

DECISION OF HEARING OFFICER

IN RE: CASE NO. 11955
HEARING DATE: 6-8-2023
DECISION ISSUED: 7-13-23

PROCEDURAL HISTORY

Grievant was issued two (2) Written Notices on March 17, 2023¹ ²for infractions of “unknown date(s) in 2022/2023.” After filing an Appeal, a Hearing Officer was appointed on April 5, 2023. A pre-hearing conference was scheduled for April 20, 2023, and rescheduled for May 8, 2023. The hearing was scheduled for June 8, 2023, at Grievant’s place of employment.

APPEARANCES

Agency Advocate

Agency representative as witness

One additional agency witness

Grievant, pro se

Two additional Grievant witnesses

ISSUES

- 1) Whether Grievant violated Operational Procedure 1.60; ³agency policy 99 and DHRM policy 2.35.⁴
- 2) Whether Grievant’s actions violate the definition of Employee Standards of Conduct and violate Concepts of Civility in the Workplace.
- 3) Whether two (2) Group Two’s discipline with termination was an appropriate discipline.
- 4) Whether there were mitigating circumstances.
- 5) Whether Grievant was on proper notice from a Written Notice issued to him.

¹ Agency Exhibit 2

² Agency Exhibit 7

³ Agency Exhibit 3

⁴ Agency Exhibit 4

BURDEN OF PROOF

In disciplinary actions, the burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary actions against the Grievant were warranted and appropriate under the circumstances. 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. Grievant has the burden of proving any affirmative defenses raised by Grievant. GPM §5.8.

APPLICABLE POLICY

This hearing is held in compliance with Virginia Code § 2.2-3000 et seq the Rules for Conducting Grievances effective July 1, 2012, and the Grievance Procedure Manual (GPM) effective July 1, 2017.

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “includes acts of minor misconduct that require formal disciplinary action.” Group II offenses “include acts of misconduct of a more serious and/or repeat nature that requires formal disciplinary action.” Group III offenses “include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.” More than one (1) active Group II offense may be combined to warrant termination.

FINDING OF FACTS

After reviewing the evidence presented and observing the demeanor of each witness the Hearing Officer makes the following findings of facts:

The Agency had hired an employee who suffered brain injury from an accident. (The accident was not related to this employment.)⁵ This employee (hereinafter referred to as “Complaining Employee – CE) complained to management that on several occasions he had been harassed or bullied by other employees. The Agency hired an independent investigator to evaluate these many situations made by, or not report by, several employees.⁶

Grievant was accused of making comments about CE’s girlfriend saying, “she had a big juicy ass.” A few months later Grievant was accused of asking CE what his sister looked like, CE responding, “she looks like me,” and Grievant responding, “oh, I bet she’s pretty then. I’d tear her up.” This statement was interpreted as a sexual comment.⁷

⁵ Testimony of Agency Representative

⁶ Testimony of Agency Representative

⁷ Testimony of Agency Witness and Investigative Report Exhibit 1

The Agency produced a witness that collaborated on these statements although this witness stated the events happened at different times other than at an employee luncheon. CE was not called by the Agency as a witness.

Grievant produced two witnesses who both stated no such statements were made at the employee luncheon.

The second incident occurred sometime between December 2022 and February 2023. Agency witness stated CE was very upset about events that occurred prior to his starting that workday. CE was verbally ranting and acting out as he stood near the flagpole on the property. Grievant made a statement to CE and approached CE, and a loud exchange occurred.⁸ Grievant offered no evidence to the contrary.

Further, the Agency witness stated as Grievant approached, CE took out a knife and threatened Grievant. Grievant then undid his belt and let his trousers fall to the ground.⁹ It is simply incredible that a person confronted with a knife would tether himself from movement by having trousers around his ankles. Although Grievant never testified, he did state in his due process response that he did undo his belt and unzip his pants for the purpose of tucking in his shirt.¹⁰

Whatever actually happened, it is clear Grievant did nothing to de-escalate the situation. Had the situation been observed by anyone, it would not have been viewed in a favorable light. The Agency stressed, by the Agency's representative witness, that all employees of the Agency were expected to show professional respect for the public as well as each other.

OPINION

While Grievant may have made derogatory statements, the Written Notice stated the comments occurred at an employee luncheon. This is what Grievant was on notice that he did. Grievant produced two (2) witnesses that stated no negative comments were made at the luncheon. The Agency's employee stated verbal statements were made at other times than the time frame of the employee luncheon. Grievant need only respond to the Written Notice he received.

As to the altercation that occurred at the flagpole, it is clear a situation occurred that was, at the least, unbecoming. It violated both Operational Procedures 1.60, page 4, Employee Standards of Conduct, in that the situation did not, "Demonstrate respect for the Agency and toward agency co-workers....., and customers." It violated Operational Procedures 2.35, page 3, "Behaviors that undermine team cohesion, staff morale....., and safety are not acceptable." The person investigating this incident did not make a recommendation for discipline for this action. The Agency deemed it as Group II Offense

⁸ Testimony of Agency Witness and Investigative Report Exhibit 1

⁹ Testimony of Agency Witness and Investigative Report Exhibit 1

¹⁰ Agency Exhibit 6

giving that a cemetery location requires the utmost professionalism and quiet demeanor. Grievant did not testify. Grievant offered no mitigating evidence.

DECISION

For the reasons above, I find the Agency's discipline of a Group II Offense of unbecoming behavior is UPHELD. The Group II Written Notice for sexual comments cannot be upheld as Grievant was not properly noticed about these infractions and is RESCINDED. Grievant shall be reinstated with back pay which will include a 10-day suspension without pay. Any benefits that were part of Grievant's employment will be reinstated.

Grievant shall be counseled on corrective behavior.

Sondra K. Alan
Hearing Officer

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].

^[1] Agencies must request and receive prior approval from EEDR before filing a notice of appeal.