



**COMMONWEALTH OF VIRGINIA**  
*Department Of Human Resource Management*  
*Office of Employment Dispute Resolution*

**DECISION OF HEARING OFFICER**

In re:

**Case number: 12008**

**Hearing Date: September 26, 2023**  
**Decision Issued: October 24, 2023**

**PROCEDURAL HISTORY**

On July 7, 2023, Grievant was issued a Group II Written Notice of Disciplinary Action with termination for failure to follow instructions or policy.

On August 3, 2023, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On August 21, 2023, the Office of Employment Dispute Resolution assigned this grievance to the Hearing Officer. On September 26, 2023, a hearing was held virtually via the Microsoft TEAMS platform consistent with the scheduling letter the Hearing Officer sent to the parties dated September 11, 2023. The Grievant did not appear for the hearing. Prior to commencing the hearing, the Hearing Officer called the telephone number she had for Grievant and received no answer. The Hearing Officer left a voicemail message for the Grievant. The hearing proceeded as scheduled without Grievant's participation.

**APPEARANCES**

Agency Representative  
Agency Party Designee  
Witnesses

**ISSUES**

1. Whether Grievant engaged in the behavior described in the Written Notice?

*An Equal Opportunity Employer*

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:

Prior to his dismissal, Grievant was employed by the Department of Behavioral Health & Developmental Services (Agency) as a Safety and Security Technician (SST) at one of the Agency's facilities. Grievant had been working at the Facility since April 2020.<sup>1</sup>

At the time of his dismissal, Grievant had two prior active Group II Written Notices for failure to follow instruction and/or policy, including violation of DHRM Policy 2.35, Civility in the Workplace.<sup>2</sup>

On June 30, 2023, Grievant reported to work wearing a non-Agency issued cap with writing on it, jewelry in the form of three chains around his neck, sunglasses and sneakers with white soles.

Witness 1 and another employee were in the Office with Grievant and the Security Lieutenant when the Security Lieutenant spoke to Grievant about his uniform.

The Security Lieutenant advised Grievant that the cap, jewelry and sneakers were not consistent with the Agency's uniform policies. The Security Lieutenant also advised Grievant that unless he had a prescription for the glasses, he would also have to stop wearing the glasses.

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<sup>1</sup> Based on the information provided in the Agency's exhibits, Grievant appears to have worked at the Facility for a period prior to returning in April 2020; see Agency Ex. at 23-32.

<sup>2</sup> Agency Ex. at 146-148.

Grievant responded to the Security Lieutenant that he would not take off his glasses and he would not provide a prescription.

Grievant expressed frustration and anger about having received a written notice in the past and feeling as though he was being negatively “focused on.”

Grievant used profanity during the verbal exchange with the Security Lieutenant.

The Security Lieutenant asked Grievant to stop using profanity.

Grievant continued to use “profanity and curse” after the Security Lieutenant had asked him to stop.

Grievant suggested to the Security Lieutenant that they “take it outside” where there would “not be any witnesses.”

The Security Lieutenant ended the conversation and directed Grievant to report to his post.

On July 1, 2023, approximately five hours after the incident, the Security Lieutenant sent an email to his supervisor, Witness 2, providing details of his interaction with Grievant.<sup>3</sup>

### **CONCLUSIONS OF POLICY**

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “include acts of minor misconduct that require formal disciplinary action.”<sup>4</sup> Group II offenses “include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action.” Group III offenses “include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.”

#### **Relevant Policies and Instructions**

The Facility has specific uniform standards for security staff set forth in “Uniform Standards Security Staff Addendum to HR 21.”<sup>5</sup> The uniform standards include the following:

All security staff while on duty shall wear the security uniform unless the Security Director grants an exception.

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<sup>3</sup> Agency Ex. at 15-16. The Security Lieutenant did not provide testimony at the hearing.

<sup>4</sup> The Department of Human Resources Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

<sup>5</sup> Agency Ex. at 81.

1. New staff will wear blue Maximum Security T-Shirts with blue trousers and all black shoes (tennis/boots) until uniforms are provided. Uniforms will be ordered upon completion of the probationary period.

a. Maximum T-Shirts will be issued by the Department

b. It will be your responsibility to purchase blue trousers, plain blue or black jacket/sweater with no large logos and black boots (No Steel toe)

2. All Security Staff

a. All uniforms must be clean and neatly pressed

b. Tight Trousers are not permitted

c. Shorts are not permitted

d. Black boots or tennis shoes are to be worn. No colors are allowed.

No Steel toe.

e. Black or navy blue socks will be worn

f. Only Security Issued hats are to be worn while on duty. Hats are to be worn with the bill facing forward. Exception is plain blue or black knit cap may be worn due to fluctuating temperatures in work areas.

g. Hoodies are not permitted to be worn while on duty.

h. While on the clock, all shirts must be tucked in and belts worn.

