COMMONWEALTH of VIRGINIA

Department of Human Resource Management
Office of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 11924

Hearing Date: July 18, 2023
Decision Issued: July 20, 2023

PROCEDURAL HISTORY

On October 4, 2022, Grievant was issued a Group II Written Notice of disciplinary action. The offense was obscene or abusive language, occurring on July 26, 2022.

The Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On February 14, 2023, the Office of Employment Dispute Resolution assigned this grievance to the Hearing Officer. On July 18, 2023, a hearing was held in person, a date that was delayed and continued because of an appeal for an administrative ruling on an order for the production of documents.

The Agency submitted documents for exhibits that were accepted into the grievance record, and they will be referred to as Agency's Exhibits, by numbered tab. The hearing officer has carefully considered all evidence and argument presented.

APPEARANCES

Grievant
Agency Representative
Counsel for Agency
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

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as claims of retaliation and discrimination, the employee must present her evidence first and must prove her claim by a preponderance of the evidence. *In this grievance, the burden of proof is on the Agency. Grievance Procedure Manual* (GPM) § 5.8. However, § 5.8 states *"[t]he employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline*." A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

> It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . .
> To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

Va. Code § 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code § 2.2-3005.1 provides that the hearing officer may order appropriate remedies including alteration of the Agency's action. Implicit in the hearing officer's statutory authority is the ability to determine independently whether the employee's alleged situation, if otherwise properly before the hearing officer, justifies relief. The Court of Appeals of Virginia in *Tatum v. Dept. of Agr. & Consumer Serv.*, 41 Va. App. 110, 123, 582 S.E. 2d 452, 458 (2003) (*quoting Rules for Conducting Grievance Hearings*, VI(B)), held in part as follows:

> While the hearing officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy ... "the hearing officer reviews the facts *de novo* ... as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action."

DHRM Policy 1.60, *Standards of Conduct*, requires employees (among other things) to:

- Demonstrate respect for the agency and toward agency coworkers, supervisors, managers, subordinates, residential clients, students, and customers.
- Resolve work-related issues and disputes in a professional manner and through established business processes.
- Conduct themselves at all times in a manner that supports the mission of their agency and the performance of their duties.

Agency Exh. 14.

DHRM Policy 2.35, *Civility in the Workplace*, prohibits 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. Agency Exh. 15.

Agency Operating Procedure 135.1, *Standards of Conduct*, echoes the personal conduct expectations of DHRM Policy 1.60. Agency Exh. 12. Under this policy, the agency supports the use of progressive discipline applied fairly and consistently to address employee behavior, conduct, or performance incompatible with the *Standards of Conduct*, performance expectations, and procedures and training. Sec. III.A. Depending on the severity of the situation, corrective or disciplinary action may be accomplished through informal or formal means. Sec. III.C. The more severe formal discipline divides unacceptable behavior into three groups, according to the severity of the behavior, with *Group I* being the least severe and *Group III* being the most severe. Sec. X.E. Group I offenses include types of behavior less severe in nature, but require correction in the interest of maintaining a productive and well-managed work force. Group I includes use of obscene or abusive language (depending on the severity, harshness, and impact of the language). Violation of DHRM Policy 2.35 may be considered a Group I, Group II, or Group III offense depending upon the nature of the violation. 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 termination.

Operating Procedure 145.3, *Equal Employment Opportunity, Anti-Harassment, and Workplace Civility*, provides:

> 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.

Agency Exh. 13, Sec. IV.A.

Under DHRM Policy 1.60, a Group I offense includes acts of minor misconduct that require formal disciplinary action. This level is appropriate for repeated acts of minor misconduct or for first offenses that have a relatively minor impact on business operations but still require formal intervention. Use of obscene or disrespectful language falls squarely within a Group I offense, and the agency has the discretion to issue written counseling or issue a Group I Written Notice. The *Standards of Conduct*, Agency Exh. 14.

<u>The Offense</u>

The Group II Written Notice, issued by the assistant warden on October 4, 2025, detailed the facts of the offense, and concluded:

> Group II written notice is for Obscene or abusive language. [The Grievant] was called via telephone bv Captain H. during that phone call. [The Grievant] made the statement "If that "CUNT" lieutenant come to work on Thursday, then I will come in tomorrow." The phone call was on speaker phone and Lt. H. was present as well as other members of security supervisor's team were present.

Written statements were obtained by the witnesses. The Grievant made written statements admitting the language and apologizing for his misconduct, conceding the inappropriateness but explaining that it was said in jest without animus.[1] Further, the Grievant explained in his statements that he was unaware the call was on speaker phone.[2] Agency Exh. 1. As circumstances considered, the Written Notice did not include specific mitigating or aggravating circumstances. The Agency stipulated that the Grievant is and has been a valued employee.

