



**COMMONWEALTH of VIRGINIA**  
*Department of Human Resource Management*

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 11953**

Hearing Date: June 13, 2023  
Decision Issued: July 3, 2023

**PROCEDURAL HISTORY**

On July 1, 2023, Grievant was issued a Group I Written Notice of disciplinary action for failure to maintain civility in the workplace.

On August 1, 2023, 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 she requested a hearing. On April 13, 2023, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 13, 2023, a hearing was held by remote conference.

**APPEARANCES**

Grievant  
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 employs Grievant as a Support Specialist IV at one of its locations. She has been employed by the Agency for approximately 42 years. The Warden described Grievant as an expert at performing her duties.

Ms. P reported to Grievant. It was raining outside and Ms. P was discussing whether to go out to lunch. Grievant said, "it doesn't look like you missed too many meals." Ms. P was uncomfortable with Grievant's comment because she believed Grievant was saying Ms. P was too heavy. Ms. P heard Grievant cuss at work. She also heard Grievant tell an inmate that he had not had any pu—y since it had him. On one occasion, Ms. P assisted a Sally Port Officer and he appreciated her help. The next day he called and asked for "Ms. Wonderful." Grievant began referring to the Sally Port Officer as Ms. P's boyfriend. Ms. P told Grievant that she did not need a boyfriend since she was happily married. Grievant continued to refer to that Sally Port Officer as Ms. P's boyfriend even though Ms. P had asked Grievant to stop. Ms. P transferred out of the Unit because of the atmosphere in the office.

Ms. A reported to Grievant. In October 2021, Grievant and Ms. A met for a written counseling. The CHAP also attended the meeting. During the meeting, Grievant asked Ms. A if she could read. Grievant asked Ms. A if she had short term memory. Ms. A was

shaking uncontrollably. Grievant's demeanor was strong and overpowering. The CHAP believed Grievant's comments were rude and unprofessional.

Grievant was asking staff including Ms. A about things the Unit might need to obtain. Grievant said she had been trying to get new chairs for the Unit and that she had been falling out of her chair. Ms. A said she would switch chairs with Grievant. Grievant said, "Why would you do that since your butt is bigger than mine." Ms. H heard Grievant's comment and felt it was inappropriate.

## **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."<sup>1</sup>

Group I offenses include:

Violation of DHRM Policy 2.35 Civility in the Workplace or Operating Procedure 145.3, Equal Employment Opportunity, Anti-Harassment, and Workplace Civility, (considered a Group I offense depending upon the nature of the violation).<sup>2</sup>

DHRM Policy 2.35 defines bullying as:

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. The behavior may involve a real or perceived power imbalance between the aggressor and the targeted person. The behavior typically is severe or pervasive and persistent, creating a hostile work environment. Behaviors may be discriminatory if they are predicated on the targeted person's protected class (e.g., using prejudicial stereotyping or references based on the targeted person's characteristics or affiliation with a group, class, or category to which that person belongs, or targeting people because they are in a protected class).

Grievant acted contrary to DHRM 2.35 because she made denigrating comments about her subordinates. She suggested Ms. P was too heavy. Grievant said Ms. P had a

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<sup>1</sup> See, Virginia Department of Corrections Operating Procedure 135.1.

<sup>2</sup> Operating Procedure XII(B)(9).

boyfriend even though Ms. P was married and asked Grievant to stop saying that. Grievant suggested Ms. A could not read and had poor memory. Grievant suggested that Ms. A had a big rear end. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.

Grievant argued that she ran her department to accommodate everyone and that they laughed and joked. She asserted Ms. P's allegations were not true. She said she treated her staff like team players but would not let staff disrespect her. Grievant denied many of the Agency's allegations. Contrary to Grievant's assertions, the Agency has presented credible evidence to supporting its decision to issue Grievant a Group I 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 ...."<sup>3</sup> 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 I Written Notice of disciplinary action 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

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<sup>3</sup> *Va. Code § 2.2-3005.*

101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto: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.<sup>[1]</sup>

[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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>[1]</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.