This refers to all locations on campus and when working off campus.

i. Name tags and badges will be worn on the outer garments on your upper torso at all times. Badges must be worn with picture outward so that it can be easily read.

j. No visible body jewelry, piercings or removal mouth jewelry are to be worn. The only exceptions are staff may wear up to 2 rings (large rings that could be a safety issue are not permitted) one thin necklace with a small charm no larger than 1 inch, 1 pair of stud ear rings (cannot hang below the ear lobe) and no more than 3 silicon bracelets which cannot contain offensive, vulgar or explicit wording/pictures.

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The Facility also issued a memorandum to all security staff working in the Building on Night Shift regarding "Shift Expectation – Night Shift Orientation"<sup>6</sup> which also sets forth General Expectations, including expectations regarding uniforms as follows:

3. Appearance

a. Uniforms should be clean, neat, and pressed.

b. Staff that has not been issued the regular uniform is required to wear navy blue pants and the issued forensic lee shirt.

c. Only black shoes, tennis/athletic shoes or boots may be worn. (No colored soles or steel toe boots allowed).

d. Staff must only wear headgear issued with uniforms and head gear approved by the Security Director. A black or blue stocking cap can be worn while working control center if it is cold. No hoodies are allowed.

e. Only black or navy blue jackets can be worn if a state jacket has not been issued to you. (No logos or pictures).

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<sup>6</sup> See Agency Ex. at 93-103.

f. Jackets/ outerwear are not to be draped or wrapped around the waist while on post.<sup>7</sup>

The Department of Human Resources Management has issued Policy 2.35 (Civility in the Workplace)<sup>8</sup> which applies to all state executive branch employees, including employees of the Department of Behavioral Health and Developmental Services.

DHRM Policy 2.35 makes clear that

[t]he Commonwealth strictly forbids 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.

DHRM Policy 2.35 defines “non-discriminatory workplace harassment” as “any targeted or directed unwelcome verbal, written, social or physical conduct that either denigrates or shows hostility or aversion towards a person not predicated on the persons protected class.” “Workplace violence” is defined as “[a]ny physical assault, threatening behavior, or verbal abuse occurring in the workplace by employees or third parties. Threatening behaviors create a reasonable fear of injury to another person or damage to property or subject another individual to extreme emotional distress.”

Prohibited Conduct/Behaviors under DHRM Policy 2.35 may include, but are not limited to:

- Injuring another person physically;
- Engaging in behavior that creates a reasonable fear of injury to another person;
- Threatening to damage or vandalize or intentionally damaging or vandalizing property;
- Making threats to injure another person;
- Assaultive behavior such as pushing, shoving, grabbing, hitting, kicking, or spitting toward another person;
- Cornering people or blocking egress;
- Invading personal space;
- Stalking;
- Possessing, brandishing, or using a weapon that is not required by the individual’s position while on state premises or engaged in state business;
- Subjecting others to communication or innuendoes of a sexual nature;
- Demonstrating behavior that is rude, inappropriate, discourteous, unprofessional, unethical, or dishonest;
- Behaving in a manner that displays a lack of regard for others and significantly distresses, disturbs, and/or offends others;

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<sup>7</sup> See Agency Ex. at 95-96.

<sup>8</sup> See Agency Ex. at 109-118.

- Making disparaging remarks, spreading rumors, or making innuendos about others in the workplace;
- Raising one's voice inappropriately or shouting at another person;
- Swearing or using obscene language or gestures toward another person;<sup>9</sup>

....

*Whether Grievant engaged in the behavior described in the Written Notice and whether the behavior constituted misconduct*

When Grievant arrived to work on June 30, 2023, he was wearing a non-Agency issued cap with writing on it, three chains, and tennis shoes with white soles. Grievant was thus dressed in a manner that was in violation of the Facility's uniform standards for security personnel.

Witness 1 observed that when the Security Lieutenant asked Grievant to make adjustments to his attire to conform to the uniform standards and to confirm that his glasses were required by prescription, Grievant refused to follow the instruction, began using profanity and suggested to the Security Lieutenant that they could take it outside where there would not be any witnesses.

Witness 1 provided credible testimony regarding Witness 1's observations of the exchange between Grievant and the Security Lieutenant. Witness 1 made clear that Witness 1 had no prior issues or problems with Grievant. Witness 1 observed that Grievant was using profanity and cursing and continued to do so after the Security Lieutenant had instructed him to stop. Witness 1 also observed that Grievant said to the Security Lieutenant "we can take this outside where there are no witnesses."<sup>10</sup> Witness 1 perceived this statement as "inappropriate in a threatening manner" and that Grievant was trying to take the interaction to "another level" and being "aggressive."<sup>11</sup>

On July 1, 2023, approximately five hours after the incident, the Security Lieutenant sent an email to his supervisor, Witness 2, detailing the interaction with Grievant. The Security Lieutenant stated in his email that "[t]he fact that he said I don't know him, and we should take it outside for a one to one with no witness, and that he was raised by drug dealer I have no idea as to what he is capable of, and I think this is a form of intimidation and can lead to serious outcome."<sup>12</sup> Although the Security Lieutenant did not testify during the hearing, his email to Witness 2 shortly after the incident was consistent with Witness 1's testimony regarding the incident.

