Chief 1 text messages expressing his frustration with how Deputy Chief 1 was treating Grievant. Grievant had the right to attempt to resolve his complaint with Deputy Chief 1. None of his text messages were inappropriate. In response, Deputy Chief 1 switched from lower case to upper case in his messages. Upper case texts are typically associated with yelling.⁷

⁷ Deputy Chief 1 testified he sometimes uses capital letters to just "to get my point across, to need him to understand."

Based on the evidence presented, there is no basis for disciplinary action against Grievant and, thus, the sustained finding is reversed.⁸

DECISION

For the reasons stated herein, the University's issuance to the Grievant of a Sustained finding that he was disrespectful to his supervisor is **rescinded**.

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]

⁸ Grievant also alleged retaliation. It is unclear what action the University took that was retaliatory. Grievant claimed his evaluation was affected by the sustained allegation. It is unclear what part of the evaluation was in dispute. The University indicated that Grievant's evaluation was the subject of a separate grievance. It is unclear whether Grievant sought transfer to another campus. Grievant sought removal from his file of a counseling memorandum but the University indicated no such memorandum existed.

^[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