VIRGINIA: IN THE DEPARTMENT OF HUMAN RESOURCE MANAGEMENT, OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

IN RE: CASE NO.: 11967

DECISION OF HEARING OFFICER

The Department of Corrections issued the grievant a Group II Written Notice on January 5, 2023. The basis for this disciplinary action was an email sent by the grievant to the staff at an agency facility on December 6, 2022. For the reasons given below, I find that the agency acted improperly in issuing the Group II Written Notice and suspending him for 10 workdays. I also find, however, that some disciplinary action was warranted and reduce the level of decline to a Level I offense.

I. PROCEDURAL BACKGROUND

The grievant initiated this action by filing his Form B on Jan 30, 2023, challenging the Written Notice issued on January 5, 2023. I was appointed as hearing officer on May 9. A prehearing conference call was held on May 16, setting the matter for hearing for August 14.

The grievant submitted a request for production of documents on June 15. The agency submitted its response on June 16. I issued my ruling on the request on July 3.

A change in representation of the agency necessitated a rescheduling of the hearing date. By the agreement of the parties, the matter was continued to September 20. The grievant objected to the responses of the agency to his request for documents. I ruled on the objections August 10. On August 18 the grievant filed a motion regarding alleged noncompliance by the agency. On August 28 he submitted a subsequent motion for sanctions. I denied those motions on August 28.

A second prehearing conference call was held on September 6. This was at the request of the agency. I clarified my ruling of August 28.

After the second prehearing conference the grievant objected to the attempt by the agency to add a witness to its previously submitted list. Finding the addition was untimely and not in compliance with the prehearing order, and without good cause, I sustained the objection.

The agency objected to the inclusion by the grievant of certain proffered exhibits. By email message on September 18, I sustained the objection to those proffered exhibits as not having probative evidentiary value, although proper for inclusion in the record of this matter.

The in-person hearing was conducted as scheduled on September 20. The hearing time was approximately five hours.

II. APPEARANCES

The agency was represented by an in-house attorney. The agency called five witnesses, four of whom testified by video from another facility. The thirteen exhibits proffered by the agency were accepted into evidence.

The grievant was represented by a lay advocate. The grievant testified and called two additional witnesses. He proffered 89 pages of exhibits, numbered consecutively. As stated in my prehearing ruling, I sustained the objection to the following pages: 18, 21-33, 35-39, and 40-55. The remainder were accepted into evidence without objection.

III. ISSUE

The question presented is whether the agency was correct in issuing the grievant a Group II Written Notice and suspending him for 14 days on January 5, 2023.

IV. FINDINGS OF FACTS

The grievant is a corrections officer having many years of experience with the agency at multiple facilities. He has been a good employee, receiving several ratings of "exceeds contributor." From his beginning position he has received promotions and at the relevant times to this proceeding held the rank of Lieutenant. On November 10, 2022, he requested a transfer from the facility to which he was then assigned (Facility A). This request was made because of his belief that his opportunities for further promotion within the agency were minimal at Facility A. He based this belief on the presence of higher-ranking officers who were unlikely to leave the agency or facility in the foreseeable future. His ambition to rise through the ranks caused him to see a transfer as being the best avenue to fulfill his goal.

The transfer to a different facility (Facility B) was approved, effective as of November 25, 2022. The grievant ceased working at Facility A and began his work at Facility B after completing a temporary assignment at a third facility. On December 2, a personnel assistant in the human resource office of Facility A sent an email to all the staff of Facility A notifying them of the transfer by the grievant to Facility B. The email asked the staff to wish him well and praised him for his service to Facility A.

On December 6, the grievant sent the following reply email to the personnel assistant and all staff at Facility A:

"Thank you very much for the thoughtful e-mail… {name of personnel assistant REDACTED]". It's been a blessing to work at {Name of Facility A REDACTED]" the last 5.5 years. I can honestly say I've met lifelong friends and learned more in my short time there than I could have ever imagined. I would never be the rank I am without the help of each and everyone of you; I will be forever indebted to each of you. The decision to lateral was not easy whatsoever. But after much thought and consideration, it was the best decision at the time, given the circumstances. Continue the VISION that has been the cornerstone since (Facility A) is opened…being the "best in the west". It always has been, and always will be…only thanks to the STAFF who give it their all each and every day. It's easy lose focus on the big picture due to the environment we all work in. It's not the INMATES that we need to focus on, it's each other. I'm always just a phone call or email away if you need anything. Find a good STRESS RELIEF that works for you and take care of yourselves and each other; and from the words of my old First Sergeant remember, 'we all we got'."