Grievant's behavior violated policy and constituted misconduct. Grievant used profanity and was rude, inappropriate, discourteous, and unprofessional. Grievant's behavior also was threatening and intimidating.

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<sup>9</sup> See Agency Ex. at 117-118.

<sup>10</sup> Hearing Recording at 17:09-17:13.

<sup>11</sup> Hearing Recording at 17:24-17:51.

<sup>12</sup> Agency Ex. at 15-16.

A suggestion to “take this outside” is a slang phrase generally understood to be a suggestion to move to a location outside the current location to escalate an altercation or a fight. Suggesting to the Security Lieutenant that they could “take this outside” and to further reference that by doing so there would be no witnesses would reasonably be understood to be a threat and intended to intimidate. Particularly, when such statements are made in conjunction with the use of profane language. In this case, Grievant’s statements were reasonably considered threatening and intimidating by the Security Lieutenant and were observed to be so by Witness 1.

The information provided by Grievant in writing in response to the Written Notice and on the Grievance Form A indicate that if Grievant had participated in the hearing, he may have broadly denied that he violated the uniform policy, used profane or obscene language and made threatening statements.<sup>13</sup> Grievant did not participate in the hearing and has not offered any evidence to support the assertions he made in response to the Written Notice. In this case, the Security Lieutenant reported his observations of the incident in an email to his supervisor not long after the incident occurred. Witness 1 credibly testified regarding Witness 1’s observation of the incident and Witness 1’s testimony was consistent with the Security Lieutenant’s observations in the email he sent to Witness 2. Witness 1 indicated that Witness 1 had prior interactions with Grievant and had no prior issues with Grievant. The Hearing Officer found Witness 1’s testimony and observations of Grievant’s interaction with the Security Lieutenant on June 30, 2023 to be credible.

Grievant’s behavior violated policy and constituted misconduct.

*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)*

Failure to follow instruction or policy is a Group II offense. Violation of DHRM Policy 2.35 may be a Group I, Group II, or Group III offense depending upon the nature of the violation.

The Policy Guide for DHRM Policy 2.35 provides that

Disciplinary actions to address prohibited behaviors may be taken on a progressive basis or actions may be taken upon the first occurrence, depending upon the nature and seriousness of the conduct. The context of the behaviors, nature of the relationship between the parties, frequency of associated behaviors, and the specific circumstances must be considered in determining if the behavior is prohibited. A “reasonable person” standard is applied when assessing if behaviors should be considered offensive or inappropriate.

The information provided by Grievant in writing in response to the Written Notice and on the Grievance Form A indicates that if Grievant had participated in the hearing, he may have asserted that he suffers from anxiety and post-traumatic stress disorder (PTSD)

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<sup>13</sup> Agency Ex. at 6-14, 17-19.

and/or takes medication that may have impacted his behavior.<sup>14</sup> Any assertion regarding a claim of disability impacting Grievant's behavior would necessarily be fact and case specific. Grievant did not participate in the hearing and has not offered any evidence to support an assertion that anxiety, PTSD or medication caused him to engage in the behavior described in the Written Notice. Further, the Americans with Disabilities Act requires employers to provide reasonable accommodations for an employee's disability, but it does not broadly shield employees from disciplinary action for their own misconduct.<sup>15</sup>

Grievant had two active prior Group II written notices. One of those written notices was for violation of DHRM Policy 2.35 (Civility in the Workplace). Witness 2 credibly testified that Grievant's disruptive and threatening and intimidating behavior toward the Security Lieutenant on June 30, 2023 was similar to the disruptive and intimidating behavior for which he received prior discipline.<sup>16</sup> Given the nature of the misconduct in this case including violation of policy and disruptive and threatening behavior as well as the fact that Grievant had received prior discipline for similar behavior, the Agency's characterization of the offense(s) in this case as a single, Group II offense was reasonable.

An agency may terminate an employee who has accumulated two active Group II written notices.

The Agency's discipline was consistent with law and policy. The Agency has met its burden.

### Mitigation

Virginia 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>17</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.

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<sup>14</sup> Agency Ex. at 6-14, 17-19.

<sup>15</sup> See EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities, EEOC Notice Number 915.002 (March 25, 1997).

<sup>16</sup> See Agency Ex. at 147.

<sup>17</sup> Va. Code § 2.2-3005.



## DECISION

For the reasons stated herein, the Agency's issuance to Grievant of a Group II Written Notice with termination 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  
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>18</sup>

*Angela Jenkins*

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Angela L. Jenkins, Esq.  
Hearing Officer

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<sup>18</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.