



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 12084

Hearing Date: April 9, 2024

Decision Issued: June 4, 2024

PROCEDURAL HISTORY

On January 26, 2024, Grievant was issued a Group III Written Notice of disciplinary action with removal for lack of civility in the workplace.

On February 2, 2024, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On February 20, 2024, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 9, 2024, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's 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 Virginia Department of Transportation employed Grievant as a Transportation Operations Manager II at one of its locations. He had been employed by the Agency for over 24 years. Grievant received an overall rating of "Met Expectations" on his 2023 annual performance evaluation. A manager wrote, "Thank you [Grievant] for being the leader of the Area Headquarters. You have built quite a crew at [location]. Continue to develop your folks and prepare them for advancement."¹ No evidence of prior active disciplinary action was introduced during the hearing.

Grievant was responsible for supervising staff at the Agency's location. Mr. G and approximately seven other employees reported to Mr. H who reported to Grievant. Mr. G was liked by some staff but unpopular with other staff. Mr. G had been working with Grievant since August 2019.

Grievant instructed Mr. G and Mr. T to attach a sliding keyboard tray on a computer desk used by crew members. Mr. G did not understand Grievant's instructions to be an instruction for him to complete the task. The project was not completed. On December 14, 2023, Grievant entered the lower shop building where Mr. G, Mr. T, Mr. W, and Mr. B were located. Grievant asked, "Why haven't you fixed the desk yet?" Mr. G replied, "You didn't tell me to do it today." Grievant did not agree with Mr. G's

¹ Grievant Exhibit p. 7.

statement. Grievant walked to the other side of the shop and approached a 6 foot tall ladder. He pushed the ladder over onto a concrete floor causing a loud and startling sound. Everyone became silent. Grievant said, "I have your attention now?" Mr. T walked to the ladder and picked it up. Mr. T said he would complete the task.

At approximately 3:15 p.m. on December 14, 2023, Grievant and several employees were in the meeting room. Mr. W said to Mr. G, "Hey you know that man told you to do that today." Grievant thanked Mr. T for completing the task. Mr. G said, "I wasn't going to do it anyway. That wasn't my idea." Grievant told Mr. G, "you need to stop running your mouth and shut the f—k up!" Seven other employees heard Grievant's statement to Mr. G. Grievant's behavior made Mr. G angry. Mr. G looked at his phone while the other employees laughed.

Grievant knew he had angered Mr. G. At approximately 3:30 p.m. on December 14, 2023, as Mr. G was leaving the workplace, Grievant loudly and repeatedly told Mr. G, "Love you [Mr. G's last name]." Mr. G was angry and refused to respond. Grievant said "love you" to several other employees as well.

Grievant sent text messages to Mr. G to apologize. Grievant called Mr. G but Mr. G did not answer. Mr. W also called Mr. G.

On December 15, 2023, at approximately 7 a.m., Grievant held a staff meeting. Grievant realized what he had said to Mr. G was wrong. Mr. W asked Mr. G, "Are you okay. I tried calling you and you didn't answer." Mr. G said, "I did not want to talk to y'all mother f—kers." Grievant responded, "That's enough. Y'all be quite." Grievant apologized to Mr. G in front of the crew.

Approximately 15 minutes after the crew left the shop with their assignments, Mr. W walked back and told Grievant that he was not going to ride with the guys because he got into it with Mr. T. Mr. T accused Mr. W of taking up for Grievant. Mr. W was angry and said he was not taking up for Grievant and wanted to go home. Grievant and Mr. H were able to calm down Mr. W. Grievant said he would get it all straight.

Grievant called for Mr. T to ride with Grievant. Grievant and Mr. T went for a ride in Grievant's truck. Mr. T told Grievant that Mr. W and Mr. G were having problems and that Grievant should talk to them both.

