

Issue: Group III Written Notice with Termination (workplace harassment); Hearing Date: 03/14/18; Decision Issued: 04/09/18; Agency: DOC; AHO: Sondra K. Alan, Esq.; Case No. 11164; Outcome: No Relief - Agency Upheld.

DECISION OF HEARING OFFICER

IN RE:

CASE NO. 11164

HEARING DATE: March 14, 2018
DECISION ISSUED: April 9, 2018

PROCEDURAL HISTORY

On December 14, 2017, Grievant was issued a Group III Written Notice of disciplinary action with removal for workplace harassment regarding an incident which occurred on July 31, 2017.¹

Grievant made a timely request for review. On January 29, 2018, a Hearing Officer was appointed. A pre-hearing conference was scheduled for February 20, 2018.² The hearing was scheduled for March 14, 2018.

APPEARANCES

Agency Advocate
Agency Representative as witness
2 Agency witnesses
Grievant Advocate
Grievant as witness
1 Grievant witness

¹ Agency Exhibit 1

² The delay between the Hearing Officer appointment and the Pre-Hearing conference occurred as the Agency waited for Agency counsel to be appointed.

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 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. ³Group 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.”

³ Agency Exhibit 6 Standards of Conduct OP135.1

DHRM Policy 2.30 4 Workplace Harassment. This policy provides:

Workplace Harassment: Any unwelcome verbal, written or physical conduct that either denigrates or shows hostility or aversion towards a person on the basis of race, sex, color, national origin, religion, sexual orientation, gender identity, age, veteran status, political affiliation, genetics, or disability, that: (1) has the purpose or effect of creating an intimidating, hostile or offensive work environment; (2) has the purpose or effect of unreasonably interfering with an employee's work performance; or (3) affects an employee's employment opportunities or compensation.

DHRM Policy 1.80 5 governs Workplace Violence. This policy provides:

Workplace Violence: Any physical assault, threatening behavior or verbal abuse occurring in the workplace by employees or third parties. It includes, but is not limited to, beating, stabbing, suicide, shooting, rape, attempted suicide, psychological trauma such as threats, obscene phone calls, an intimidating presence, and harassment of any nature such as stalking, shouting or swearing.

Prohibited conduct includes, but is not limited to:

- Injuring another person physically;
- Engaging in behavior that creates a reasonable fear of injury to another person;
- Engaging in behavior that subjects an individual to extreme emotional distress;
- Possessing, brandishing, or using a weapon that is not required by the individual's position while on state premise or engaged in state business;
- Intentionally damaging property;
- Threatening to injure an individual or to damage property;
- Committing injurious acts motivated by, or related to, domestic violence or sexual harassment; and
- Retaliating against any employee who, in good faith, reports a violation of this policy.

4 Agency Exhibit 5 Policy 2.30

5 Agency Exhibit 4 Policy 1.80

DHRM Policy 145.3 6 gives further definition to Workplace Harassment:

Workplace Harassment: 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
 - Has the purpose or effect of unreasonably interfering with an employee's work performance
 - Affects an employee's employment or opportunities or compensation.
- Workplace harassment on the basis of race, sex (including sexual harassment, pregnancy, and marital status), color, national origin, religion, sexual orientation, gender identity, age, political affiliation, veteran status, or against otherwise qualified persons with disabilities is illegal. Workplace harassment not involving protected areas is in violation of DOC operating procedures.

FINDING OF FACTS

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

Two incidences were reported at hearing wherein the word "snitch" may have been used toward Officer A.

The facts agreed upon by those parties present during the July 27, 2017 incident are as follows:

During the beginning of a shift on July 27, 2017, Officer A made a report to her superior about misconduct by an Officer. The reported Officer was not Grievant. At the end of this work shift both Officer A and Grievant were present in the same room. It was a large room. Several other Officers were also present in this room. Grievant and Officer A were not standing close to each other.

The disparity in this incident is that:

Officer A claims Grievant loudly called to Officer A saying, "Oh snitch" when he entered the room. Grievant testified he did not remember that day but knew he would, "never do something like that".⁷ "That" being calling a person a snitch.

⁶ Agency Exhibit 8 OP 145.3

⁷ Grievant's testimony at hearing

The facts agreed upon by those parties present during the night of the July 31, 2017 and morning of August 1, 2017 incident are as follows:

At some time during this shift Officer B and Grievant were on a speaker phone conversation. Grievant was in a location other than the near vicinity of Officer B. Officer A walked into the room where Officer B was located and heard Officer A and Grievant on the speaker phone. A three-way conversation ensued.

