

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

Office of Employment Dispute Resolution

DECISION OF HEARING OFFICER

**In re:
Case Number: 11466**

Hearing Date: March 5, 2020
Decision Issued: March 11, 2020

PROCEDURAL HISTORY

On September 20, 2019, Grievant received a Group I Written Notice with an offense date of May 1, 2019 for violation of Operating Procedure 135.1. Standard of Conduct, for failure to follow procedure regarding immediate removal from the workplace for disciplinary reviews or administrative investigations. No disciplinary action was taken in addition to issuing the Written Notice.

Grievant timely filed Grievance Form A to challenge the Agency's action. The Hearing Officer in this matter was appointed effective December 11, 2019, conducted a telephone conference with the Grievant and the Agency Representative on December 16, 2019, and set a hearing date of January 30, 2020. Due to a witness being unavailable on January 30, 2020, by agreement of the parties, the hearing in this matter was rescheduled to March 5, 2020.

In the letter from the Hearing Officer dated December 16, 2019 it was set out that a copy of all exhibits, in the form of hard copy, a party intends to introduce at hearing and list of witnesses to be called was to be provided the Hearing Officer and to the other party no later than January 23, 2020. The Agency provided a notebook with the Agency's exhibits and a list of witnesses to be called. The Grievant submitted a package of loose pages, not in a notebook and not identified as exhibits. By the Hearing Officer's letter dated February 7, 2020, setting out the new hearing date of March 5, 2020, the Hearing Officer directed the Grievant to resubmit the Grievant's exhibits contained in a notebook and identified by numbered or lettered tabs. The Grievant did not do so prior to the hearing.

APPEARANCES

Grievant

Agency's Party Designee

Agency's Representative

ISSUES

1. Whether Grievant on May 1, 2019 violated Operating Procedure 135.1. Standards of Conduct by failing to follow procedure regarding immediate removal from the workplace for disciplinary reviews or administrative investigations?
2. Whether the Grievant's alleged action constitutes a Group I offense?
3. Whether the Agency's issuing a Group I Written Notice was consistent with law and policy?
4. Whether there were mitigating circumstances justifying a reduction or removal of any 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 Grievant 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) section 5.8. a preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM section 9.

EXHIBITS

The Agency Exhibits admitted into evidence are contained in one notebook with the following contents:

1. Group I Written Notice
2. Counseling letter
3. Grievance Form A and attachments
4. OP 135.1 Standards of Conduct
5. OP 145.3 Equal Employment Opportunity

6. OP 260.1 Purchases of Goods and Services
7. SIU Report with attachments

The Hearing Officer did not consider Agency exhibits number 2 and number 6 in that those matters were not included in the matters to be considered by the Hearing Officer.

While the Grievant referred to documents during Grievant's testimony, Grievant did not offer any exhibits.

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 Agency employed Grievant as a Warden at a state correctional facility.

The Agency's first witness was a Unit Manager at the facility for four years prior to May 1, 2019. The Unit Manager had been employed with the Agency for twenty-five years and at the current facilities since 1998. The witness testified that during a meeting with two Assistant Wardens and five Unit Managers the Assistant Wardens asked for input or feedback from the Unit Managers regarding various concerns with facility operations. The witness said that at the meeting the witness and other Unit Managers expressed their concerns about addressing assaults by offenders against other offenders and against staff. The witness testified that during the meeting the witness never mentioned the Warden. The witness did not recall saying during the meeting that the Warden was going to cause somebody to get hurt or that the "Warden will have blood on his hands".

The first Agency witness further testified that after the meeting the Warden's office contacted the Unit Manager and advised the Unit Manager to come to the Warden's office immediately. When the Unit Manager arrived at the Warden's office the Unit Manager was told by the Warden that "You are not on board", placed the Unit Manager on paid leave, made the Unit Manager turn in the Unit Manager's credentials and leave the facility. No other explanation was given by the Warden to the Unit Manager. The Unit Manager testified that the Unit Manager was out on paid leave from May 1st until the Unit Manager received a call from the Human Resources Officer to report to the facility on June 3rd and expect to stay the day. The Unit Manager also testified that upon returning to the facility, the Human Resources Officer told the Unit Manager on June 4th that the Unit Manager had been kept out on paid leave because the Unit Manager said "the Warden is going to get somebody killed." The Unit Manager denies ever having made that statement. Upon cross examination by the Warden, the Unit Manager stated that during the entire time the Unit Manager was out on paid leave no one ever contacted the Unit Manager about what was going on. As a result, the Unit Manager testified that life was

made very difficult since no explanation could be given to family as to why the Unit Manager could not return to work. The witness testified that the only communication the Unit Manager received was a letter dated May 1, 2019 from the Human Resources Officer (Page 76 in the Agency Exhibit Notebook) in which it states “You were informed that an open investigation is being conducted...Administrative Leave can last up to fifteen days, while the investigation is ongoing. You will be notified when to report to the facility for a meeting with the Warden... .”

