



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

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 11537**

Hearing Date: September 2, 2020  
Decision Issued: September 22, 2020

**PROCEDURAL HISTORY**

On April 7, 2020, Grievant was issued a Group III Written Notice of disciplinary action with a demotion to a lower pay band with a five percent disciplinary pay reduction for failing to maintain civility in the workplace.

On April 14, 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 8, 2020, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 2, 2020, a hearing was held at the Agency's office.

**APPEARANCES**

Grievant  
Grievant's Counsel  
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 Juvenile Justice employs Grievant as a Senior Probation Officer following his demotion, transfer, and five percent disciplinary pay reduction. He began working for the Agency in April 2010. He received evaluations rating him as a Major Contributor. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant supervised the Juvenile Probation Officer (JPO). The JPO was a difficult employee to supervise. The JPO had difficulty performing his work. He had to be "told things over and over again." The JPO did not like having Grievant as his supervisor.

On December 4, 2019, Grievant's Unit held training in a conference room. Approximately 25 people were in the meeting. An instructor was at the front of the room. The JPO was seated in the back of the room. Ms. T was seated to the JPO's left. Grievant was seated at a table in front of the JPO. Grievant and the JPO were a few feet apart. Ms. A was seated next to Grievant on his left side. Ms. H was seated next to Ms. A on her left side.

During the presentation, the JPO raised his hand to ask a question. The JPO mentioned that he was not allowed to stay late. Grievant said, “oh f—king re--rd” in response to the JPO’s question. Ms. A grabbed Grievant’s arm and shook her head so that he would not say anything else.

Ms. H heard Grievant’s comment. She was not surprised by Grievant’s comment because she had heard Grievant call the JPO similar names in the past.

Ms. M was also in the room. She heard Grievant’s comment. She was offended by Grievant’s use of a pejorative term for mental illness.

Ms. S was in the room. She heard Grievant say “re--rded.”

Not all of the employees in the room heard Grievant’s comment. The JPO did not hear Grievant’s comment. The JPO later learned of Grievant’s comment and became upset and offended by Grievant’s insult.

## **CONCLUSIONS OF POLICY**

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “include acts of minor misconduct that require formal disciplinary action.”<sup>1</sup> Group II offenses “include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action.” Group III offenses “include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.”

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

The Commonwealth strictly forbids harassment (including sexual harassment), bullying behaviors, and threatening or violent behaviors of employees, applicants for employment, customers, clients, contract workers, volunteers, and other third parties in the workplace. Behaviors that undermine team cohesion, staff morale, individual self-worth, productivity, and safety are not acceptable.

Non-Discriminatory Workplace Harassment includes:

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.

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<sup>1</sup> The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

The Policy Guide to Policy 2.35 gives examples of prohibited behavior:

Prohibited Conduct/Behaviors may include, but are not limited to:

- Demonstrating behavior that is rude, inappropriate, discourteous, unprofessional, unethical, or dishonest;
- Behaving in a manner that displays a lack of regard for others and significantly distresses, disturbs, and/or offends others;
- Making disparaging remarks, spreading rumors, or making innuendos about others in the workplace; \*\*\*
- Swearing or using obscene language or gestures toward another person; \*\*\*
- Humiliating others; making public statements with the intent of embarrassing a targeted person; impugning one's reputation through gossip;

On December 4, 2019, Grievant called the JPO a "f---king re--rd." His comment was the use of obscene language toward the JPO. Grievant's comment was rude, inappropriate, discourteous, and unprofessional. Grievant's comment distressed employees around him who heard the comment. The JPO was upset, distressed, and humiliated by Grievant's comment upon learning what Grievant said about him. The Agency has presented sufficient evidence to show that Grievant violated DHRM Policy 2.35.

The Agency's decision to issue Grievant a Group III Written Notice is authorized by DHRM Policy 2.35 which provides:

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.

The Agency's decision to issue a Group III Written Notice is supported by the evidence. This is especially true because Grievant supervised the JPO. Upon the issuance of a Group III Written Notice, an agency may remove an employee. In lieu of removal, an agency may impose a disciplinary transfer, demotion and pay reduction. Accordingly, Grievant's Group III Written Notice with transfer, demotion and disciplinary pay reduction is upheld.

Grievant denied creating a hostile work environment for the JPO. Grievant said he did not remember making the comment and the JPO did not hear the comment. He did not know the JPO was offended until December 18, 2019 and then he apologized. These arguments are not persuasive. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice regardless of whether Grievant created a hostile work environment for the JPO. The evidence is clear that Grievant made his comment

directly following the JPO's question and in response to the JPO's question. His apology did not prevent the Agency from taking disciplinary action.

Grievant argued that the disciplinary action was excessive. Although the Agency could have addressed Grievant's behavior with a lesser level of disciplinary action, DHRM Policy 2.35 authorizes agencies to issue Group III Written Notices with removal. The Agency has presented sufficient evidence to support its decision to issue a Group III Written Notice in this case.

*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.

## DECISION

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

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<sup>2</sup> Va. Code § 2.2-3005.

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].

*/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 EDR before filing a notice of appeal.