



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11539

Hearing Date: August 31, 2020

Decision Issued: October 14, 2020

PROCEDURAL HISTORY

On May 1, 2020, Grievant was issued a Group II Written Notice of disciplinary action for:

On Thursday, April 23, 2020, in speaking with staff employees, [Grievant] described an incident he had with an offender and made reference to being called the "N" word and the color of his skin. Grievant repeated these comments several times which was offensive to staff working in the area. Repeatedly using this language constitutes a violation of DOC OP 145.3 *Equal Employment Opportunity, Anti-harassment, and Workplace Civility* and DHRM Policy 2.35 *Civility in the Workplace*.¹

Grievant was removed from employment based on the accumulation of disciplinary action.

On May 13, 2020, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On May 26, 2020, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 31, 2020, a hearing was held by audio conference.

¹ Agency Exhibit p. 1.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's Counsel
Witnesses

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 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:

The Department of Corrections employed Grievant as a Buildings and Grounds Supervisor at one of its facilities. He began working for the Agency in April 2013. Grievant had prior active disciplinary action. He received a Group III Written Notice with a five workday suspension on October 31, 2019.

The Hearing Officer will use the terms “N-word” and “full N-word” throughout this decision. The full N-word begins with “N” and ends with “er”. It is the most offensive word in the English language. Merriam-Webster’s online dictionary defines this term as:

1. used as an insulting and contemptuous term for a [B]lack person.
2. used as an insulting and contemptuous term for a member of any dark-skinned race.
3. a member of a class or group of people who are systematically subjected to discrimination and unfair treatment.²

“N-word” is a substitute for using “full N-word.”

Grievant described himself as “Caucasian” with some “African American in my blood line.” Ms. T is African American.

On October 9, 2019, Grievant received an Improvement Plan stating:

You must take steps to immediately correct your attitude and demeanor towards the administrative staff as well as all of your co-workers (security and non-security). Being disrespectful and being unprofessional to your co-workers and the administration will not be tolerated. Being quick to hear slow to speak and even slower to anger is how we need to practice business while we are at work.³

Grievant worked at a Facility with female inmates. Some of those inmates were violent and dangerous.

On April 23, 2020, the Inmate placed paper in a cell door lock to stop the door from closing and locking properly. Grievant was asked to clean out the lock. Grievant went to the Inmate’s cell with a Corrections Officer. The Inmate was asked to step back so Grievant could fix the lock. As Grievant was waiting for the Inmate to move back to

² The definition includes further discussion:

[Full N-word] is an infamous word in current English, so much so that when people are called upon to discuss it, they more often than not refer to it euphemistically as “the N-word.” Its offensiveness is not new—dictionaries have been noting it for more than 150 years—but it has grown more pronounced with the passage of time. The word now ranks as almost certainly the most offensive and inflammatory racial slur in English, a term expressive of hatred and bigotry. Its self-referential uses by and among [B]lack people are not always intended or taken as offensive (although many object to those uses as well), but its use by a person who is not [B]lack to refer to a [B]lack person can only be regarded as a deliberate expression of contemptuous racism. Its offensiveness has grown to such an extent in recent decades that sense 3 is now rarely used and is itself likely to be found offensive. The word’s occurrence in older literary works by such writers as Joseph Conrad, Mark Twain, and Charles Dickens can be shocking and upsetting to contemporary readers.

³ Agency Exhibit p. 64.

her bed, the Inmate told Grievant and the Corrections Officer to “f—k off” several times. A few moments later, the Inmate pushed her door open and came out of the cell. The Inmate moved directly towards Grievant and stood in front of him. The Inmate called Grievant a “stupid f—king [full N-word]” two times. She stepped towards Grievant again and cleared her throat. She lunged towards Grievant and spit at him.⁴ Grievant called for assistance from the corrections officers. The corrections officers entered Grievant’s area and asked him to leave while they addressed the Inmate. Grievant left the building.⁵

Grievant was upset by the Inmate’s behavior. He was concerned by the Inmate’s spitting “right in the middle of the pandemic.” He was concerned about contracting COVID19 because he was aware of positive tests for COVID19 at the Facility.

Grievant walked to the Building and Grounds Building. He wanted to tell the Supervisor what had happened. Ms. T’s and the Supervisor’s office were next to each other. The Supervisor was not present. Ms. T was in her office.

It was common for employees in Grievant’s Unit to discuss their daily events with other employees.

At approximately 3:10 p.m., Grievant entered Ms. T’s office and said, “I almost lost my religion, my job and more.” Ms. T asked “why?” Grievant said, “I was working in Building Eight cleaning out a lock when the offender in that cell stated “get the [f—k] out of my room.” Grievant said, “The offender then called me a [full N-word].” Grievant said, “I looked at my arm and looked back at the offender and said you must not know what color I am.” Ms. T looked up at Grievant as he continued to “keep talking and telling me the offender spit at him twice.” Ms. T did not say anything. She left her office.

Grievant went into the hallway to speak with Mr. F. Mr. F was approximately 40 feet from Ms. T’s office. Grievant recounted the story he told Ms. T and used the full N-word. Ms. T walked by Grievant and Mr. F. She did not respond even though she had heard Grievant talking because Grievant’s usual speaking voice was loud. She went to the front of the bay as Grievant kept talking.

The Supervisor entered the building. He approached Ms. T who was standing by a “walk through door.” The Supervisor asked Ms. T about her afternoon.

