

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

Office of Employment Dispute Resolution

DECISION OF HEARING OFFICER

**In re:
Case Number: 12013**

Hearing Date: December 5, 2023
Decision Issued: December 12, 2023

PROCEDURAL HISTORY

The Hearing Officer was appointed effective October 2, 2023. Upon being appointed, a pre-hearing telephone conference was conducted on October 5, 2023 and the Grievance Hearing was scheduled for December 5, 2023, with a copy of all exhibits and list of witnesses to be provided no later than November 28, 2023.

The Grievance Hearing was conducted on December 5, 2023 as scheduled.

The grievance hearing addressed the following Written Notice:

Group III Written Notice issued on April 5, 2023 for engaging in conduct that violated Standards of Conduct and the Civility in the Workplace. The disciplinary action taken in addition to issuing the written notice was a five-day suspension. (Agency Exhibit 1)

APPEARANCES

Grievant

Agency Party Designee
Agency's Attorney
Agency Attorney Observer

ISSUES

1. Did the Agency's evidence prove by a preponderance of the evidence that the Grievant's conduct was in violation of the alleged policy, procedure or directive?

2. Did the Grievant's conduct constitute a Group III violation under the Standards of Conduct?
3. Whether the Agency considered mitigating and aggravating factors as to the Written Notice?
4. Was the Written Notice consistent with law and policy?

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 Grievant 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) section 5.8. a preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM section 9.

EXHIBITS

The Agency Exhibits admitted into evidence are contained in one notebook with tabs 1-24.

The Grievant did not provide to the Hearing Officer or to the Agency prior to the hearing a notebook of indexed exhibits. No exhibits were introduced into evidence by the Grievant.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness called to testify, the Hearing Officer makes the following findings of fact:

The Agency employed Grievant as a Corrections Officer with such employment governed by the following:

- DOC Operating Procedure 135.1 Standards of Conduct (Agency Exhibit 19)
- DOC Operating Procedure 145.3 Workplace Civility (Agency Exhibit 20)
- DHRM Policy 1.60 Standards of Conduct (Agency Exhibit 21)
- DHRM Policy 2.35 Civility in the Workplace (Agency Exhibit 22)

The Agency's first witness was the Sergeant who supervised the Grievant. The Sergeant testified that the Sergeant heard the Grievant refer to another officer as a "Jap". Sergeant D. stated that he thought "[Grievant] did ask [Officer A.] if [Officer A.] was a Jap." The Sergeant went on to testify that the comment was made by the Grievant after the other officer mentioned that that officer's family fought for the Japanese in the second world war and probably fought (and possibly killed) Marines. The evidence indicated that the Grievant was a Marine.

The Sergeant further testified that the Sergeant recalled the Grievant and Officer C. frequently making sexual comments but not directed at Officer A. The Sergeant also testified that the Sergeant did not recall the Grievant making comments about Officer A's virginity.

The Agency's second witness was Major R., Chief of Security at the facility. Major R. testified that due to the Grievant and Officer A. making allegations of inappropriate behavior by the other individual, an investigation was performed. The Major testified that at the conclusion of the investigation (Agency Exhibit 24, Incident Report) all five officers investigated, including the Grievant and Officer A., were disciplined. The Major R. reviewed the Incident Report (Agency Exhibit 24), which set out, in part, the following:

- The allegation that the Grievant made racial slurs towards Officer A. was confirmed by Sergeant D.
- The allegation that the Grievant made multiple comments concerning Officer A.'s virginity was confirmed by Sergeant D. and Officer B.V.
- The allegation that the Grievant struck Officer A. with a jail-style door and penned Officer A. against a display case was admitted by the Grievant who qualified the admission with the statement that the Grievant did not pen Officer A. with a door but only pushed Officer A. with the door.
- The allegation that Officer C. and the Grievant frequently made sexual comments to each other during the course of the work day was admitted by the Grievant and confirmed by Sergeant D.
- The allegation that the Grievant, Officer C. and Officer B. had a conversation about their fetishes and favorite porn stars and strip clubs during work hours was admitted by the Grievant with the exception of the fetish element which the Grievant denied.
- The allegation that the Grievant referred to Officer A. as being gay was confirmed by Officer B.V. but denied by the Grievant.
- The allegation that the Grievant called Officer A. retarded was confirmed by Officer B.V. and Sergeant D. Sergeant D. recalled that Officer A. had stated that Sergeant D.'s son was in Special Education. It was then that the Grievant asked Officer A. if Officer A. was in Special Education. The Grievant denied calling Officer A. retarded.
- The allegation that the Grievant made an issue of Officer A.'s weight was confirmed by Officer B.V.

