



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11692

Hearing Date: September 7, 2021
Decision Issued: September 27, 2021

PROCEDURAL HISTORY

On March 30, 2021, Grievant was issued a Group III Written Notice of disciplinary action with removal for creating an unauthorized video.

On April 12, 2021, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On May 3, 2021, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 7, 2021, a hearing was held by remote conference.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
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 Intelligence Officer at one of its facilities. He began working for the Agency in 2012. No evidence of prior active disciplinary action was introduced during the hearing.

The Agency has a video surveillance system at the Facility. This system uses cameras located throughout the Facility's grounds to observe and record movement on the Facility property. It does not record sound. Access to the video surveillance system was restricted based on job function.

Grievant was responsible for reviewing video so Facility managers could determine who should be held accountable when employees or inmates made mistakes or engaged in inappropriate behavior.

Grievant attended active shooter training in another locality in June 2018. None of his duties involved creating active shooter training videos.

The Counselor worked at the Facility prior to her retirement. She was approximately 75 years old woman with "impaired mobility" who walked with a cane. On February 26, 2021, the Counselor left the Facility Building and entered the parking lot to

leave work. She fell flat on the ground several times which was recorded by the Agency's surveillance system.

Mr. C was the Recreation Supervisor at the Facility where Grievant worked. He had no supervisory authority over Grievant. Mr. C was not involved in creating training programs.

Grievant and Mr. C watched the surveillance video showing the Counselor falling repeatedly. Mr. C said that it looked like someone had been shot because how the Counselor fell to the ground. Mr. C told Grievant it would be funny to have a voice over describing the video. Grievant did not report to Mr. C.

The Unit had a B-device which intelligence officers could use to create video recordings.

Grievant began playing on his Agency computer the surveillance video recording of the Counselor falling. He used the B-device to record what was playing on the computer screen. Grievant's computer monitor showed three boxes with videos from different positions. One box showed the inside of the building with an exit door. A second box showed the front entry door from outside the building. The third box showed the parking lot in front of the front entry doorway. As Grievant watched the surveillance video play, he began to narrate what was happening and pretend to speak to a shooter.

Grievant referred to the Counselor as the "suspect." Grievant said he had a suspect moving towards the door from the inside. He said confidential informants had given him the information. As the Counselor pushed the front entry door open to exit the building, Grievant said the suspect was breaching the door. He then asked, "Shooter do you have the option to shoot targets in sight? Pull the trigger!" Grievant then made the sound of a gunshot at the moment the Counselor fell forward landing flat on the parking lot asphalt. Grievant said, "Suspect down. Suspect is completely down." The Counselor began moving while on the ground. Grievant said, "Suspect is still moving, shooter. Do you still have occupied sites on suspect?" Grievant said, "That's a confirmation; we do have sites on that. Hold tight. We will wait for any perpetrators to run out the door; take shots at them also." Grievant said, "Suspect is moving. Suspect seems like she is reaching for something inside her coat. Shooter, see a weapon; shoot at discretion. Confirmation. I see a weapon." At this point, the Counselor was finally successful in standing up. Grievant says, "Ok, take a shot. Confirmation. Shots fired." Grievant makes a gunshot sound as the Counselor falls flat on the asphalt again. Grievant says, "Shot has been hit, target is down."

Mr. C asked Grievant to send him a copy of the B-device video recording. Grievant used his State email account to send the B-device recording to Mr. C's State email account. Mr. C watched the video. Counselor M came to Mr. C's office and watched the video. Counselor M knew the identity of the woman in the video. Mr. C sent the B-device video from his State email account to his personal email account. While at his home, Mr. C showed his Wife the recording. The Wife did not know the person in the video. The

Wife asked Mr. C if the person in the video was actually shot. Mr. C said “No” and that the woman in the video was okay. Mr. C explained how the video came about.

The Warden described the video as making a “mockery” of another person having an accidental fall.

Agency training videos are authorized by Regional and Central Office managers and managed through the training department. No one requested or authorized Grievant to create an “active shooter” training video.

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.”¹

DHRM Policy 2.35 governs Civility in the Workplace. 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.

Bullying is defined as:

Disrespectful, intimidating, aggressive and unwanted behavior toward a person that is intended to force the person to do what one wants, or 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 typically is severe or pervasive and persistent, creating a hostile work environment. Behaviors may be discriminatory if they are predicated on the targeted person’s protected class (e.g., using prejudicial stereotyping or references based on the targeted person’s characteristics or affiliation with a group, class, or category to which that person belongs, or targeting people because they are in a protected class).

¹ See, Virginia Department of Corrections Operating Procedure 135.1.

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.

"Violation of DHRM Policy 2.35" is a Group III offense.² Grievant created a video describing the Counselor as a "suspect" and "target." Grievant exploited the Counselor's misfortune for his own purpose. Grievant marginalized, denigrated, and showed hostility towards the Counselor. Grievant engaged in bullying and non-discriminatory workplace harassment. His behavior rose to the level of a Group III offense because he portrayed the Counselor as someone being shot. It is not necessary for the Agency to show that the Counselor was aware of Grievant's behavior. 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 he was trying to illustrate an active shooter scenario based on his prior training.³ The Agency suggested Grievant was trying to "be funny". If the Hearing Officer assumes for the sake of argument that Grievant intended to create an active shooter training video, the outcome of this case does not change. Grievant had no responsibility for creating training videos. His attempt to create a training video resulted in his bullying and workplace harassment thereby justifying the Agency's decision to issue disciplinary action.

Grievant argued he was not properly trained regarding use of the video system. Grievant has not established what training he would have received to enable him to realize he should not have created a training video exploiting the hardship of another employee.

Grievant argued that the level of disciplinary action was excessive. Although the Agency could have taken lesser disciplinary action, its decision to issue a Group III Written Notice with removal is supported by the Standards of Conduct.

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"⁴ 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

² See, Operating Procedure 135.1.

³ It is unclear how Grievant's video would train anyone to respond to an active shooter situation.

⁴ *Va. Code § 2.2-3005.*

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 argued the Agency took inconsistent disciplinary action. Grievant presented examples of employees whose behavior could have risen to Group III Written Notices with removal but those employees were not removed from employment. None of those employees involved behavior similar to Grievant's behavior. In order to establish the inconsistent application of disciplinary action, an employee must show similarly situated employees were treated differently. Mr. C could have been disciplined for several reasons including sending the video from his State email to his personal email address. Mr. C, however, did not create or narrate the video.⁵ His behavior was not similar to Grievant's behavior. There is no basis for the Hearing Officer to believe that the Agency singled-out Grievant for disciplinary action. 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.

⁵ Grievant claimed he was creating the training video, in part, to help train Mr. C for an active shooter scenario.

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.