



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11634

Hearing Date: April 13, 2021

Decision Issued: April 14, 2021

PROCEDURAL HISTORY

On August 3, 2020, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory work performance and use of obscene language.

On August 31, 2020, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On December 14, 2020, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 13, 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 employs Grievant as a Captain at one of its facilities. She has been employed by the Agency for approximately 17 years. No evidence of prior active disciplinary action was introduced during the hearing.

On May 8, 2020, Grievant was working as the Watch Commander at the Facility. The Unit Manager ("UM") was working as the Administrator on Duty that day. Grievant and the UM held peer positions when the UM was acting as Unit Manager of a building at the Facility. When the UM was the Administrator on Duty, however, the UM outranked Grievant.

At approximately 7:45 a.m., Grievant learned that inmates in the Wing were not "coming out for their 2.5 hours of dayroom time." Instead, the inmates were coming out whenever they wanted and the dayroom was open to them all day. Grievant did not agree with this change since the inmates in the Wing were among the worst offenders at the Facility. The UM was in charge of the Wing.

Grievant was seated at a desk in the Watch Office. The Watch Office had two doors to enter and exit the office. At approximately 8:30 a.m., the Unit Manager, ("UM")

entered the Watch Office and sat down in a chair. In order to exit the office, Grievant would have had to walk past the UM to get to either doorway.

The UM wanted to speak with the Grievant to obtain information about what had happened during her shift before the UM arrived at the Facility. The UM asked Grievant what was going on. He told Grievant he was the Administrator on Duty for the week. Grievant told the UM that there had been a “use of force” and that one inmate was admitted to the hospital. Grievant asked the UM about what was going on with the Wing and why had there been a change. The UM said that the inmate had behaved well. Grievant told the UM she did not agree with his action because the offenders had disciplinary problems. Grievant said, “Ya’ll mother—kers have gotten soft and that’s why the inmates are running the prison.” The UM said he was not “soft” and if the offenders were behaving better it was appropriate to give them an incentive. The UM told Grievant, “Captain, I do not tell you how to manage your roster or the watch office and I do not need you to tell me how to run my building.” Grievant was angry and said, “Since this is my office, get the f—k out.” The UM was shocked by Grievant’s statement. They continued to argue. Grievant loudly said, “Get the f—k out before I call HR.” The UM said he was not going anywhere.¹

Grievant used the office telephone to call the Major. The Major answered the telephone. Grievant loudly told the Major, “You better come get this motherf—ker out of my office.” After hanging up the telephone, Grievant told the UM to “Get the f—k out of my office.” The UM refused to leave.

The Major walked to the Watch Office. He asked what was the issue. Grievant told the Major that the UM said, “You run the Watch Office and I will run my building.” Grievant again referred to the UM as a “mother—ker.” The Major asked Grievant to calm down. The Major asked the UM why he made that comment. The UM said because Grievant called him “soft” for decisions he made in his building. Grievant said that the UM needed to “get the f—k out of here.” The Major then instructed the UM to return to his building and the UM left the Watch Office.

After the UM left, the Major told Grievant that she could not talk to the UM in such a manner and that her statement to him could be perceived as a threat. Grievant understood but laughed it off saying, “He just made me so mad with that comment.”

During the argument and before the Major arrived to the Watch Office, the Lieutenant and the Corrections Officer were also in the Watch Office. The Corrections Officer left the Watch Office and went to the Caseworker’s office. The Corrections Officer told the Caseworker that she left the Watch Office because “it was too much.” The Lieutenant later stated that the incident caused her “severe discomfort and fear of being in the compound.”²

¹ The UM refused to leave because, “nobody talks to me like that.”

² Agency Exhibit p. 36.

Other people near the Watch Office could hear Grievant speaking loudly but could not hear the UM speaking.

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.”³

Group I offenses include, “[u]se of obscene or abusive language (considered a Group I depending on the severity, harshness, and impact of the language.)”⁴ “F—k” and “mother—ker” are obscenities. On May 8, 2020, Grievant repeatedly used the word “f—k” while angry to intimidate the UM. Grievant called the UM a “motherf—ker”. Grievant was angry and intended to insult the UM. The UM heard Grievant’s insults. Other employee’s also heard Grievant use obscene language. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice for obscene language.

Grievant admitted to cursing but denies she was screaming or yelling. The evidence showed that Grievant was speaking loudly while the UM’s voice remained at a normal level.

Grievant argued that she was experiencing a hostile work environment caused by the UM. The incident was caused primarily by Grievant’s outburst and was not the result of a hostile work environment caused by the UM.

Grievant argued that the Agency failed to provide her with pre-disciplinary due process. For example, she argued that the Warden had decided to issue the Group I Written Notice before considering Grievant’s written statement made in her defense. To the extent the Agency failed to provide Grievant with procedural due process, that error is cured by the hearing process. Grievant had the opportunity to present testimony and documents expressing her defense to the disciplinary action that she could otherwise have submitted to the Agency for its consideration.

Grievant objected to the Agency’s delay in issuing disciplinary action. The Group I Written Notice was issued almost three months after the incident. Although the Agency

³ See, Virginia Department of Corrections Operating Procedure 135.1.

⁴ See, Operating Procedure 135.1, Standards of Conduct.

should have issued its disciplinary action as soon as possible, the delay was not contrary to policy such that it would affect the outcome of this grievance.

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 ...”⁵ 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.

Grievant argued that the Agency inconsistently disciplined her and the UM. The UM received no disciplinary action. The Warden verbally counseled the UM that he should have left the Watch Office when Grievant asked him to do so. Although the UM should have immediately left the Watch Office when requested to do so, the Hearing Officer cannot conclude that Grievant was singled out for disciplinary action for several reasons. First, the UM did not raise his voice or curse at Grievant. Grievant alleged but did not prove that the UM cursed at her. Second, the Watch Office was not Grievant’s office. It was Agency property that was used by many employees. She did not have the “right” to force the UM out of the Watch Office. Third, on May 8, 2020, the UM was of a higher rank than Grievant. He was not obligated to comply with Grievant’s instruction on the basis of rank.⁶ In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group I Written Notice of disciplinary action is **upheld**.

APPEAL RIGHTS

⁵ Va. Code § 2.2-3005.

⁶ The UM should have left the Watch Officer as a matter of courtesy and then reported Grievant’s behavior to his superior if he wanted to do so.

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].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

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