Major R. reviewed additional evidence including Agency Exhibit 7 which is a photo of the Grievant and Officer C. at the firing range displaying inappropriate conduct.

During cross examination by the Grievant, Major R. confirmed that Officer B.V. worked night shift, coming in between 5:00 and 5:45. The Grievant's purpose for the question was to

establish that Officer B.V. could not have heard or seen any conduct which was the basis of the allegations against the Grievant.

The Agency's third witness was Investigator M., Senior Special Agent who reviewed the Incident Report (Agency Exhibit 24). The Investigator testified that the initial allegation against the Grievant involved inappropriate contact between the Grievant and an inmate.

Investigator M. reviewed Agency Exhibit 3, the typed transcript of a recorded interview conducted with the Grievant on February 9, 2023. (The Hearing Officer notes for the record that while the Grievant initially challenged the accuracy of the transcript, upon thoroughly reviewing the transcript the Grievant did not identify any omission or misstatement of a substantial nature).

Upon review of the transcript, the following items are noted by the Hearing Officer:

- The Grievant denied making any comments about Officer A.'s virginity.
- The Grievant admitted that the Grievant and other officers talked about strip clubs while on duty, although Grievant indicated that those discussions were typically during break.
- The Grievant denied that the Grievant and Officer C. made comments to each other of a sexual nature, such as joking about each other's butts.
- Grievant denied that he ever called Officer A. retarded.
- Grievant denied that Grievant teased Officer A. about Officer A.'s weight but did admit that there were conversations about Officer A.'s need "...to be healthier and take care of himself...".
- Grievant admitted that when Officer A. was "...trying to shut me out and I pushed the door and panned [Officer A.]... Do I remember [Officer A.] getting panned? Yeah because [Officer A.] was trying to push me out."

The Agency's fourth witness was Superintendent R., who has been Superintendent at the facility since March 2006. The Superintendent testified that the Superintendent received a call initially about an allegation that the Grievant had touched an inmate in the groin area with a water bottle, which complaint was filed by Officer A. but then was followed with a complaint by the Grievant against Officer A. The Superintendent testified that the matter was then turned over to Special Investigations. The Superintendent testified that of all of the officers investigated, Officer B.V. was the only officer who was not disciplined.

The Superintendent testified that the chain of command (Agency Exhibits Tab 4 and 5) authorized the Written Notice issued on April 5, 2023 by Major R., Chief of Security, acting upon the authorization of the Superintendent. Upon cross examination by the Grievant the Superintendent confirmed that Officer A.'s father had been a Major at the facility in the past but denied that the Major had any involvement in or influence over the investigation and discipline against the Grievant or any other officer. The Superintendent also testified that Officer B.V.,

even though working night shift, could have heard or observed the alleged behavior by Grievant during shift changes.

Upon the completion of the Agency's case, the Grievant called Officer A.C. who testified that he worked the same shift as the Grievant, never heard the Grievant call Officer A. retarded or gay; that he never heard Grievant engage in a conversation about porn stars; that Officer A. regularly talked about Officer A.'s sexuality; that Officer A. was constantly making sexual comments; that Officer A. was the one who brought up special education; and that Grievant was always professional with inmates and otherwise and only engaged in any inappropriate conversations that Officer A. instigated.

