

COMMONWEALTH OF VIRGINIA  
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT  
DIVISION OF HEARINGS  
DECISION OF HEARING OFFICER  
In Re: Case No: 11451

Hearing Date: December 17, 2019  
Decision Issued: December 20, 2019

**PROCEDURAL HISTORY**

On September 30, 2019, the Grievant was issued a Group III Written Notice for:

On September 30, 2019, you were assigned to Housing Unit 2 Upper Control with Officer [AB] as the Floor Officer. At approximately 12:45 pm, you and [AB] had a negative interchange on the radio. Shortly thereafter [AB] came to the Control Booth and asked to enter. When you opened the Control Booth door, [AB] began to berate you. You exchanged insults with [AB] for several minutes and the situation escalated. As a result, you and [AB] began to physically fight thus requiring assistance to be called to stop the fight. This physical altercation took several minutes to develop; therefore you had the opportunity to walk away and resume your duties as the Control Booth Officer. Instead you engaged in [a] mutual physical fight with a co-worker in the workplace. Your actions violate DHRM Policy 2.35 - Civility in the Workplace, DOC Operating Procedure (OP) 135.1 - Standards of Conduct, and DOC OP 135.5 - Workplace Violence. <sup>1</sup>

On October 28, 2019, the Grievant timely filed a grievance challenging the Agency's actions. <sup>2</sup> On November 15, 2019, the grievance was assigned to a Hearing Officer. A hearing was held on December 17, 2019, at the Agency's location.

**APPEARANCES**

Counsel for Agency  
Agency Representative  
Grievant  
Witnesses

**ISSUES**

Did the Grievant violate DHRM Policy 2.35; DOC Operating Procedure 135.1; and DOC Operating Procedure 135.5.

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<sup>1</sup> Agency Exhibit 1, Tab 1, Pages 1-2

<sup>2</sup> Agency Exhibit 1, Tab 2, Pages 1-3

## **AUTHORITY OF HEARING OFFICER**

Code Section 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code Section 2.2-3005.1 provides that the Hearing Officer may order appropriate remedies including alteration of the Agency's disciplinary action. By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.<sup>3</sup> Implicit in the Hearing Officer's statutory authority is the ability to independently determine whether the employee's alleged conduct, if otherwise properly before the Hearing Officer, justified termination. The Court of Appeals of Virginia in *Tatum v. VA Dept of Agriculture & Consumer Servs.*, 41VA. App. 110, 123, 582 S.E. 2d 452, 458 (2003) held in part as follows:

While the Hearing Officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy...the Hearing Officer reviews the facts de novo...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action. Thus the Hearing Officer may make a decision as to the appropriate sanction, independent of the Agency's decision.

## **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 proof for establishing any affirmative defenses to discipline such as retaliation, discrimination, hostile work environment and others, and any evidence of mitigating circumstances related to discipline. A preponderance of the evidence is sometimes characterized as requiring that facts to be established more probably than not occurred, or that they were more likely than not to have happened.<sup>4</sup> However, proof must go beyond conjecture.<sup>5</sup> In other words, there must be more than a possibility or a mere speculation.<sup>6</sup>

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<sup>3</sup> See Va. Code § 2.2-3004(B)

<sup>4</sup> *Ross Laboratories v. Barbour*, 13 Va. App. 373, 377, 412 S.E. 2d 205, 208 1991

<sup>5</sup> *Southall, Adm'r v. Reams, Inc.*, 198 Va. 545, 95 S.E. 2d 145 (1956)

<sup>6</sup> *Humphries v. N.N.S.B., Etc., Co.*, 183 Va. 466, 32 S.E. 2d 689 (1945)

## FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of the witness, I make the following findings of fact:

The Agency provided me with a notebook containing nine tabs and a video recording, which was placed at Tab 10. That notebook was accepted in its entirety as Agency Exhibit 1, without objection.

The Grievant stated that all of the documents that she wished to enter were contained within Agency Exhibit 1, so she provided no additional documentary evidence.

