



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

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 11633**

Hearing Date: March 22, 2021  
Decision Issued: April 23, 2021

**PROCEDURAL HISTORY**

On October 13, 2020, Grievant was issued a Group III Written Notice of disciplinary action with removal for violating DHRM Policy 2.35 governing Civility in the Workplace.

On November 11, 2020, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On December 8, 2020, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 22, 2021, a hearing was held by remote conference.

**APPEARANCES**

Grievant  
Agency Party Designee  
Agency Representative  
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 Corrections Officer at one of its facilities. He began working for the Agency on January 17, 2019.

The Agency established a front entry check point located at the beginning of the Facility's driveway. An Agency employee used a hand-held temperature gauge to take the temperature of each employee entering the Facility grounds.

On July 8, 2020, Officer H was working at the front entry temperature check point. She was taking the temperature of employees entering the Facility grounds. She did not need or request Grievant's assistance.

Grievant was working at the Facility's main building. During his break, he drove his personal vehicle from the main building to the front entry check point to speak with Officer H. He spoke with Officer H for approximately 15 to 20 minutes. During his conversation, Grievant asked Officer H, "was her husband home?" He said he, "would take care of her." Grievant asked Officer H if her husband gave her massages. Officer H said "no." Grievant said, "terrible, you deserve to be pleased."

On July 9, 2020, Officer H was working at the front entry temperature check point. During Grievant's break, he drove his personal vehicle from the main building to the front entry check point to speak with Officer H. He spoke with Officer H for approximately 15 to 20 minutes. Grievant told Officer H, "We will have to do something when you get back from the academy." Grievant asked Officer H, "if she liked to use toys or if she had anything to pleasure herself with". Officer H replied she did not like to be touched.

A Human Resource employee, Ms. B, drove her vehicle to the front entry check point. Officer H whispered to Ms. B that said she wanted to talk to her. Officer H quietly told Ms. B that she was uncomfortable with Grievant and that he was talking to her in an inappropriate sexual manner. Officer H told Ms. B that this was not the first time Grievant had spoken to her in this manner. Ms. B told Officer H to report the matter to the HR Officer.

Mr. R approached the front entry check point. When Officer H approached his vehicle she mouthed "help me" because Grievant was present at the check point. As Mr. R drove away, Officer H mouthed "help me" again.

When Grievant was interviewed by the Agency Investigator, Grievant explained that he had seen inmates "study" female corrections officer and felt it was his responsibility to educate female officers in training because fraternization with inmates could lead to termination.

## **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."<sup>1</sup>

Operating Procedure 145.3 governs Equal Employment Opportunity Anti-harassment and Workplace Civility. Sexual harassment is defined as:

Unsolicited, unwelcome behavior of a sexual nature including, but not limited to, sexual advances, requests for sexual favors, or verbal, written or physical conduct of a sexual nature by a manager, supervisor, co-worker(s), or non-employee (third party). Sexual harassment is unlawful.

Hostile work environment is defined as:

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<sup>1</sup> See, Virginia Department of Corrections Operating Procedure 135.1.

A form of sexual harassment when a target is subjected to unwelcome and severe or pervasive comments, innuendos, touching, or other conduct of a sexual nature that creates an intimidating or offensive work environment.

Group III offenses including violation of Operating Procedure 145.3 depending on the nature of the violation. Grievant engaged in sexual harassment of Officer H. Grievant created a hostile work environment for Officer H. Grievant made sexual advances towards Officer H. Officer H did not welcome Grievant's behavior and there was no reason for Grievant to believe his behavior was welcomed. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, the Agency's decision to remove Grievant must be upheld.

Grievant denied making any inappropriate statements to Officer H. He asserted that it was his word against her word. Officer H did not testify during the hearing because she stopped working for the Agency. The Hearing Officer finds Officer H's written statement credible and sufficient to uphold the disciplinary action for several reasons. First, Grievant left the main building during his break and drove to the front entry point to contact Officer H. He had no personal or business reason to spend his break at the front entry speaking with Officer H. Second, other employees testified that Officer H spoke with them about Grievant's offensive behavior. Officer H told Ms. B that Grievant made her feel uncomfortable and spoke to her in an inappropriate manner. Officer H told Mr. R to help her because of Grievant's behavior. Third, Grievant asserted he was trying to educate Officer H because he knew how inmates studied female correctional officers. Grievant's job duties did not include educating female correctional officers and his action was inappropriate. The Agency has presented sufficient evidence to support its allegations about Grievant's behavior.

*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 ...."<sup>2</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>2</sup> Va. Code § 2.2-3005.

## DECISION

For the reasons 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 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>[1]</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].

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<sup>[1]</sup> 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