The second witness was also a Unit Manager who attended the May 1st meeting and was placed on paid leave following the meeting. The Unit Manager has worked at the facility for twenty-one years and has been a Unit Manager since 2016. The witness testified that the May 1st meeting was called to discuss reassignments but was then open to general discussion. The witness testified that the problem with assaults on staff and other offenders was discussed. The witness testified that everyone in the meeting joined in the discussion. The witness testified that he did not hear the other Unit Manager (who was placed on paid leave) say that “The Warden will get somebody killed”. The Unit Manager testified that everyone in the meeting was concerned, including the other Unit Manager in question who is outspoken. The witness testified that following the meeting, upon returning from lunch, the Unit Manager was told to go to the Warden’s office. The Unit Manager testified that the Warden told him “You are not on board” and to hand over the Unit Manager’s credentials. The Unit Manager testified that the Warden gave no other explanation at that time. The Unit Manager testified that until the Unit Manager was contacted to return to work on May 13th, no information was provided to help him explain to his family why the Unit Manager could not return to work.

During cross examination by the Warden, the Unit Manager (the Agency’s second witness) stated that the Unit Manager believed that the Warden was given bad information by the assistant Wardens who related what was allegedly said by the two Unit Managers during the meeting.

The Agency’s third witness has been a Special Agent with the Agency for twenty-eight years and was requested to conduct an investigation arising out of the Warden’s decision to place the two Unit Managers on paid leave. The Investigative Report (Agency Tab 7) sets out a synopsis at page 62 of the Agency exhibit book in which it is stated:

Investigation found no evidence that Unit Managers...violated any policy or created a hostile working environment as suggested by Warden _____ and Assistant Warden’s _____ and _____...Moreover, it appears that Warden _____ may have taken unnecessary administrative action against _____ and _____ in retaliation for the partial reported information (The Warden) was given against them by AW’s _____ and _____ from a staff meeting, wherein, a “safe container” was prevalent when their work related opinions were enlisted by management.

The Investigative Report goes on to set out the details of the interviews conducted during the investigation.

The Agency's next witness was the Regional Administrator, having been employed by the Agency since 1989 and having served as Regional Administrator for three years. The Regional Administrator testified that Operating Procedure 135.1. Standards of Conduct (Agency Tab 4) sets out relevant procedures at "D. Pre-Disciplinary Leave with Pay" (Agency Notebook Page 23). The language states as follows:

1. Immediate Removal from the Workplace for Disciplinary Reviews or Administrative Investigations.
 - a. Management may immediately remove an employ from the workplace without providing advance notification when the employee's continued presence:
 - i. May be harmful to the employee, other employees, clients, offenders and/or patients.
 - ii. Makes it impossible for the Agency to conduct business.
 - iii. May hamper an internal investigation into the employee's alleged misconduct, may hamper an investigation being conducted by law enforcement.
 - iv. May constitute negligence in regard to the Agency's duties to the public and/or other employees.
 - b. An employee should be immediately advised of the reason for their removal from the workplace...
 - c. Employees may be placed on Pre-Disciplinary Leave for up to fifteen work days... during which time a disciplinary review or administrative investigation should be conducted. If the disciplinary review or administrative investigation is not complete within fifteen work days, the DOC must:
 - i. Impose disciplinary action in accordance with the operating procedure
 - ii. Permit the employee to return to work pending the outcome of review or investigation
 - iii. Extend Pre-Disciplinary Leave with Pay for a specified period of time as determined by the Director. This authority has been delegated to the Human Resources Director.

The Regional Administrator testified that the Warden did not follow the procedures set out above in that the enumerated reasons for immediate removal did not exist. In addition, as to one of the Unit Managers placed on paid leave, the Unit Manager was not advised to return to work within fifteen days and the Pre-Disciplinary Leave with Pay was not extended for a specified period of time.

The Regional Manager further testified that the Warden's actions could have been written up as a Group III offense as a violation of DHRM Policy 2.35 Civility in Workplace or Operating Procedure 145.3 Equal Employment Opportunity (II Groups of Offenses D. Third Group Offenses.s.) or t. Violation of DHRM Policy 2.05 Equal Employment Opportunity or Operating Procedure 145.3, Equal Employment Opportunity. The Regional Manager testified that the circumstances or background information used to mitigate a possible Group III included the Warden's twenty-three years of service with the Agency, previous good performance record, and lack of prior disciplinary action (Agency Exhibit 1).

Upon completion of the Agency's evidence, the Grievant called the Human Resources Officer as a witness. The Human Resources Officer testified that the two Assistant Wardens relayed to the Warden what was said in the meeting by the two Unit Managers and on that basis the Human Resources Officer advised the Warden that the Warden could place the two Unit Managers on paid leave pending an investigation.

The Human Resources Officer testified that the Warden did not want to question the Unit Managers due to the nature of the alleged statements they made about the Warden and that the Warden requested the investigation be conducted during the paid leave.

Upon questioning by the Agency Advocate, the Human Resources Officer admitted that if the Human Resources Officer knew at the time that the comments were made in a "safe container" context that the Human Resources Officer would not have supported the immediate suspensions.

During the Warden's testimony, the Warden made clear that the Warden believed proper procedures were followed. However, the Warden did not produce any evidence to explain why immediate removal from the workplace was necessary for an administrative investigation as set out in the Operating Procedure: 135.1 (Agency Notebook Page 23). Although the Warden testified that he was prepared to have the Unit Managers return to work and was concerned that the investigation was taking so long, no explanation was given as to why the procedures were not followed when the one Unit Manager was not allowed to return to work after fifteen days of paid leave.

The Warden's narrative attached to the Warden's Grievance Form A (Agency Exhibit 3) made it clear that the Warden's decision made on May 1st was for alleged behaviors that had occurred prior to May 1st and that the boiling point was reached with the nature of the comments reported by the Assistant Wardens following the staff meeting conducted on May 1st. The Warden states in the Warden's narrative "After the report and with the recommendation from my Assistant Wardens, I put the Unit Managers out on administrative leave for the safety of the facility and to allow time for HR to investigate if they saw fit. This decision was made after consultation with my HRO...to ensure that we were acting within OP 135, while addressing the concerns of impact UM _____ and _____ could have on staff and facility

management. I purposely did not order the investigation myself and requested that HR handle it, so that I could ensure the process was objective and avoid any appearance of retaliation.

CONCLUSIONS

The Commonwealth of Virginia provides certain protections to employees Chapter 30 of Title 2.2 of the Code of Virginia. Among these protections is the right to grieve formal disciplinary action. The Department of Equal Employment and Dispute Resolution has developed Grievance Procedure Manual (GPM). This manual sets forth the applicable standards for this type of proceeding. Section 5.8 of the GPM provides that in disciplinary grievances the Agency has the burden of going forth with the evidence. It also has the burden of proving, by preponderance of the evidence that its actions were warranted and appropriate. The GPM is supplemented by a separate set of standards promulgated by the Department of Employment Dispute Resolution, *Rules For Conducting Grievance Hearings*. These Rules state that on a disciplinary grievance a Hearing Officer shall review the facts *de novo* and determine:

- A. Whether the employee engaged in the behavior described in the written notice;
- B. Whether the behavior constituted misconduct;
- C. Whether the discipline was consistent with law and policy; and
- D. Whether there were mitigating circumstances justifying the reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances.

The Agency's evidence, even in light of the Grievant's testimony and assertions contained in Grievant's Form A, establishes by a preponderance of the evidence that the Grievant did not follow the procedures required by operating procedure 135.1. The Agency's evidence further established by a preponderance of the evidence that the Warden's actions could have been written as a Group III offense but were mitigated to a Group I offense for the reasons set out in the Written Notice.

Virginia Code Section 2.2-3005.1 authorizes Hearing Officer's to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "accordance with rules established by the Department of Human Resource Management...". Under the rules for Conducting Grievance Hearings "[a] hearing officer must give deference to the agency's consideration in the 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.

While the Hearing Officer may personally be inclined to substitute a letter of counseling to the Warden's record in place of the Group I Written Notice, the Agency elected to impose the Group I Written Notice and such election is consistent with law and policy. The Hearing Officer finds no mitigating circumstances which exist to further reduce the disciplinary action imposed by the Agency.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice 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 Resources 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.

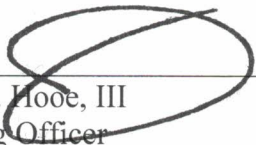
A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to 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 EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

ENTERED: 3/11/2020
Date



John R. Hooe, III
Hearing Officer

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