The evidence concluded with the Grievant's testimony. The Grievant admitted during his testimony that the Grievant made the statement that Officer A. had marine blood on his hands. The Hearing Officer notes that the Grievant denied making that statement when interviewed by Special Investigator M. on February 9, 2023 (Agency Exhibit 3). The Grievant also admitted in the Grievant's testimony that the Grievant panned Officer A. with the door, denied that the water bottle with the inmate occurred, denied making sexual comments while around Officer A, denied talking about sexual fetishes but did admit talking about strip clubs, denied ever calling Officer A. gay (commenting that the Grievant was aware that Officer B.V. is transgender and knew any sexual orientation comments would be offensive), denied calling Officer A. retarded (commenting that the Grievant's mother is a Special Education teacher and that the Grievant is sensitive to offensive language in that regard); and denied teasing Officer A. about Officer A.'s weight but admitted having conversations about Officer A.'s need to take better care of himself.

At the conclusion of the evidence both the Agency and the Grievant made closing statements.

CONCLUSIONS

Unacceptable behaviors are divided into three types of offenses, according to their severity. Group I offenses "include 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 require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination." (Standard of Conduct)

Virginia Code Section 2.2-3005.1 authorizes Hearing Officer's to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "accordance with rules established by the Department of Human Resource Management...". Under the rules for Conducting Grievance Hearings "[a] hearing officer must give deference to the agency's consideration in the 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.

The Commonwealth of Virginia provides certain protections to employees Chapter 30 of Title 2.2 of the Code of Virginia. Among these protections is the right to grieve formal disciplinary action. The Department of Equal Employment and Dispute Resolution has developed Grievance Procedure Manual (GPM). This manual sets forth the applicable standards for this type of proceeding. Section 5.8 of the GPM provides that in disciplinary grievances the Agency has the burden of going forth with the evidence. It also has the burden of proving, by preponderance of evidence, that its actions were warranted and appropriate. The GPM is supplemented by a separate set of standards promulgated by the Department of Employment Dispute Resolution, *Rules For Conducting Grievance Hearings*. These Rules state that on a disciplinary grievance a Hearing Officer shall review the facts *de novo* and determine:

- A. Whether the employee engaged in the behavior described in the written notice;
- B. Whether the behavior constituted misconduct;
- C. Whether the discipline was consistent with law and policy; and
- D. Whether there were mitigating circumstances justifying the reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances.

After reviewing all of the Exhibits, the testimony of all of the witnesses and the arguments made by the Agency's Attorney and the Grievant, the Hearing Officer concludes as follows:

1. The Agency proved by a preponderance of the evidence that the Grievant penned Officer A. with a door, that such behavior is misconduct and constituted a violation of the Standards of Conduct of the most serious nature and could be charged as a Group III offense;
2. The Agency proved by a preponderance of the evidence that the Grievant behaved inappropriately at the firearms range and that such misconduct constituted a violation of the Standards of Conduct of the most serious nature and could be charged as a Group III offense;
3. The Agency proved by a preponderance of evidence that the Grievant made racial slurs toward Officer A. referring to Officer A. as a "Jap" and proclaiming that Officer A. had Marine blood on Officer A.'s hands and that such misconduct constituted a violation of the Standards of Conduct, Civility in the Workplace and such conduct is of the most

serious nature and could be charged as a Group III offense.

The Hearing Officer concludes that the Agency considered the mitigating factors of the Grievant having an otherwise good work record; that the Grievant, before working as a Corrections Officer, was a Marine supporting Operation Iraq Freedom from 09/2007 to 10/2015; and in November 2021 was issued an Acknowledgement of Extraordinary Contribution for Grievant's work in restorative housing while assisting at another facility. The mitigation resulted in a single Group III Written Notice. In addition, rather than termination, only a five day suspension was imposed.

The Hearing Officer further concludes that the Group III Written Notice was consistent with law and policy.

DECISION

For the reasons stated herein, the Agency's Group III Written Notice with five day suspension is upheld.

APPEAL RIGHTS

You may request an administrative review by EEDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EEDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Equal Employment and Dispute Resolution
Department of Human Resources 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.

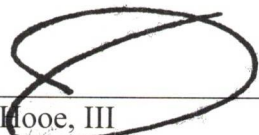
You must also provide a copy of your appeal to the other party and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

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 EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

ENTERED: 12/12/23
Date



John R. Hooe, III
Hearing Officer

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