



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11536

Hearing Date: August 17, 2020
Decision Issued: September 8, 2020

PROCEDURAL HISTORY

On April 21, 2020, Grievant was issued a Group II Written Notice of disciplinary action with suspension from April 29, 2020 through May 5, 2020 for lacking civility in the workplace.

On April 25, 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 he requested a hearing. On June 2, 2020, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 17, 2020, a hearing was held by audio 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 Corrections Lieutenant at one of its facilities. He has been employed by the Agency since 2007. No evidence of prior active disciplinary action was introduced during the hearing.

On January 10, 2020, the Secretary questioned Grievant about his absence for a supervisor's security meeting on January 6, 2020. The Secretary told Grievant he needed to provide her with a 24-hour notice before being absent in the future from such a meeting. Grievant did not report to the Secretary and she had no authority to instruct him as to when he had to give her notice of his possible absence. Grievant told the Secretary he was in the emergency room on Monday, January 6, 2020, and had called the institution on Sunday night to report that he was sick and would not be at work on the following day. The Secretary told Grievant, "You are trying to be a pain in my ass." Grievant replied, "No, but I can be a pain in your ass if you want me to." Grievant did not intend his words to be sexual innuendo. The Secretary construed Grievant's words to be sexual innuendo.

The Secretary had shoulder-length hair.

On January 14, 2020, the Secretary was leaving the compound. She was waiting for a locked door to be opened. Grievant was to the Secretary's right side and the Unit

Manager was on the Secretary's left side. Grievant used his forefinger and thumb to touch the Secretary's hair. He pulled his hand in a downward motion to where her hair touched her shoulders. Grievant said, "I see you got your hair colored. It looks nice." When the door opened, the Secretary quickly exited to avoid Grievant.

Grievant's behavior was not welcomed by the Secretary. It made her feel uncomfortable. The Secretary felt like she was being patted "like a dog." Grievant is "very tall" and the Secretary is "very short". Their height disparity added to the Secretary's level of discomfort. Grievant made the Secretary feel so uncomfortable that she sometimes locked her office door and remained in her office to avoid encountering Grievant.

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."¹

Operating Procedure 145.3 governs Equal Employment Opportunity. Section III defines Workplace Harassment as:

Any unwelcome verbal, written or physical conduct that denigrates or shows hostility or aversion towards a person 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. ***

Grievant engaged in workplace harassment. He touched the Secretary's hair without her permission. His behavior was unwelcome. It denigrated the Secretary and had the effect of unreasonably interfering with her work performance. Grievant caused the Secretary to become upset, quickly leave the Facility, and avoid him at work. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice. Upon the issuance of a Group II Written Notice, an agency may suspend an employee for up to ten workdays. Accordingly, Grievant's 40-hour suspension must be upheld.

Grievant agreed that touching the Secretary's hair was inappropriate. He asserted that his touching of the Secretary's hair was "not sexual in nature." It is not

¹ See, Virginia Department of Corrections Operating Procedure 135.1.

necessary for the Agency to show Grievant's behavior was sexual in nature to establish a violation of Operating Procedure 145.3.

The Agency argued that Grievant's comments on January 10, 2020 were sexual innuendo. This allegation is not supported by the weight of the evidence for two reasons. First, Grievant was annoyed that the Secretary acted as if she were Grievant's supervisor even though she had no authority over Grievant. He was annoyed that the Secretary had falsely accused him of failing to notify Facility managers that he would be absent on January 6, 2020. His level of anger towards the Secretary was not consistent with someone making sexual innuendo. It was consistent with Grievant's assertion that he was reacting to the Secretary's inappropriate accusation. Second, the Unit Manager overheard the Secretary's and Grievant's conversation. He remembered Grievant saying, "I can be a pain in your ass." The Unit Manager did not construe Grievant's comment to be sexual innuendo. Although the Agency has not established that Grievant's comment on January 10, 2020 was sexual innuendo, there remains sufficient evidence to support the issuance of a Group II Written Notice.

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"² 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 II Written Notice of disciplinary action with a 40-hour suspension 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.

² *Va. Code § 2.2-3005.*

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.