The disparity in this incident is as follows:

Officer B and Grievant agreed that Officer B asked Grievant why people were calling Officer A “a snitch”. Grievant stated he responded, “Ask _____” (Officer A). A conversation then took place between Officer A and Grievant over the speaker phone as to the incident of Officer A reporting another officer’s misconduct of July 27, 2017. Grievant stated he only said it wasn’t the way to handle the matter to try to get a guy in trouble. Grievant told Officer A she should have talked to the fellow first, not the supervisor. Grievant stated Officer A responded with statements such as, “I don’t give a damn” and, “F- - - you”.

Officer A stated Grievant asked Officer B who was in the room with him and Officer B stated, “snitch _____” (Officer A). A conversation then took place between Officer A and Grievant as to the incident of her reporting another officer. Officer A said she tried to explain her action and her need for reporting in the manner she did. Officer A stated Grievant made several comments to her such as, “Are you God damned stupid?”; “You are damn dumb”; “Shit like that will get someone hurt”; “If someone reported me for that shit I’d beat their ass in the parking lot”.

This matter was investigated months later in late October by a phone conversation with each person, at separate times, with Officer A, Officer B and Grievant. The Investigator did not interview any other possible witnesses. The Investigator concluded Officer A’s statements were credible and Officer B and Grievant were evasive about the incidences. 8

The Investigator reported that Grievant told her he didn’t call Officer A “a snitch” but informed the Investigator others called Officer A names and “treated her like a dog” and further said, “We all call her a snitch”. It was reported Grievant also said “sometimes we get carried away and talk junk on the phones; sometimes we get a little rowdy”.

Grievant responded in testimony that what he said was “who wouldn’t call her a snitch” but claimed he personally never called her a snitch. He also claimed in his written response 9 that the statement about phone usage was meant to convey “We cut up and have fun”.

8 Agency Exhibit 2 Report of investigation

9 Agency Exhibit 9

Based on the Investigators conclusion that Officer A's complaint was founded the Warden, following procedure, told Grievant of the allegations, gave Grievant an opportunity to respond and then issued a Written Notice with a Group III discipline and termination

OPINION

Grievant's Written Notice only references the July 31/August 1, 2017 incident so the earlier, July 27th incident is of no relevance to this disciplinary action.

The overnight July 31/August 1, 2017 incident was only witnessed by the three parties involved. In testimony Officer B and Grievant basically agreed on the manner the incident took place, both denying culpability. It would have been in their best interest to support the other as they were both subject to discipline. It was also noted Grievant attempted to blame others and place his opinion of his good character, rather than specific facts of the case, before the Hearing Officer.

The testimony of Officer A was consistent each time it was recounted and believable. It is also believable that Officer A used bad language in her conversation on the phone with Grievant the night of July 31st. However, bad language isn't the point of this discipline, threats and harassment are the issues.

A person in Officer A's position is expected to report misconduct. Harassing a person for making a valid complaint has a chilling effect on future compliance with policy to report misconduct. The language used is likely to cause emotional distress as described in OP 1.80 and 2.30. The statements to "get someone hurt" and to "...beat their ass in the parking lot" are certainly threatening and violent remarks. This violates Policy 1.80 by a threat to injure. While Policy 1.80 refers to protected classes, Policy 145.3 makes it clear not only protected classes are protected from workplace harassment. This policy would then make Officer A inclusive in the policy directives and protections.

Whether any of the remarks reported were actually made by either party, it is clear Officer A and Grievant had a conversation about Officer A reporting the incident of July 27, 2017. This conversation should never have happened. It was none of Grievant's business what conversation transpired between Officer A and her Superior. That alone should be actionable. However, it is also more likely than not that Grievant made harassing remarks.

Operational Procedure 135.1⁹ states violation of O. P. 2.30, Workplace Harassment, are listed as examples in all three Groups of possible disciplinary actions.

The Warden stated he considered the negative effects that threatening an officer properly reporting misconduct would have on the facility. Both the chilling effect on encouraging persons to make honest reports and the discord caused by an employee being harassed were of concern for the Warden. From these considerations he reached his decision for the level discipline.

Officer A’s testimony was credible, the Agency had an important interest in preserving the “See it, Report it” policy and in protecting its employees from harassment. The Hearing Officer concludes that the Agency has met its burden of proof and has properly chosen the discipline.

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...”¹⁰ 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 reason stated herein, the Agency’s issuance to the Grievant of a Group III Written Notice of disciplinary action with removal 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 Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

¹⁰ Va. Code § 2.2-3005.

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.¹¹¹

EEDR Consultant]. [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

Sondra K. Alan, Hearing Officer

¹¹ Agencies must request and receive prior approval from EEDR before filing a notice of appeal.