

Issue: Group III Written Notice with Demotion and Pay Reduction (workplace harassment); Hearing Date: 03/27/18; Decision Issued: 03/28/18; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 11161; Outcome: No Relief – Agency Upheld; **Administrative Review: Ruling request received on 04/12/18; EEDR Ruling No. 2018-4706 issued on 04/17/18; Outcome: AHO’s decision affirmed.**



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

**OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 11161**

Hearing Date: March 27, 2018  
Decision Issued: March 28, 2018

**PROCEDURAL HISTORY**

On October 26, 2017, Grievant was issued a Group III Written Notice of disciplinary action with a disciplinary pay reduction and demotion for workplace harassment.

On November 3, 2017, 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 he requested a hearing. On February 1, 2018, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On March 27, 2018, a hearing was held at the Agency's office.

**APPEARANCES**

Grievant  
Grievant's Representative  
Agency Party Designee  
Agency's 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 Corrections Officer at one of its facilities. He worked as a Corrections Sergeant until he was demoted with a five percent disciplinary pay reduction.

Grievant supervised Officer B. Officer B was well-regarded by Grievant. Officer B was a "serious person" when he worked at the Facility. He did not often "joke around" with his co-workers, including Grievant.

On October 3, 2017, Officer B was in the Watch Commander's office talking to Captain B. Captain B was serving as the Watch Commander meaning he was the highest ranking employee at the Facility at that time.

Grievant entered the Watch Commander's office and observed Officer B speaking with Captain B. Grievant said to Officer B, "are you sucking his d—k again?" Grievant's comment was intended to suggest that Officer B was acting in a manner to gain the favor of Captain B. Officer B said, "What are you talking about?"

Officer B was greatly offended by Grievant's comment. He became enraged by Grievant's comments. He continued talking to Captain B but was so upset by Grievant's comment that he was unable to comprehend what Captain B was saying.

Captain B asked Officer B to step out of the office. After Officer B left the office, Captain B told Grievant that Grievant should apologize to Officer B.

Grievant asked Officer B to meet in the Sergeant's office. Grievant apologized to Officer B. Grievant said he "was wrong for what he said." Officer B believed Grievant was a good person who cared about staff but used a poor choice of words.

The Agency decided to issue Grievant a Group III Written Notice with a five percent pay reduction and demotion to a Corrections Officer position.

### **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."<sup>1</sup> 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."<sup>2</sup> Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."<sup>3</sup>

DOC Operating Procedure 143.5 governs Equal Employment Opportunity. This policy defines Workplace Harassment as:

Any unwelcome verbal, written or physical conduct that either 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.<sup>4</sup>

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<sup>1</sup> Virginia Department of Corrections Operating Procedure 135.1(VI)(B).

<sup>2</sup> Virginia Department of Corrections Operating Procedure 135.1(VI)(C).

<sup>3</sup> Virginia Department of Corrections Operating Procedure 135.1(VI)(D).

<sup>4</sup> The policy lists three bullet points without punctuation. The policy does not reveal whether the items should be connected with an "and" or an "or" or an "and/or". The Hearing Officer interprets this policy to

Section IV(A)(11) of the policy provides:

A state employee found in violation of this procedure shall be subject to appropriate disciplinary action under Operating Procedure 135.1 (Standards of Conduct.)

“Failure to follow a supervisor’s instructions, perform assigned work, or otherwise comply with applicable established written policy” is a Group II offense.<sup>5</sup>

On October 3, 2017, Grievant engaged in verbal conduct that denigrated Officer B that created an offensive work environment for Officer B. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

In certain extreme circumstances, an offense listed as a Group II Notice may constitute a Group III offense. Agencies may consider any unique impact that a particular offense has on the agency.

There exists sufficient evidence to elevate the disciplinary action from a Group II offense to a Group III offense.<sup>6</sup> Grievant did not simply direct his comment at a co-worker, he spoke to an employee who reported to him. Grievant held a position of power over Officer B and was entrusted by the Agency with the responsibility to serve as a good role model and leader. Grievant’s comment undermined his credibility of leadership.

Upon the issuance of a Group III Written Notice, an agency may remove an employee. In lieu of removal, an agency may demote an employee and reduce the employee’s salary. Accordingly, the Agency’s decision to demote Grievant to a Corrections Officer with a five percent disciplinary pay reduction must be upheld.

Grievant argued that his behavior did not rise to the level of a Group III offense. Grievant points out that Officer B accepted Grievant’s apology and Officer B repeatedly indicated that he had no problem working for Grievant. He contends the impact on the Agency was not sufficient to justify a Group III offense.

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be connected by an “or”. The DOC policy is similar to the DHRM Policy 2.30, Workplace Harassment. The definition of workplace harassment in the DHRM Policy has three bullet items connected with an “or.” State agencies may draft separate policies as long as they are consistent with the DHRM policies.

<sup>5</sup> Virginia Department of Corrections Operating Procedure 135.1(V)(C)(2)(a).

<sup>6</sup> The Agency alleged but did not establish that Grievant acted contrary to DHRM Policy 2.30, Workplace Harassment. This definition of Workplace Harassment requires a showing that Grievant’s comment was “**on the basis of** race, sex, color, national origin, religion, sexual orientation, gender identity, age, veteran status, political affiliation, genetics, or disability.” (Emphasis added). Grievant’s comment was not on the basis of any of these protected classes. Grievant did not violate DHRM Policy 2.30 and, thus, did not act contrary to DOC Operating Procedure 135.1(V)(D)(t), “Violation of DHRM Policy 2.30, Workplace Harassment (considered a Group III offense, depending on the nature of the violation.)” The Agency’s workplace harassment policy does not require a showing of “on the basis of”.

Although the Agency could have addressed Grievant's behavior with a lesser level of disciplinary action and effectively corrected his action, the Agency was not obligated to do so. The Agency chose to issue Grievant a Group III Written Notice and has presented sufficient justification for that level of disciplinary action under policy.

*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>7</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.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with demotion and disciplinary pay reduction 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 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.

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<sup>7</sup> Va. Code § 2.2-3005.

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

*/s/ Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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