DHRM Policy 2.35, Civility in the Workplace, states in part as follows:

...It is the policy of the Commonwealth to foster a culture that demonstrates the principles of civility, diversity, inclusion and equity. In keeping with this commitment...workplace violence of any kind are prohibited in state government agencies...<sup>7</sup>

DHRM Policy 2.35(A)(1) defines Prohibited Conduct as:

The Commonwealth strictly forbids...threatening or violent behaviors of employees...in the workplace. Behaviors that undermine team cohesion, staff morale, individual self-worth, productivity, and safety are not acceptable.<sup>8</sup>

DOC OP 135.5(III), defines Workplace Violence as

...any physical assault, threatening behavior...which occurs in the workplace by employees; it includes...beating.<sup>9</sup>

DOC OP 135.5(IV)(A)(1), also states in part as follows:

The Department of Corrections (DOC) shall provide a safe...environment free from violence or threats of violence...<sup>10</sup>

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<sup>7</sup> Agency Exhibit 1, Tab 5, Page 1

<sup>8</sup> Agency Exhibit 1, Tab 5, Page 2

<sup>9</sup> Agency Exhibit 1, Tab 4, Page 1

<sup>10</sup> Agency Exhibit 1, Tab 4, Page 1

DOC OP 135.5(IV)(A)(2)(a) and (b), states as follows:

Prohibited conduct includes...injuring another person physically; engaging in behavior that creates a reasonable fear of injury to another person. <sup>11</sup>

DOC OP 135.5(IV)(B)(1), states in part as follows:

Employees violating these procedures will be subject to disciplinary action under Operating Procedure 135.1, Standards of Conduct, up to and including termination... <sup>12</sup>

DOC OP 135.1, Standards of Conduct, sets forth third Group Offenses. Policy 135.1(II)(D)(2)(f), states in part that a Group III Offense is an act of physical violence or fighting.

On September 30, 2019, the Grievant, along with two other Officers in Training, was in a Control Room for housing Unit 2. Each of those officers testified before me and their testimony is succinctly captured in their statements that were made on the afternoon that the offense took place. <sup>13</sup>

The Grievant's testimony was essentially the same as the testimony as the other two Officer in Training candidates that were with her in the Control Room. It is unclear as to what exactly originally sparked this confrontation. The video clearly shows that the second Officer involved in the actual confrontation comes to the Control Room and requests entry. <sup>14</sup> It is clear that door is then opened. The Grievant is standing inside the Control Room on the second or third step. There is no audio, but it is clear from hand motions and body language that an argument is taking place. The argument escalates, the spitting event is not visible on the video, but the evidence would seem to suggest that it may have taken place and the verbal argument escalates into a physical altercation that ultimately ends up with both the Grievant and the other employee thrashing on the floor beating each other. <sup>15</sup> In a relatively short time frame, other officers arrive and separate the two. The testimony before me is that the other officer involved in the confrontation was terminated immediately as she was an Officer in Training.

The evidence: Written; verbal; and visual, clearly indicates that the Grievant became a party to a physical altercation with another employee. From the video and testimony, it is clear that this fight was witnessed by many inmates. A warden testified that this simply was not acceptable. I find, from the testimony, documentary evidence and the video of the event that the

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<sup>11</sup> Agency Exhibit 1, Tab 4, Page 1

<sup>12</sup> Agency Exhibit 1, Tab 4, Page 2

<sup>13</sup> Agency Exhibit 1, Tab 8, Page 1 and Tab 9, Page 1

<sup>14</sup> Agency Exhibit 1, Tab 10

<sup>15</sup> Agency Exhibit 1, Tab 10

Grievant violated DHRM Policy 2.35; DOC Operating Procedure 135.1; and DOC Operating Procedure 135.5.

### MITIGATION

*Va. Code § 2.2-3005.1* authorizes Hearing Officers to order appropriate remedies including “mitigation or reduction of the Agency disciplinary action.” 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, (3) the disciplinary action was free of improper motive, (4) the length of time that the Grievant has been employed by the Agency, and (5) whether or not the Grievant has been a valued employee during the time of his/her employment at the Agency.

I find no reason to mitigate this matter.

### DECISION

For reasons stated herein, I find that the Agency has borne its burden of proof in this matter and that the issuance of the Group III Written Notice to the Grievant with termination was proper.

### 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

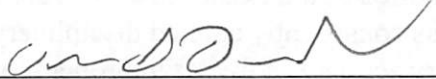
or, send by e-mail to [EDR@dhrm.virginia.gov](mailto:EDR@dhrm.virginia.gov), or by fax to (804) 786-1606.

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].



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William S. Davidson  
Hearing Officer

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