Approximately 3 hours after the grievant's reply was sent a former coworker at Facility A sent a reply email to the grievant, with all staff employed at Facility A being recipients of the email as well. The reply from the coworker was "(Name of grievant), just remember 'in the woods there was a tree'". The reference in the email was to a children's song regularly used by the coworker to reduce tensions and stress. He had sung the song multiple occasions to the grievant when they both worked at Facility A.

This email string raised concern among some unspecified number of employees at Facility A. In particular, the reply by the coworker was seen as possibly as being a racist "dog whistle". The warden at Facility A is a woman of color. She had been at the facility only a few months in December of 2022. Some employees believed that the culture at Facility A was impacted by a "good old' boy network." The grievant was perceived by at least one employee as being part of a clique that was part of the network. No evidence was presented that the tension at Facility A was overtly racial. The demographic of the staff at Facility A was approximately 5 percent being people of color.

Upon the complaints being made to the warden regarding the email chain, an investigation ensued. The grievant was eventually given a Group II Written Notice for violations of agency Operating Procedures 135.1, 135.3, and 145.3. He was suspended without pay for 14 days. The coworker who had sent the reply email was also given formal discipline.

V. ANALYSIS

The Commonwealth of Virginia provides protections to its employees in Chapter 30 of Title 2.2 of the Code of Virginia. Among these protections is the right to grieve formal disciplinary actions. The Department of Human Resource Management (DHRM) Office of Employment Dispute Resolution has developed a Grievance Procedure

Manual (GPM) and Rules for Conducting Grievance Hearings (the Rules). The GPM sets the applicable standards for this type of proceeding. Section 5.8 provides that in disciplinary grievance matters (such as this case) that the agency has the burden of going forward with the evidence. It has the burden of proving, by a preponderance of evidence, that its actions were warranted and appropriate. The Rules state that in a disciplinary grievance a hearing officer shall review the facts de novo and determine:

I. Whether the employee engaged in the behavior described in the Written Notice.

II. Whether the behavior constituted misconduct.

III. Whether the discipline was consistent with policy; and

IV. Whether there were mitigating circumstances justifying the reduction or removal of disciplinary action, and, if so, whether aggravating circumstances existed that would overcome the mitigating circumstances.

Section 5.8 of the GPM requires a hearing officer uphold the discipline unless it exceeds the "bounds of reasonableness." Under Section VI(A) of the Rules the decision of the agency is to be given the "appropriate level of deference." A hearing officer is not to serve as a "super-personnel manager." In other words, I can overrule the agency's decision only if it was an unreasonable one. In this case, as is true in many grievance matters, reasonable people can disagree with the choices of the agency but find them to be reasonable.

The agency relies on three distinct Operating Procedures to support its discipline of the grievant. Each procedure has unique elements and standards. I first analyze each separately before reviewing the Written Notice as a whole.

First, the Written Notice cites Operating Procedure 135.1, the general Standards of Conduct policy, Subpart I (G)(9) requires employees to "create and maintain a Healing Environment…by treating coworkers, supervisors, managers, subordinates, inmates/probationers/parolees…with respect, courtesy, dignity, and professionalism…". By his email, the grievant violated this standard. He wrote that staff should be more focused on themselves, rather than the inmates. This statement contradicts the official policies and procedures of the agency regarding the desire to create a healing environment for inmates. A reasonable interpretation of the email is that the grievant believed that inmates were to be treated in an inferior manner. More importantly, it encourages that attitude among others.

The grievant testified that the intent of the email was to encourage his former coworkers. The environment within a corrections facility certainly is a difficult one. Reasonable people can disagree on where lines should be drawn in creating and maintaining a healing environment. That is not a decision within my purview, or that of the grievant. I will give the deference required to the agency required by the GPM in assessing the effect of the email as viewed against this particular Operating Procedure and the other relevant policies of the agency.

