



# **COMMONWEALTH of VIRGINIA**

*Department of Human Resource Management*

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

## **DECISION OF HEARING OFFICER**

In re:

**Case Number: 11672**

Hearing Date: July 12, 2021  
Decision Issued: August 2, 2021

### **PROCEDURAL HISTORY**

On December 9, 2020, Grievant was issued a Group III Written Notice of disciplinary action with demotion, transfer and disciplinary pay reduction for using derogatory and offensive language and favoritism.

On January 6, 2021, 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 March 29, 2021, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 12, 2021, 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 a Captain at one of its facilities until he was demoted to Sergeant and moved to another Facility. He received a 15 percent disciplinary pay reduction.

Grievant began working for the Agency in 2009. He was promoted to Sergeant in June 2015 and received a ten percent pay increase. Grievant was promoted to Lieutenant in August 2017 with a ten percent pay increase. He became a Captain in February 2020. He sometimes worked as Watch Commander at the Facility. No evidence of prior active disciplinary action was introduced during the hearing. He received an overall rating of "Contributor" on his October 2019 annual performance evaluation.

Grievant received three Notices of Improvement Needed/Substandard Perform during his tenure. Two of those notices were issued by the Major.

In May 2020, Grievant complained to the Former Warden about the behavior of the Assistant Warden in a meeting. Grievant said the Assistant Warden's behavior "made the atmosphere incredibly hostile."<sup>1</sup>

Grievant filed a complaint against Captain W when Captain W drafted employees from his shift for coverage because Captain W was having a cookout.

On occasion, Grievant would refer to inmates as fat cows or wh--es. He made these comments to insult the inmates. He made these comments to some of his subordinates and not directly to the inmates. Sergeant H testified she heard Grievant make these comments "very often" and at least once per week and once per shift. Sergeant T told the Investigator, "I heard [Grievant] make a comment referring to an inmate as a 'cow'."

Grievant expressed to subordinates his displeasure with the Major and Assistant Warden. He referred to them as stupid and not knowing their jobs. While speaking to his subordinate female staff, Grievant referred to female employees including Captain W, the Major, and the Assistant Warden as "bi--hes, c--ts, and wh--es." The Lieutenant told the Investigator that Grievant's comments were sporadic but became more intense in the week of October 3, 2020 after Captain W drafted a few officers from Grievant's shift. By drafting officers from Grievant's shift and having them work on Captain W's shift, Captain W made it more difficult for Grievant to have an adequate number of employees on his shift. Sergeant T told the Investigator that Grievant "might have called someone a bi--h."

The Agency alleged but did not establish that Grievant "played favorites" for an impermissible reason. Grievant denied giving preference to employees for any reason other than competency.

## **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."<sup>2</sup>

Section IV(A)(7)(i) of Operating Procedure 135.1 sets forth Standards of Conduct for employee personal conduct. This section requires employees to:

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<sup>1</sup> Grievant Exhibit p. 48.

<sup>2</sup> See, Virginia Department of Corrections Operating Procedure 135.1.

Create and maintain a Healing Environment within the DOC by treating coworkers, supervisors, managers, subordinates, offenders, and other stakeholders with respect, courtesy, dignity, and professionalism; be open to communication and collaboration with colleagues in a manner that generates trust and teamwork.

Operating Procedure 135.3 governs Standard of Ethics and Conflict of Interest. Section II(D) provides:

Employees in DOC supervisory and managerial positions must be especially mindful of how their words and deeds might be perceived or might affect or influence others.

Operating Procedure 135.2 governs Rules for Conducting Employees Relationships with Offenders. Section II (I)(3) provides:

No profane, demeaning, indecent, or insulting, ... conduct (verbal, written or physical) will be tolerated, including but not limited to ... derogatory language ....

DHRM Policy 2.35 governs Civility in the Workplace. The purpose of this policy is:

It is the policy of the Commonwealth to foster a culture that demonstrates the principles of civility, diversity, equity, and inclusion. 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.

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.

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.

