

**VIRGINIA: IN THE DEPARTMENT OF HUMAN RESOURCE MANAGEMENT,
OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

IN RE: DHRM CASE NO.: 11685

DECISION OF HEARING OFFICER

The grievant challenges the issuance of a Group III Written Notice to him and his termination from employment on March 3, 2021. The disciplinary action charges the grievant with bullying and harassment. For the reasons stated below, I uphold the issuance of a disciplinary action to the grievant and his termination from employment.

I. PROCEDURAL BACKGROUND

The grievant submitted his Form A on March 5 challenging the disciplinary action. The Department of Human Resource Management appointed me as Hearing Officer on April 6. During a prehearing conference-call the agency requested an in-person hearing. The grievant did not object to that. By agreement, the hearing was scheduled for June 24. Shortly before that date the grievant requested a continuance of the matter to further explore retaining counsel. Without objection for the agency, the matter was rescheduled for August 27. An Amended Prehearing Order was issued setting a deadline for the exchange of a list of witnesses and exhibits. The agency submitted seven exhibits prior to the deadline. Prior to the hearing date but after the deadline set in the Prehearing Order, the agency proffered two additional exhibits. The grievant objected to those exhibits and I disallowed them as being untimely.

The hearing was scheduled to commence at 9:30 a.m. It was delayed due to my having received erroneous directions from a popular online mapping service. The hearing commenced at approximately 10:15 a.m. Approximately one hour into the hearing the grievant announced that

he wished to leave the hearing. I explained to him the options of withdrawing the grievance or allowing the hearing to proceed in his absence. He asked that the hearing proceed and that I issue a ruling. He then departed and the hearing resumed.

II. APPEARANCES

The agency was represented by the facility director. Another staff person was present throughout the hearing as a note-taker without objection from the grievant. The agency presented seven witnesses. It attempted to contact by phone an eighth individual to testify but multiple efforts were unsuccessful. I accepted into evidence the seven exhibits proffered by the agency within the deadline set by the prehearing order.

The grievant represented himself. Prior to his early departure from the hearing, he presented no witnesses and no exhibits. He did not testify.

III. ISSUE

Whether the agency was correct in issuing the grievant the Group III Written Notice and terminating him from employment on March 3, 2021?

IV. FINDINGS OF FACTS

On March 2, 2021, the grievant had been an employee of the Department of Veterans Services in a custodial position for several years. On that date he was serving as a floor technician. On March 2 he criticized the work being done by a co-worker, saying that he was leaving footprints while in the process of dry stripping the floor. This co-worker had been trained initially by the grievant. By a written statement dated March 2, 2021, the co-worker complained that he felt like he was the subject of daily bullying by the grievant. The co-worker also complained of a prior statement by the grievant, referencing the prior employment by the co-worker in the county school

system and the grievant having applied for a position in that system. The grievant stated that “there was a black lady and a fag” employed in the school system that made the position less attractive to him. This co-worker is a homosexual.

The grievant had accumulated three prior Group I offenses in the eighteen months immediately preceding these events. All the disciplinary actions were active at the time this most recent action was given. Two of the prior notices were for excessive absenteeism. He had received a Group I Written Notice on December 23, 2020, for a violation of the Civility in the Workplace policy (DHRM Policy 2.35). He had also received multiple prior oral counselings regarding inappropriate behavior in the workplace.

V. ANALYSIS

The Commonwealth of Virginia provides certain protections to employees in Chapter 30 of Title 2.2 of the Code of Virginia. Among these protections is the right to grieve formal disciplinary actions. The Department of Employment Dispute Resolution has developed a Grievance Procedural 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 forward with the evidence. It has the burden of proving, by a 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 Resolutions, Rules for Conducting Grievances. These Rules state that in a disciplinary grievance (such as this matter) a hearing officer shall review facts de novo and determine:

- I. Whether the employee engaged in the behavior described in the Written Notice.
- II. Whether the behavior constituted misconduct.
- III. Whether the discipline was consistent with law and policy; and
- IV. 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 statements made by the grievant as part of this grievance process are found in the agency exhibits. They are the only evidence tending to contradict the allegations of bullying by the co-worker. The grievant's statements fall short of a blanket denial. Although the co-worker did not testify, I give greater weight to Exhibit 1-3 than I do to the written statements of the grievant. No reason or evidence has been given to cause me to believe that the co-worker had any bias against the grievant that would have caused him to make false accusations. Therefore, I find that the grievant committed the acts as alleged.

Policy 2.35 defines bullying in very broad terms. It includes behavior that is intended "to denigrate or marginalize the targeted person. The behavior may involve a real or perceived power imbalance between the aggressor and the targeted person. The behavior is typically severe or pervasive and persistent, creating a hostile work environment." This language describes the conduct alleged by the co-worker. The allegation is that it had been occurring over a lengthy amount of time. It was clearly unwanted.

The evidence presented by the agency may have been substantially stronger had the co-worker made himself available to testify by phone. He is no longer employed by the agency, and I cannot use any adverse inferences as to his failing to testify. Based on the record before me, I

find that the evidence is sufficient to support the issuance of a formal written discipline to the grievant.

Under DHRM Policy 1.60 (the “Standards of Conduct”), Group III violations are stated to be those of such a serious nature that a first offense should result in termination from employment. The scant evidence in the record does not support that level of discipline. I find that the more appropriate level is that of a Group I Written Notice. Those offenses are less severe in nature but still require formal correction. I will reduce the March 3, 2021 Written Notice to that of a Group I Written Notice.

As stated above, the grievant had three prior active Group I Written Notices. With the addition of this notice, the termination of the grievant from employment can still be upheld. I choose to do so.

I am not finding that the grievant is guilty of discriminatory harassment under Policy 2.35. The behavior exhibited by the grievant toward the co-worker has not been shown to my satisfaction to have been because of any of the prohibited considerations set forth in that policy. In particular, the record does not show that the inappropriate language used by the grievant in the conversation with the co-worker about the county school system was made with the knowledge of the sexual orientation of the co-worker.

No argument has been made nor evidence presented, that the decisions of the agency are otherwise inconsistent with established law and policy. No evidence has been presented that would support a further mitigation of the offense and discipline.

VI. DECISION

For the reasons stated above, I reduce the Group III Written Notice issued the grievant on March 3, 2021 to a Group I Written Notice. I uphold his termination from employment.

VII. APPEAL RIGHTS

You may file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

1. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by fax to (804) 371-7401, or e-mail to EDR.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. 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 may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must provide a copy of all your appeals to the other party, EDR, 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.

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.

RENDERED this September 14, 2021.

/s/Thomas P. Walk, Hearing Officer