The Written Notice next cites Operating Procedure 135.3. Section II (D) requires employees of the agency in supervisory or managerial positions to be "especially mindful of how their words and deeds might be perceived or might affect or influence others." As a Lieutenant, the grievant qualifies as someone in a supervisory position. He was careless in sending the email in two regards. The words chosen, as discussed above, could be viewed as encouraging the staff to treat inmates with an inappropriate level of respect.

The second aspect of his carelessness was in sending the email to the entire facility staff. I express no opinion on whether a more targeted email replying only to the personnel assistant would have been a violation of Operating Procedure 135.1. Also, sending the email to a targeted number of his former coworkers who he knew to be particularly disposed to read the email as such encouragement but able to control such leanings could possibly, and I emphasize, possibly, been in violation of this Operating Procedure.

The agency also alleges the grievant violated Operating Procedure 145.3. The purpose of that policy is to ensure a workplace free of harassment and to encourage civility. I do not find the grievant violated this policy.

Workplace harassment is defined as:

> "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…"

In an attachment this Operating Procedure sets forth specific items or actions that are prohibited. I cannot find that the email sent by the grievant violated this policy. Operating Procedure 145.3 does not contain a specific definition of a hostile or offensive work environment. This is not surprising or fatal as that phrase is a well-established term of art in the area of employment law. The Operating Procedure is similar, but not identical, to the general Civility in the Workplace Policy promulgated by the Virginia Department of Human Resource Management (DHRM), Policy 2.35.

In its application of Policy 2.35, DHRM consistently looks to federal law to determine what is a hostile or offensive environment. See, e.g, DHRM ruling 2022-5411. The factors to be considered are the frequency of the conduct, its severity, whether it is physically threating or humiliating, and whether it unreasonably interferes with an employee's work performance. Harris v. Forklift Systems, Inc., 510 US 17(1993). The application of these factors is what leads me to my conclusion.

The alleged conduct, the December 6 email from the grievant, was a nearly isolated event. The agency presented insufficient evidence to conclude that the grievant had any significant history of similar conduct or messaging. The Executive Secretary to the Warden testified that the grievant had expressed concern over a perceived siding with the inmates by the Warden. There was no evidence of whether his comment was

heard by influential or a relatively large number of staff members. I note her testimony about his objections to discussions in a facilitated intra-staff “dialogue”, that meeting being focused on the culture at Facility A. I don’t view those objections as part of a pattern including the December 6 email.

I view the email from the standpoint of the intended audience, the recipients of the message. I do not see it as being severe, given its ambiguous wording, relatively mild tone, and the fact that the grievant was no longer employed at Facility A. The Warden at Facility A testified that she and other staff members were confused by the message. Certainly, the use of all capital letters for certain words added to the confusion; it does not materially change the overall tone of the message. The staff at Facility A were no longer under any possible supervision or direct influence of the grievant. That fact mitigates any impact of the message.

Whether it is viewed as physically threatening can be a subjective question. The reply email from the coworker was viewed by at least one minority staff member as being a reference to a possible hanging tree. I do not doubt that the concern expressed by the employees was genuine. Offensive or threating language can be couched in an ambiguous manner, commonly referred to a “dog whistle.” The reception, and perception, of such a statement is certainly an individual one.

Operating Procedure 145.3 does not expressly state what standard to use in determining whether a hostile environment is created, The adverse reactions to the grievant’s email, especially after the “tree email” from the coworker, were those of an unspecified number of employees. As before, I use the interpretation of the DHRM Policy 2.35 to base my decision. That policy requires that the effect on workplace be viewed from the perspective of “an objective reasonable person.” DHRM Ruling No. 2022-5411. The agency did not present substantial evidence or argument as to objective considerations, nor did the grievant.

I have used that standard, looking first at the words used by the grievant. The evidence does not show that the grievant requested or expected the reply email from the coworker. The words used by the grievant are not so out of line that a reasonable person would find them to be sufficient to create a hostile workplace. I am not stating that the offended members of the staff were hypersensitive in their subjective reactions to the email chain, only that the evidence of the agency does not establish that the number of offended staff was sufficiently large to be the deciding factor in a hostile environment analysis.

My inquiry does not end with the words used. In assessing all the circumstances of the email, I also look at other factors. One of these factors is the identity of the speaker. Although the grievant was possibly part of the “good old boy” network at the facility, he had no known reputation as a racist. Even the staff member who complained to the Warden and testified that she was fearful based on the email chain acknowledged that the grievant had never said any racist comments in her presence. She described

him as being well respected, but detected a change in him once the warden's position became filled by a woman of color.