After reviewing the evidence presented and observing the demeanor of each testifying witness, the Hearing Officer makes the following findings of fact and conclusions:

The Agency employed the Grievant as lieutenant for over eight years, without other active disciplinary actions.

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[1] Although the Grievant did not testify, his written apology to the warden and assistant warden is included as an exhibit in the grievance hearing record. The Grievant wrote, "It was out of my character and said in jest without animus. Those are not excuses and don't make what I said right." Agency Exh. 1.A. The Grievant's written apology to the object of the remark is also an exhibit in the grievance hearing record. The Grievant wrote, "What I said was in jest, however this does not make it right. I wanted it to be known that I hold no animus towards you." Agency Exh. 1.B. The Grievant's incident statement is also an exhibit in the grievance hearing record. The Grievant wrote, "Afterwards it was brought to my attention that this call was on speaker phone and overheard by other individuals. While what I said was highly unprofessional it was said in jest, and meant with absolutely no ill will towards Lt. [_], and for that I apologize. Agency Exh. 1.C.

[2] Id. at Agency Exh. 1.C.

The assistant warden testified consistently with the offense noted in the Written Notice. She testified that after reviewing the information, including the written statements, she recommended formal discipline of a Group I written notice, noting that the Grievant has been an outstanding employee. Regional command, upon review of the planned discipline, indicated that a Group II written notice was appropriate. Thus, the assistant warden issued the Group II written notice. No one from regional command testified regarding the rationale for electing the more severe Group II written notice.

The assistant warden testified that she strives for consistent, fair, and firm discipline, considering the totality of the circumstances. When questioned about a separate incident of obscene or abusive language, occurring a few months after the Grievant's, involving another lieutenant, Lieutenant A., using a derogatory name toward a sergeant, the assistant warden testified that she viewed the incident similarly to the Grievant's. The matter was referred to the security major to investigate and obtain statements. No discipline occurred.

The security major testified that the matter involving Lieutenant A. was never forwarded to her, and she did not recall this incident involving Lieutenant A., confirming that no discipline was issued.

The warden testified that he does not tolerate profane, obscene, or abusive language in the workplace. He was involved in the decision initially to impose a Group I written notice, but he confirmed that regional command indicated the offense should be a Group II. The warden did not have the benefit of a rationale from regional command, but he testified that the Grievant was in a position of authority, that he expects such employees to model good behavior, and that the "totality of the circumstances" warranted the Group II level. The warden was assigned to the facility in February 2021, and his expectation for staff is "not to use profanity—period." The warden's discipline philosophy is to use the most mercy with the least punishment. This is the only discipline during his tenure for obscene or abusive language. The warden admitted his belief that the ball was dropped regarding potential discipline for Lieutenant A.'s alleged offense.

The shift commander testified consistently with the factual allegation of the written notice. He was on the telephone with the Grievant and had the call on speakerphone that others could hear. He thought there may be some tension between the Grievant and the staff member who was the object of the comment. The shift commander testified that he has experienced and observed other staff members using vulgar language in front of inmates and other staff.

Captain W. testified that she overheard the telephone incident, but she was not really paying attention. She confirmed that she has heard profane language used at the workplace, she has not reported anyone, and she is not sure whether anyone else has been disciplined for such.

Sergeant L. testified that he is aware of profane language used in the workplace, and he has heard supervisors speak disparagingly of staff. He is aware of the warden's view that it has no place in the workplace, and he gives warnings when offending language is used.

Captain H. testified that she was aware of the Grievant's discipline, and she would recommend an informal notice of improvement needed. She also witnessed Lieutenant A.'s offensive remark, noted above. The captain testified that if discipline was levied for cursing, everybody would be written up.

Through his stipulations and written statements, the Grievant admitted to his profane verbal outburst as described in the Written Notice. The Grievant elected not to testify. The object of the Grievant's obscene language did not testify.

Analysis

The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g.*, *Rules for Conducting Grievance Hearings*, § VI (*Rules*); *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).

As long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer must be careful not to succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management. DHRM Policy 1.60. As long as it acts within law and policy, the Agency is permitted to apply exacting standards to its employees.

EDR's *Rules* provide that "a hearing officer is not a 'super-personnel officer'" therefore, "in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy." *Rules* § VI(A).

As previously stated, the agency's burden is to show upon a preponderance of evidence that the discipline of the Grievant was warranted and appropriate under the circumstances. Pursuant to applicable policy, management has the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior.

EDR's *Rules* provide that in disciplinary grievances, if the hearing officer finds that:

> (i) the employee engaged in the behavior described in the Written Notice,
> (ii) the behavior constituted misconduct, and
> (iii) the agency's discipline was consistent with law and policy,
>
> the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.

Rules § VI(B).