When Grievant returned from the ride, Grievant called for Mr. G to go to the shop with Grievant. Mr. W also went to the shop at Grievant's request.² Grievant spoke with Mr. H. Grievant believed he told Mr. H to come to the shop, but Mr. H believed Grievant said to "hold tight" and remain in the office. Grievant wanted to resolve what he believed

² The Agency alleged it was improper for Grievant to include Mr. W in the meeting with Mr. G. The evidence showed that Grievant's decision to include was appropriate because Grievant believed there was a conflict between Mr. W and Mr. G and Grievant wanted to address that conflict.

was a conflict between Mr. G and Mr. W. Grievant regretted how he had treated Mr. G and wanted to apologize to Mr. G.

Mr. G recorded the conversation without anyone else knowing.

Grievant told Mr. G:

First of all, [Mr. G], like I said, I apologize for yesterday. If I pissed you off, I pissed you off. I went too far. You couldn't handle it. I'm sorry. I didn't mean to say you couldn't handle it, but I shouldn't have said what I said. I'm your superintendent, not your buddy like that. I shouldn't have said what I said.³ ***

But you and I -- [Mr. G], I'm going to tell you like this to your face, man to man, eye to eye: I'm sorry. It won't happen again.⁴

Mr. G replied to Grievant:

And you can say that, I don't accept it, man⁵ ***

Grievant told Mr. G:

If I piss you off -- I knew you -- I knew you was pissed off at me, and you know what? I kept f--king with you because I could, because you don't say nothing.⁶ ***

Grievant told Mr. G:

And I -- I play a lot. That's my biggest problem. I'm a playful person.⁷ ***

Now, I'm not going to say that I'm not going to slip and cuss, but saying I'll punch you in the face and call you a bi-ch, I'm not going to do that no more.⁸

After approximately 30 minutes, Grievant called Mr. H and told Mr. H, "I thought I told you to come down here." Mr. H apologized and said he thought Grievant said to

³ Agency Exhibit p. 56.

⁴ Agency Exhibit p. 64.

⁵ Agency Exhibit p. 64.

⁶ Agency Exhibit p. 72.

⁷ Agency Exhibit p. 78.

⁸ Agency Exhibit p. 83.

hold tight. Grievant said for Mr. H to come to Grievant's location. Mr. H went to the shop and joined Grievant, Mr. W, and Mr. G. When Mr. H arrived at the shop, he observed that Mr. G was "shaken."

The conversation became heated and Grievant approached Mr. G and put his finger near Mr. G's face.

Mr. G told Grievant:

I'm going to tell you what you're not going to do is put that finger in my face.⁹ *** Hold on. No. Hold on. You ain't going to put your finger in my face.¹⁰

Grievant told Mr. G:

I'm going to do the best of my ability. Now, that's the best I can tell you, [Mr. G]. All I can give you is to try to give you what you deserve. That's respect. If I disrespect you, right up front, you tell me right to my face. Don't even hesitate. (Unintelligible) I'm sorry if I did that, because you deserve better.¹¹ ***

Grievant told Mr. G:

Now, when I say I'm sorry, I'm telling you I'm sorry and I apologize. Now, if you accept it, that's on you. If you don't, that's -- that's on you. I can't make nobody accept nothing. Only thing I can get you to believe me, if I continue to do what I'm supposed to do.¹²

The meeting ended. Mr. H drove Mr. G back to the office. Mr. G said he did not feel safe here and he was worried for his job.

During a two year period, Grievant called Mr. G a "bi-ch" on several occasions in front of other staff.¹³ Grievant also told Mr. G, "I will bust you in the mouth." Grievant believed he was "playing."

⁹ Agency Exhibit p. 86.

¹⁰ Agency Exhibit p 87.

¹¹ Agency Exhibit p. 91.

¹² Agency Exhibit p. 121.

¹³ According to one witness, Grievant referred to Mr. G as "my bi-ch" or said "get my little bi-ch to get this done" when Grievant wanted Mr. G to do something.

Grievant's behavior affected Mr. G by making him mad, causing him to worry, and not want to come to work.

Grievant observed an employee sleeping. Grievant asked that employee's supervisor to send him an email. The supervisor did not send Grievant an email so Grievant did not immediately report the matter.