I also have considered the audience of the email. This was the entire staff of Facility A, including the approximately five percent minority members. There is no indication that the grievant specifically targeted any particular member or members of the audience. The exception to that is a possible verbal swipe at the Warden with his comment about stress relief.

The final factor considered by me is the context of the message. The atmosphere at the prison was far from perfect. The evidence suggests but does not prove by a preponderance of the evidence, that there may have been racial overtones to this morale issue. The effort by the facility to address the issues provides a backdrop to the message; it does not make it offensive enough to create a hostile or offensive environment sufficient to support a violation of Operating Procedure 145.3 when balanced with the other factors.

The Written Notice is contradictory in that it references agency Offense Code 39 (violation of DHRM Policy 2.35) but in its narrative portion cites Operating Procedure 145.3. As mentioned, these policies are not identical. To the extent they conflict, I have applied OP 145.3, as that is the one included in detail in the Written Notice. It was adopted subsequent to DHRM Policy 2.35. The agency could have simply expressly charged the grievant with violating that policy (see OP 135,1(XIII)(B)(10); it did not. I express no opinion on whether the grievant violated the DHRM policy.

To summarize, I find the agency presented sufficient evidence to support violations of Operating Procedure 135.1 and Operating Procedure 135.3, but not OP 145.3. In its evidence and argument, the agency had relied heavily on Operating Procedure 145.3. The question becomes whether the violation of the other two procedures is sufficient to support the issuance of the Group II Written Notice. Under Section VI(A) of the Rules, a hearing officer is required to defer to the agency if its application of the policies is reasonable. When a hearing officer finds that at least one, but not all of the charges have been proven by the agency, the level of discipline may be reduced. Rules, Section VI(B)(1).

Because I am making the finding that I have regarding Operating Procedure 145.3, I am not required to use the same level of deference. The employee relations manager from the central office testified that in viewing this case she believed that it supported discipline "up to" a Group II Written Notice. I believe that the violations of the two policies support the issuance of only a Group I Written Notice. Group II offenses are those "that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant termination." Group I offenses are those that are less severe in nature but still require correction. I believe that the discipline to be issued by the agency is more proper than that of a Group I Written Notice.

Except as discussed above I find no indication that the agency has misapplied governing law or policy inappropriately. No evidence has been shown that the grievant is a member of a protected class or has otherwise been discriminated against. Prior to issuing the discipline the agency considered the work history and performance of the grievant. I find no additional mitigating factors.

VI. DECISION

In this difficult case I reduce the level of discipline issued to the grievant to a Group I Written Notice. Because he was suspended because of the initial discipline, he is hereby awarded his backpay and benefits, if any.

VII. APPEAL RIGHTS

The parties may file an administrative review request within 15 calendar days from the date this decision is issued, if any of the following apply:

1. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request
the Director of the Department of Human Resources Management to review the decision. You must
state the specific policy and explain why you believe the decision is not consistent with that policy.

Please address the request to:

Director, Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or send by facsimile to (804) 371-7401, or by email.

2. If you believe the decision does not comply with the grievance procedure, or you have new evidence that could not have been discovered before the hearing you may request that EDR review the decision. You must state these specific portions of the grievance procedure with which you believe the decision does not comply. Please address your requests to:

Office of Employment Dispute Resolution
Department of Human Resource Management
101 N 14th street, 12th floor
Richmond, VA 23219

or send by email to EDR@dhrm.virginia.gov, or by facsimile to (804) 786-1606.

You may request more than one type of review. Your request must be in writing and must be received by the reviewer within fifteen calendar days of the date of the issuance of this decision. You must provide a copy of all your appeals to the other party, EDR, and the hearing officer. The decision becomes final when the 15-calendar day period has expired, or when requests for administrative review have been decided.

You may request a judicial review if you believe the decision is contrary to law. You must file a notice of appeal with the clerk of circuit court in the jurisdiction in which the grievance arose within 30 days of the date when the decision becomes final.

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or you may call EDR'S toll-free Advice Line at 888-232-3842 to learn more about appeal rights help from an EDR Consultant].

ORDERED this 2nd day of October ,2023

/s/Thomas P. Walk
Thomas P. Walk, Hearing Officer