In sum, the grievance hearing is a *de novo* review of the evidence presented at the hearing, as stated above. The Agency has the burden to prove that the Grievant is guilty of the conduct charged in the written notice. Such decision for discipline falls within the discretion of the Agency so long as the discipline does not exceed the bounds of reasonableness. Based on the testimony, manner, tone, and demeanor of the testifying witnesses, I find that the Agency has reasonably proved the misconduct, but it has failed to demonstrate through evidence or policy that the offense is properly a Group II Written Notice.

By a preponderance of the evidence, the Agency has proved the conduct described in the Written Notice and that it was misconduct. However, I find that the Agency has failed to prove the misconduct is properly a Group II offense. The offense is a single, isolated lapse of behavior that falls squarely within a Group I offense for a first offense. As charged, the conduct was not part of a pattern or repeated conduct. The Agency asserts the "totality of the circumstances" as somehow establishing aggravating factors justifying the more severe level, but the evidence did not establish more than a relatively minor impact on business operations The Agency often referred to the fact that the target object of the language heard it; but the Agency ignores the fact that the Grievant did not direct his comment to the individual. By all accounts in the record, the Grievant was unaware his phone call with the shift commander was being heard by others on speakerphone. While I am in no way condoning the offensive language used by the Grievant, possibly made in a poor effort of jest, the totality of the circumstances weighs toward mitigation rather than aggravation. Yes, the Grievant is in a position of authority who should be modeling conduct, however, there is evidence from witnesses that use of obscene language is not uncommon and is tolerated without discipline. Petty slights, annoyances, and isolated incidents (unless extremely serious) do not constitute a hostile environment.

The offense occurred on July 26, 2022; the Written Notice was issued October 4, 2022. The Agency had over two months to assess and determine the impact on the Agency, and there is no evidence of any negative impact on the Agency, signaling that this conduct was not extremely serious or uncommon. The target of the offensive remark did not testify to establish any negative impact on him. While inappropriate and constituting misconduct, a single occurrence of obscene or abusive language is squarely no more severe than a Group I offense. The Agency's discretion to impose progressive discipline does not give unbridled prerogative to brand any misconduct a Group I, II or even III level offense.

The Grievant's admission establishes the essential facts of the offense. The offense falls squarely within the scope of a Group I Written Notice. Accordingly, I find that the Agency has met its burden of showing the Grievant's misconduct as charged in the Written Notice, but the Group II level is not warranted by the facts and policy. There is no evidence justifying elevating this charged conduct as a Group II offense. Therefore, unless otherwise mitigated, I find that the Group II discipline is inconsistent with policy and may not exceed a Group I Written Notice.

Mitigation

As with all mitigating factors, the grievant has the burden to raise and establish any mitigating factors. *See e.g.,* EDR Rulings Nos. 2010-2473; 2010-2368; 2009-2157, 2009-2174. *See also Bigham v. Dept. of Veterans Affairs*, No. AT-0752-09-0671-I-1, 2009 MSPB LEXIS 5986, at *18 (Sept. 14, 2009) citing to *Kissner v. Office of Personnel Management*, 792 F.2d 133, 134-35 (Fed. Cir. 1986). (Once an agency has presented a *prima facie* case of proper penalty, the burden of going forward with evidence of mitigating factors shifts to the employee).

Under Virginia Code § 2.2-3005, the hearing officer has the duty to "receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by [DHRM]." 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.

A hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. Given the nature of the Written Notice, as decided above, the totality of the circumstances—being this is the only formal discipline for obscene or abusive language during the warden's tenure; the candid testimony of multiple witnesses that such language is tolerated in the workplace; and the disparate treatment evidenced with the similar incident of Lieutenant A.—shows that the Agency has not consistently applied discipline among similarly situated employees. This mitigating factor weighs against the imposition of formal discipline in this instance.

While I find sincere the warden's intent to eliminate offensive language in the workplace, the Agency's actions show a record of inconsistent response that renders this discipline exceeding the limits of reasonableness. Thus, I rescind the Written Notice with the precatory suggestion that the Agency may levy informal discipline instead.

DECISION

For the reasons stated herein, the Agency's Group II Written Notice must be reduced as inconsistent with policy and, because of inconsistently applied discipline it must be and 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.

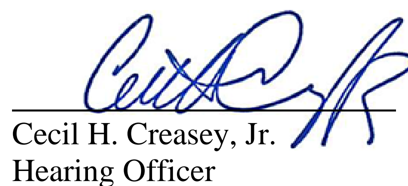
You must also provide a copy of your appeal to the other party and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

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.[3]

[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].

I hereby certify that a copy of this decision was sent to the parties and their advocates shown on the attached list.



Cecil H. Creasey, Jr.
Hearing Officer

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