



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11723

Hearing Date: March 11, 2022

Decision Issued: March 31, 2022

PROCEDURAL HISTORY

On July 8, 2021, Grievant was issued a Group III Written Notice of disciplinary action with removal for failure to follow policy and conduct unbecoming a Human Resource Officer.

On July 20, 2021, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On August 9, 2021, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 11, 2022, a hearing was held by remote conference.

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 Human Resource Officer (HRO) at one of its facilities. He was employed by the Agency for approximately ten years. He began working as the HRO on November 10, 2019. Grievant's evaluations showed satisfactory work performance. No evidence of prior active disciplinary action was introduced during the hearing.

Ms. C worked as a Psychology Associate at the Facility. She is biracial. She had been working at the Facility for approximately three and a half months. Ms. C and Grievant had a work relationship and not a personal relationship outside of work. They talked at work during their breaks. They shared jokes and stories. Ms. C told Grievant about an interaction she had with a man she met through a dating app.

Ms. P was a Psychology Associate at the Facility. She was Ms. C's "direct counterpart." Ms. C and Ms. P reported to Ms. W.

Ms. P met with the former Warden and Grievant on July 15, 2020. The purpose of the meeting was to discuss why Ms. P was missing a lot of time from work. Ms. P was pregnant and the former Warden was asking her how the Agency could help her improve

her attendance. The former Warden asked Ms. P if her children had the same father. He was trying to determine the amount of help Ms. P had available to care for her children. Ms. P said her children had the same father.¹ Once Ms. P's child was born, Ms. P posted pictures of her baby on social media sites. The pictures showed that the baby was biracial. Ms. P's older child was not biracial. Grievant observed one of the pictures and knew that Ms. P's baby was biracial.

On May 28, 2021, Grievant spoke with Ms. C by telephone while both employees were working at the Facility. Grievant asked Ms. C how she was doing working at the Facility with Ms. P. Grievant asked Ms. C if she "had to cut a bi-ch" referring to Ms. P. Ms. C responded, "No, why would I." Grievant then asked Ms. C "[i]s her baby Black" referring to Ms. P's baby. Ms. C said she believed the baby was biracial. Grievant told Ms. C that before Ms. P left on maternity leave, Ms. P told Grievant that her children had the same father.² Ms. C told Grievant she did not know what to tell him related to Ms. P's personal life but he could ask Ms. P instead. Grievant then asked Ms. P if she thought Ms. W liked the new Warden as Unit Head. Ms. C said he could ask Ms. W that question if he wanted an answer because she could not speak for Ms. W. Grievant told Ms. C that he had sent her a message on Instagram.

On May 28 2021, Ms. C approached Ms. P and told Ms. P of Grievant's comments about Ms. P including Grievant's comment about "cut a bi-ch" and the race of Ms. P's child. Ms. P was upset by Grievant's comments. Ms. P felt that Grievant was suggesting Ms. P was causing trouble even though she did not have a problem working at the Facility. Ms. P felt she could no longer trust Grievant because he was sharing confidential information she disclosed during the July 2020 meeting.

After Ms. C left work on May 28, 2021, she viewed the Instagram message from Grievant. The message contained a picture which was framed in a manner that created the impression it was a picture of a female engaging in oral sex. When the picture framing was expanded, it showed a female holding a white cat and the cat's paw in the female's mouth. The picture contained a caption stating words to the effect of "I know we are friends if we saw the same thing first."³

Ms. C was offended by Grievant's message. Ms. C immediately deleted the message and blocked Grievant so that she could no longer receive any messages from Grievant on Instagram. Ms. C acted quickly to delete the message because she knew she was a probationary employee and feared Grievant could affect her position since he was a Human Resource Officer.

¹ Ms. P knew that her two children had different biological fathers. She believed that the father of her first child would be caring for her second child.

² Ms. C knew that Ms. P's oldest child was not biracial and that her baby was biracial.

³ Grievant objected to the evidence presented by the Agency because Ms. C deleted the photograph she received and the image presented was not a copy of the actual photo. Ms. C's testimony was sufficient to establish the nature of the picture Grievant sent her.

On May 28, 2021, Grievant called Ms. W while both employees were working. Grievant asked Ms. W “what is wrong.” Ms. W said nothing was wrong. Grievant asked Ms. W if she liked the new Warden. Ms. W said she really did not know the new Warden but he was their Warden and she was just getting to know him. Grievant replied, “you just don’t seem like you like him.” Ms. W said Grievant could make that assumption, but that did not make it true. Later in the day, Ms. C approached Ms. W and said that she received a call from Grievant. Ms. C told Ms. W that Grievant asked Ms. C if Ms. W liked the new Warden and said he did not believe Ms. W liked the new Warden.