Employees asked Grievant if they could use scrap material from a sign rack that was to be thrown away to make cornhole boards.¹⁴ Grievant gave them permission to do so. Grievant understood that the employees would use the boards during lunch to practice for the Residency cornhole tournament. Grievant played cornhole one time at approximately 3:15 p.m. as he was about to leave for the day.

For several years, Grievant had given gift certificates to his employees and treated them to lunch.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "generally have a minor impact on agency business operations but still require intervention."¹⁵ Group II offenses include, "acts of misconduct, violations of policy, or performance of a more serious nature that significantly impact the agency's services and operations." Group III offenses include, "acts of misconduct, violations of policy, or performance that is of a most serious nature and significantly impacts agency operations."

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

¹⁴ Grievant testified that he obtained permission to have the boards made.

¹⁵ DHRM Policy 1.60, Attachment A.

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).

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.

Any employee who engages in conduct prohibited under DHRM Policy 2.35 shall be subject to corrective action, up to and including termination, under Policy 1.60, Standards of Conduct.

Grievant displayed a lack of civility by bullying Mr. G and engaging in non-discriminatory workplace harassment directed at Mr. G. Grievant made many unwelcomed denigrating statements to Mr. G and in front of other employees. Grievant called Mr. G a "bi-ch" and said he would punch Mr. G in the mouth. Grievant pushed over a ladder and told Mr. G to "shut the f---k up." Grievant placed his finger near Mr. G's face while arguing with Mr. G. Grievant targeted Mr. G and abused his supervisory position. Grievant admitted, "I kept f--king with you because I could, because you don't say nothing." Grievant undermined Mr. G's morale and self-worth. Grievant displayed a pattern of behavior sufficient to rise to the level of a Group III offense. 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, the Agency's decision to remove Grievant must be upheld.

Grievant argued that he was "playing." Although Grievant may not have always intended to harm Mr. G, the impact of his words was severe. The impact on Mr. G was sufficient to support disciplinary action.

Grievant argued that Grievant's behavior did not justify removal. For example, the Agency could have charged Grievant with disruptive behavior or use of obscenities as a Group I offense, according to Grievant. Given the pattern and severity of Grievant's behavior, the Agency has presented sufficient evidence to support its conclusion that Grievant should be removed from employment.

Grievant argued the disciplinary action was motivated in part as a result of his participation on a hiring panel. The evidence did not support this conclusion.

The Agency alleged Grievant knew of an employee sleeping and did not take appropriate disciplinary action. The evidence showed Grievant sought to document the employee sleeping by asking another employee for an email describing the observed behavior. It was appropriate for Grievant to delay taking action until the matter was fully documented. His behavior did not form a basis for disciplinary action.

The Agency alleged Grievant assigned staff responsibility to build cornhole boards using State materials, allowed them to play on State time, and he played the game as well. The evidence showed that staff requested to build cornhole boards to play in an agency tournament and Grievant allowed them to do so with discarded scrap materials. Grievant played only once at the end of his shift. Grievant's behavior does not form a basis for disciplinary action.

The Agency failed to present sufficient evidence to support its allegation that Grievant failed to timely address open work orders.

Although the Agency did not submit sufficient evidence to support its allegations regarding an employee sleeping, cornhole, and untimely work orders, there remains sufficient evidence to support the Group III Written Notice.

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"¹⁶ 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 recognized that his treatment of Mr. G was inappropriate and that he had angered Mr. G. Grievant apologized to Mr. G in front of other employees and promised he would not treat Mr. G improperly in the future. By recognizing his behavior was inappropriate, Grievant was in a position to correct his behavior and stop mistreating Mr. G in the future. The Agency was aware of this reason to mitigate the disciplinary action, but nevertheless chose to remove Grievant from employment despite his length of service and otherwise accomplished work performance. The Agency could have suspended and retrained Grievant to correct his behavior. When an

¹⁶ Va. Code § 2.2-3005.

agency fails to mitigate disciplinary action, the Hearing Officer's authority to mitigate arises only when the agency's disciplinary action exceeds the limits of reasonableness. The Agency's disciplinary action in this case is consistent with the Standards of Conduct and does not exceed the limits of reasonableness. 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