Grievant approached the Supervisor and began telling the Supervisor about the incident. Grievant said, “the offender must not know what her colors are because she

⁴ In one account, Grievant said the Inmate’s spit did not hit him. In another account, he said her spit landed on his clothing. Whether the Inmate spit on the Grievant is not significant.

⁵ The Agency did not take any disciplinary action against Grievant regarding his interaction with the Inmate. The Inmate’s behavior was not customary or accepted by the Agency. It is not significant to this grievance whether the Agency took action against the Inmate.

called me a [full N-word]”. Grievant looked at his arm. Ms. T walked by the Supervisor and out the door. She said, “I’m not going to address this right now.”

Ms. T then re-entered the building and said to Grievant, “I will not be disrespected this way, first of all, a [full N-word] is an ignorant person.⁶ An ignorant person can be of any color.” Grievant then “repeated the whole conversation word for word that he had with the offender . . .[,] ‘n’ word and all”, according to the Supervisor.⁷ Grievant said, “I am just repeating what she said,” referring to the Inmate.

Mr. W was sitting at a table with Mr. J. Mr. W heard Ms. T telling Grievant that the word he used was not appropriate and that it did not define a skin color. Mr. J “jumped into the argument saying that [Grievant] should not have said this particular word.”

Grievant apologized to the group and said he meant no ill intent or malice to anyone.

Ms. T left the building for the day.

Ms. T felt like she had been “disrespected” by Grievant’s comments. She later wrote about Grievant, “He just kept say[ing] it as if he was proud that [the Inmate] did not know what color he was.”⁸

Grievant was placed on pre-disciplinary leave on April 27, 2020 while the Agency conducted an investigation.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three groups, according to the severity of the behavior. Group I offenses “include types of behavior less severe in nature, but [which] require correction in the interest of maintaining a productive and well-managed work force.” Group II offenses “include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal.” Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”⁹

⁶ It is unclear what to make of Ms. T’s perception that “a [full N-word] is an ignorant person” and “an ignorant person can be of any color.” The full N-word is a slur directed at one race (African Americans) in particular and expressing contemptuous racism. Ms. T’s understanding of the term, however, appears to refer to slang use of the word. The second description of the word in Dictionary.com is, “*Slang: Extremely Disparaging and Offensive.* a contemptuous term used to refer to a person of any racial or ethnic origin regarded as contemptible, inferior, ignorant, etc.”

⁷ Agency Exhibit p. 65. Supervisor’s statement.

⁸ Agency Exhibit p. 70.

⁹ See, Virginia Department of Corrections Operating Procedure 135.1.

DHRM Policy 2.35 governs Civility in the Workplace.¹⁰ This policy provides:

Behaviors that undermine team cohesion, staff morale, individual self-worth, productivity, and safety are not acceptable.

Any employee who engages in conduct prohibited under this policy or who encourages or ignores such conduct by others shall be subject to corrective action, up to and including termination, under Policy 1.60, Standards of Conduct.

Non-Discriminatory Workplace Harassment [Harassment not Based on Protected Classes] is defined 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 person's protected class.

The Policy Guide for DHRM Policy 2.35 provides:

Non-discriminatory conduct is demeaning, intimidating, or insensitive behavior that is not targeted specifically toward individuals based on their characteristics or affiliation with a particular group, class, or category.

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.

Prohibited Conduct includes:

Behaving in a manner that displays a lack of regard for others and significantly distresses, disturbs, and/or offends others. ***

Making culturally insensitive remarks; displaying culturally insensitive objects, images, or messages.

"Violation of DHRM Policy 2.35 *Civility in the Workplace* or Operating Procedure 145.3 *Equal Employment Opportunity*" can be a Group II offense.¹¹

¹⁰ DOC Operating Procedure 145.3 and its Attachment 1 are similar to DHRM Policy 2.35 and its Policy Guide.

¹¹ See, Operating Procedure 135.1.

On April 23, 2020, Grievant used the full N-word when speaking with Ms. T and recounting his interaction with the Inmate. After using the word, Ms. T let Grievant know that she was offended by his use of the word. Even though Grievant knew Ms. T was offended by his use of the word, he repeated the word. It is reasonable for a person to be offended by use of the full N-word and offended if it was repeated. Grievant's action undermined team cohesion and staff morale. He offended Ms. T and then disregarded having done so. Grievant repeated culturally insensitive language that offended Ms. T. The Agency has presented sufficient evidence to support its decision to issue a Group II Written Notice.

Upon the accumulation of a two active Group II Written Notices, an agency may remove an employee. Grievant has accumulated a Group III and a Group II Written Notice. Accordingly, the Agency's decision to remove Grievant must be upheld.

Grievant argued he was a victim of mistreatment by the Inmate and that he was merely recounting his unpleasant experience to others. This argument may have explained Grievant's first use of the full N-word, but it does not justify Grievant's second use of the full N-word after Ms. T expressed her distaste for the word.

The Agency could have corrected Grievant's behavior by issuing him a written counseling. Grievant did not display racial animus towards anyone else. He was not calling anyone the full N-word. Grievant did not understand how his words could hurt others. Once counseled regarding using the full N-word, there is little reason to believe Grievant would repeat this mistake in the future. Grievant immediately offered a sincere apology to his co-workers who were offended. The Agency, however, had discretion to take disciplinary action and elected to do so. The Hearing Officer cannot disregard the Agency's discretion.

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"¹² 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.

¹² Va. Code § 2.2-3005.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with removal 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 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 EDR before filing a notice of appeal.

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer