



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11502 / 11503

Hearing Date: June 8, 2020
Decision Issued: June 29, 2020

PROCEDURAL HISTORY

On January 10, 2020, Grievant was issued a Group II Written Notice of disciplinary action with demotion, transfer, and disciplinary pay reduction for violation of DHRM Policies 2.05 and 2.35. On January 10, 2020, Grievant was issued a Group II Written Notice for violating written policy governing confidentiality of employee records.

On February 4, 2020, Grievant timely filed grievances to challenge the Agency's actions. The outcomes of the Third Resolution Steps were not satisfactory to the Grievant and he requested a hearing. On March 16, 2020, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 8, 2020, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's Counsel
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 employed Grievant as an Assistant Warden at one of its facilities until he was demoted with a disciplinary pay reduction and transferred to the position of Unit Manager at another facility. He began working for the Agency in 1989. No evidence of prior active disciplinary action was introduced during the hearing.

The Counselor worked at the Facility and was within Grievant's chain of command. Grievant knew the Counselor through the Counselor's Aunt and considered the Counselor as a friend of the family.

In August 2019, Grievant was in his office with the Counselor, Ms. S and Ms. H. During their conversation, Grievant said words to the effect that Grievant wanted the Counselor to get up on the desk and dance without clothing for him.

The Counselor did not say anything in response to Grievant's comment. Ms. H and Ms. S "looked at each other" in disbelief. Some of the woman laughed at Grievant's comment.

The Counselor left Grievant's office. Grievant later told the Lieutenant of Grievant's comment.¹ The Counselor did not file a written complaint about Grievant at the time of the incident.

The Counselor testified Grievant said, "get on top of that table and take all your g-d-da-n clothes off." Ms. S testified Grievant said he had, "had a rough day and my day would be better if you climbed over this desk and take care of me." Ms. H testified she could not remember the precise wording of Grievant's comments but his comment included "something about her dancing on top of a table." Grievant may have said, "come over the table and dance for me." She heard Grievant use the word, "naked." The comment did not seem like a big deal to Ms. H.

Ms. B approached the group. It does not appear that she heard Grievant's comment to the Counselor.

On September 29, 2019, a verbal conflict arose between the Counselor and Ms. G. The Counselor believed Ms. G was falsely telling other employees that the Counselor left the scene of an automobile accident. The Counselor called Ms. G and used profanity. The Counselor was referred for disciplinary action. Grievant was involved in the due process relating to that disciplinary action. Grievant told the Counselor he was moving her to another building.

Grievant and the Counselor's Aunt knew one another because they attended the same church. On October 21, 2019, Grievant sent the Aunt a text message asking her to call him. She called him as requested. Grievant told the Aunt that the Counselor was being referred for disciplinary action for using profanity but it probably would not go anywhere. Grievant told the Aunt that the Counselor was a "da-n good employee" who "just ran her mouth." Grievant told the Aunt he had considered mediation between the Counselor and another employee.

Grievant also sent the Aunt text messages on October 21, 2019. In one message, Grievant wrote:

I'm sorry to bring this to you but I am so disappointed in the behavior of [Counselor] and how she is handling her discipline for cursing out staff. She's not speaking and blaming me for the corrective action ... after I bent backwards to get her hired ... she's something and I see why no one would take her ... I hired her because ya'll asked me.

The Counselor did not give Grievant permission to speak with the Aunt about her pending disciplinary action. The Counselor learned of Grievant's comments to the Aunt when the Aunt sent the Counselor a text message asking Grievant to call the Aunt. When

¹ The Lieutenant remembered the Counselor saying that Grievant words to the effect of "get on the table and dance with me."

the Aunt spoke with the Counselor, the Aunt told the Counselor the details of Grievant's discussion about the Counselor's disciplinary action.

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."² 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."³ Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."⁴

Group II Written Notice – Civility in the Workplace.

Group II offenses include, "Violation of DHRM Policy 2.35, Civility in the Workplace."

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

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 harassment (including sexual harassment), bullying (including cyber-bullying), and workplace violence of any kind are prohibited in state government agencies.

The Policy Guide for the Civility in the Workplace policy states that prohibited conduct includes:

Humiliating others; making public statements with the intent of embarrassing a targeted person; impugning one's reputation through gossip;
Making unwelcome or suggestive comments or jokes;

The Agency has presented sufficient evidence to show that Grievant violated DHRM Policy 2.35. In August 2019, Grievant told the Counselor words to the effect that she should get on the table and dance for him without clothing. There is no reason to believe the Counselor welcomed Grievant's comment. Grievant's comment served to humiliate the Counselor by suggesting she should behave as a woman dancing on display

² Virginia Department of Corrections Operating Procedure 135.1(VI)(B).

³ Virginia Department of Corrections Operating Procedure 135.1(VI)(C).

⁴ Virginia Department of Corrections Operating Procedure 135.1(VI)(D).

in a nightclub rather than as a professional correctional officer. Although Grievant may have intended his comments as a “joke” and some of the women laughed, his comments were not appropriate in a State workplace.

Grievant denied saying Counselor should get on the table and dance for him. The Agency has presented sufficient evidence to support its allegation. All three women in the meeting stated that Grievant told the Counselor to get on the table. Their statements were credible. There was no business-related reason for the Counselor to get on the table and dance. The inappropriateness of Grievant telling the Counselor she should get on the table confirms the likelihood that Grievant also said words to the effect that the Counselor should dance without clothing to entertain him.

Grievant argued that the Counselor had initiated inappropriate sexual conversation with a male employee.⁵ Although it appears the Counselor made inappropriate sexual comments to the male employee, it does not appear that Grievant’s comment in August 2019 followed or flowed from a discussion about sexual behavior. In other words, no evidence was presented showing that Grievant’s comment about the Counselor dancing on a table would be welcomed by the Counselor or the other two women.

It appears the Counselor complained about the comments Grievant made in August 2019 in response for her perception that Grievant was involved in the corrective action taken against her. Although the Counselor may have been motivated by revenge, the Agency’s investigation was motivated by a desire to determine whether Grievant had made inappropriate comments. How the Agency learned of Grievant’s possible misbehavior did not affect its ability to investigate and take disciplinary action for that behavior.

Group II Written Notice – Employee Records

“Failure to follow a supervisor’s instructions, perform assigned work, or otherwise comply with applicable established written policy” is a Group II offense.⁶

DHRM Policy 6.05 governs Personnel Records and provides:

Other personal information may not be disclosed to third parties without the written consent of the subject employee. This information includes, but may not be limited to: *** records of suspension or removal including disciplinary actions under the Standards of Conduct, Policy 1.60;

DOC Operating Procedure 102.7 governs Employee Records. Section (V)(B)(1) provides that “personnel records are confidential and may only be released to authorized personnel.” Any records relating to pending disciplinary action are personnel records.

⁵ Grievant told the Captain, “my husband didn’t f--k me good last night.”

⁶ Virginia Department of Corrections Operating Procedure 135.1(V)(C)(2)(a).

Disclosure of information contained in a personnel record is the same as disclosing the record itself.

The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for violation of policy. Information relating to any investigation of improper behavior by the Counselor and consideration of possible disciplinary action was the Counselor's personal information. Grievant disclosed personal information about the Counselor to the Aunt without the Counselor's permission to do so.

Grievant argued that Operating Procedure 102.7 only covered information in an employee's fact file or human resources file. Although the policy addresses records (documents), it is intended to address disclosure of information even if the underlying document itself is not revealed. A policy that allowed disclosure of information contained in a document but not the document itself would be meaningless.

Accumulation of Disciplinary Action

Upon the accumulation of two Group II Written Notices, an agency may remove an employee or in lieu of removal demote, transfer, and impose a disciplinary pay reduction. Grievant has accumulated two Group II Written Notices. The Agency's demotion, transfer, and disciplinary pay reduction imposed on Grievant must be upheld.

Mitigation

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"⁷ 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 for violating DHRM Policy 2.35 is **upheld**. The

⁷ Va. Code § 2.2-3005.

Agency's issuance to the Grievant of a second Group II Written Notice for disclosure of information is **upheld**. Grievant's demotion, transfer, and disciplinary pay reduction is **upheld** based on the accumulation of disciplinary action.

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 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.