Grievant later saw Ms. P in the parking lot and she seemed upset. He apologized to her for his comment. He also apologized to Ms. W.

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.”⁴

DOC Operating Procedure 145.3 governs Equal Employment Opportunity, Anti-Harassment, and Workplace Civility. Under this policy:

Any employee who engages in conduct determined to be harassment, discrimination, retaliation, cyber-bullying, bullying, and/or other inappropriate behavior, or who encourages or ignores such conduct by others will be subject to disciplinary action under Operating Procedure 135.1, Standards of Conduct, which may include termination from employment.

Violations occurring outside the workplace may be grounds for disciplinary action, up to and including termination. In these situations, the agency must demonstrate that the conduct has a connection to the workplace, the productivity of the target, or the Department’s operations, services, or reputation.

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

Behaviors that undermine team cohesion, staff morale, individual self-worth, productivity, and safety are not acceptable.

⁴ See, Virginia Department of Corrections Operating Procedure 135.1.

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.

Violations occurring outside the workplace may be grounds for disciplinary actions, up to and including termination.

The Policy Guide for DHRM Policy 2.35 lists prohibited conduct as including:

Subjecting others to communication or innuendoes of a sexual nature;

Behaving in a manner that displays a lack of regard for others and significantly distresses, disturbs, and/or offends others;

Making unwelcome or suggestive comments or jokes;

Posting or discussing sensitive, private information about someone to others;

On May 28, 2021, Grievant sent a message to Ms. C with the innuendo of a female engaged in oral sex. Grievant's behavior was offensive and not welcome.⁵ Grievant attended a meeting with the Warden and Ms. P. Ms. P answered a question about her family which Grievant should have recognized as private information about Ms. P. Grievant discussed Ms. P's private information with Ms. C without the permission of Ms. P. Grievant's actions were contrary to DHRM Policy 2.35.

Violation of DHRM Policy 2.35 can be a Group I, Group II, or Group III offense depending on the severity of the behavior. The Agency asserts that Grievant's behavior rises to the level of a Group III offense. Grievant held the position of HRO at the Facility. He was expected to have specialized knowledge of human resource policies including DHRM Policy 2.35. He was in a position to learn private information that he was expected to keep confidential. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

Grievant argued that the level of discipline was excessive. It is clear that the Agency could have corrected Grievant's behavior with a lesser level of disciplinary action. Once Grievant realized he had offended Ms. C and Ms. P, he was remorseful and apologized for his behavior. The level of discipline issued by the Agency, however, was consistent with the Standards of Conduct. Once the Agency presents evidence supporting

⁵ Although Grievant and Ms. C were friends who discussed personal matters, Ms. C's comments to Grievant were not so unusual as to imply she would welcome the picture he sent her.

a Group III Written Notice, the Agency has discretion to remove an employee even if transfer, demotion, and disciplinary pay reduction might be a better managerial decision.

Grievant denied saying “cut a bi-ch.” Ms. C’s testimony was credible. Grievant’s statement was not, in itself, sufficient to support a Group III Written Notice. If Grievant’s assertion were assumed to be true, there would remain sufficient evidence to support the issuance of a Group III Written Notice.

Ms. W and Major W are married. Grievant and Major W were involved in hiring an employee and disagreed on the best candidate. Grievant challenged Major W’s decision. Grievant alleged the disciplinary action was in retaliation for his challenging Major W’s hiring decision. No credible evidence was presented to support this assertion. The Hearing Officer does not believe Grievant received disciplinary action because of his interaction with Major W.

Grievant suggested the Agency’s disciplinary action was motivated in part by race. No credible evidence was presented to support this allegation. The Hearing Officer does not believe the Agency improperly considered Grievant’s race when taking disciplinary action.

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 ...”⁶ 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.

Grievant alleged the Agency inconsistently disciplined employees. Grievant argued the Warden received a Group III Written Notice which was reduced to a counseling memorandum for using the phrase “eye candy.” The evidence showed that the Warden was discussing a video presentation to inmates about receiving COVID19 vaccinations and the presentation needed to have sound effects as “eye candy” because the inmates “did not want to be there.” Grievant also presented evidence that the Warden received a Group II Written Notice for telling staff that videos they were required to watch had nothing to do with their jobs and that watching the videos may make them want to rinse their mouths out with a revolver. Although the Warden’s behavior was not appropriate, the Warden’s behavior was not sufficiently similar to Grievant’s behavior to show that the

⁶ Va. Code § 2.2-3005.

Agency inconsistently disciplined employees. In light of the standard set forth in the Rules, 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 removal 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 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]

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

[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