Non-Discriminatory Workplace Harassment is defined as:

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.

Violating DHRM Policy 2.35, Civility in the Workplace, is a Group III offense depending on the nature of the violation.<sup>3</sup> Grievant violated DHRM Policy 2.35 by referring to several co-workers including supervisors as "c—ts, bi--hes, and wh—es."<sup>4</sup> He used these terms in order to demean and insult his co-workers. Grievant's comments were unwelcome and showed hostility towards other staff. He offended several of his subordinate female employees. He undermined staff morale. 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. In lieu of removal, an agency may demote, transfer, and impose a disciplinary pay reduction.

There is no basis to modify the Agency's decision to transfer Grievant to another facility.

The Agency demoted Grievant from a Captain to a Sergeant. The Agency could have demoted Grievant to Lieutenant. Typically, the Hearing Officer will give difference to the Agency's decision regarding the level of demotion. The Hearing Officer will not do so in this case for several reasons. First, the Agency could have adequately corrected Grievant's behavior by demoting him to the position of Lieutenant. The Agency has not adequately explained why demoting Grievant to Sergeant was necessary. Second, the Agency did not remove Grievant's supervisory duties. If the Agency was concerned about Grievant's ability to supervisor, it could have demoted him to Corrections Officer which would not have had supervisory duties. Having Grievant retain supervisory duties as a Lieutenant would not adversely affect the Agency's operations. Third, Grievant filed a complaint about the Assistant Warden. The Assistant Warden issued the Written Notice. Grievant asserted his discipline was influenced by his complaints against the Assistant Warden and other staff. The Assistant Warden was an Agency employee at the time of the hearing but did not testify to explain her reasoning for Grievant's demotion to Sergeant instead of Lieutenant.<sup>5</sup> Fourth, Grievant had no prior active disciplinary action. His work performance was otherwise favorable. Fifth, based on similar disciplinary action issued by the Agency, it appears that the Agency usually demoted employees one level instead of two or more levels. The Agency has deviated from that custom but has not offered a sufficient basis to explain the need for a two level demotion. Sixth, Grievant's behavior did not involve a breach of security or otherwise undermine public safety. Accordingly, the Agency must restore Grievant to the rank of Lieutenant.

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<sup>3</sup> See, Virginia Department of Corrections Operating Procedure 135.1(V)(2)(s).

<sup>4</sup> Grievant also violated Operating Procedure 135.2 by referring to inmates as "fat cows."

<sup>5</sup> The Hearing Officer does not believe the Agency's decision to take disciplinary action was in retaliation for a protected activity. The level of demotion when compared to the nature of the behavior, however, raises the question of whether the Assistant Warden, in part, was acting out of a personal dislike of Grievant.

The Agency presented sufficient evidence to support its decision to impose a disciplinary pay reduction but not with respect to the percent of the reduction. The Agency's initial proposal was to reduce Grievant's pay by ten percent but according to the Warden, the Agency used a formula to determine the amount of the reduction. Accordingly, the Agency must recalculate Grievant's disciplinary pay reduction after he is restored to the position of Lieutenant.

Grievant denied calling inmates and other employees offensive names. The Agency, however, has presented sufficient evidence to support its basis for disciplinary action. The Agency conducted an investigation that revealed several employees confirming Grievant's behavior. Although the Lieutenant was no longer employed by the Agency at the time of the hearing, the Agency's investigator assessed the Lieutenant's credibility and found her assertions credible. The Agency's witnesses at the hearing were credible and sufficient to support the Agency's decision to issue disciplinary action.

### 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 ...."<sup>6</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 transfer is **upheld**. The Agency's decision to demote Grievant to Sergeant instead of Lieutenant is **reversed**. The Agency is **ordered** to return Grievant to the rank of Lieutenant effective the date of his demotion. The Agency is **ordered** to recalculate Grievant's disciplinary pay reduction and award back pay to reflect Grievant's demotion to Lieutenant instead of Sergeant.

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<sup>6</sup> *Va. Code § 2.2-3005.*

## 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

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*

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.