

DEPARTMENT OF HUMAN RESOURCE MANAGEMENT  
DIVISION OF HEARINGS  
DECISION OF HEARING OFFICER  
In Re: Case No: 12041

Hearing Date: January 17, 2024  
Decision Issued: January 24, 2024

**PROCEDURAL HISTORY**

On November 8, 2023, Grievant was issued two Group III Written Notices and was terminated on November 8, 2023.<sup>1</sup> On November 13, 2023, Grievant filed a grievance challenging the Agency's actions.<sup>2</sup> The grievance was assigned to this Hearing Officer on November 27, 2023. A hearing was held on January 17, 2024.

**APPEARANCES**

Agency Advocate  
Agency Representative  
Grievant Counsel  
Grievant  
Witnesses

**ISSUES**

Did Grievant fail to follow Agency policy, was his behavior disruptive, did he violate Policy 2.35, Civility in the Workplace, General Order ADM 11.01, or General Order ADM 11.03?

**AUTHORITY OF HEARING OFFICER**

Code Section 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code Section 2.2-3005.1 provides that the Hearing Officer may order appropriate remedies including alteration of the Agency's disciplinary action. By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.<sup>3</sup> Implicit in the Hearing Officer's statutory authority is the ability to independently determine whether the employee's alleged conduct, if otherwise properly before the Hearing Officer, justified termination. The Court of Appeals of Virginia in *Tatum v. VA Dept of Agriculture & Consumer Servs*, 41VA. App. 110, 123, 582 S.E. 2d 452, 458 (2003) held in part as follows:

While the Hearing Officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy...the Hearing Officer reviews the facts de novo...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action. Thus, the Hearing Officer may make a decision as to the appropriate sanction, independent of the Agency's decision.

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<sup>1</sup> Agency Exhibit 1, Pages 231-238

<sup>2</sup> Agency Exhibit 1, Page 239

<sup>3</sup> See Va. Code § 2.2-3004(B)

## **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 proof for establishing any affirmative defenses to discipline such as retaliation, discrimination, hostile work environment and others, and any evidence of mitigating circumstances related to discipline. A preponderance of the evidence is sometimes characterized as requiring that facts to be established that more probably than not occurred, or that they were more likely than not to have happened.<sup>4</sup> However, proof must go beyond conjecture.<sup>5</sup> In other words, there must be more than a possibility or a mere speculation.<sup>6</sup>

## **FINDINGS OF FACT**

After reviewing the evidence and observing the demeanor of each witness, I make the following findings of fact: the Agency submitted a notebook containing 242 pages. The Grievant had no objection to the contents of this notebook and it was accepted in its entirety as Agency Exhibit 1. Grievant submitted a notebook containing 42 pages. The Agency had no objection to the contents of this notebook, and it was accepted in its entirety as Grievant Exhibit 1. Seven witnesses testified on behalf of the Agency. The Grievant did not call any witnesses.

Several Virginia Department of State Police policies are relevant to this matter.

**General Order ADM 11.01, Civility in the Workplace**, at **Purpose** states in part as follows: *To ensure the Department provides a welcoming, safe, and civil workplace for its employees... and to increase awareness of all employees' responsibility to conduct themselves in a manner that cultivates mutual respect, inclusion, and a healthy work environment.*<sup>87</sup>

**General Order ADM 11.01 (3)(c)(2)** states in part as follows: **Sexual Harassment** – *Any unwelcome sexual advance...or verbal, written...conduct of a sexual nature by...co-workers...*<sup>98</sup> **(Emphasis added)**

**General Order ADM 11.01 (3)(c)(4)** states in part as follows: **Hostile work environment** – *A form of sexual harassment when a victim is subjected to **unwelcome and severe** or pervasive **repeated sexual** comments, **innuendos**...or other conduct of a sexual nature that **creates an intimidating or offensive** place for the employees to work.*<sup>9</sup> **(Emphasis added)**

**General Order ADM 11.01 (6)(a)** states in part as follows: **Engaging in Prohibited Conduct** - *Any employee who engages in conduct prohibited under this policy... shall be subject to corrective action, up to and including termination, under ADM 12.02, Disciplinary Measures.*<sup>10</sup>

**General Order ADM 11.03 (3)(a)** states in part as follows: **Sexual Misconduct**: *Any action, whereby an employee takes advantage of his...position to engage in...prohibited or otherwise inappropriate sexual conduct. Sexual misconduct may include...speech...*<sup>11</sup>

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<sup>4</sup> *Ross Laboratories v. Barbour*, 13 Va. App. 373, 377, 412 S.E. 2d 205, 208 1991

<sup>5</sup> *Southall, Adm'r v. Reams, Inc.*, 198 Va. 545, 95 S.E. 2d 145 (1956)

<sup>6</sup> *Humphries v. N.N.S.B., Etc., Co.*, 183 Va. 466, 32 S.E. 2d 689 (1945)

<sup>7</sup> Agency Exhibit 1, Page 140

<sup>8</sup> Agency Exhibit 1, Page 141

<sup>9</sup> Agency Exhibit 1, Page 141

<sup>10</sup> Agency Exhibit 1, Page 144

<sup>11</sup> Agency Exhibit 1, Page 71

**General Order ADM 12.02 (6)(c) Group III Offense** states in part as follows: *Offenses in this category include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination. This level is appropriate for offenses that, for example... constitute unethical conduct... disruption of the workplace or other serious violations of policies procedures or laws.*<sup>12</sup>

**General Order ADM 12.02 (7) Mitigating Circumstances** states in part as follows: When determining the level of corrective action, supervisors shall consider if there are any mitigating circumstances... based on an employee's otherwise **satisfactory** work performance.<sup>13</sup> **(Emphasis added)**

The actions by the Grievant that lead to this matter took place over the time frame of 10:00 pm, May 23 to the early morning hours of May 27, 2023. Grievant, a sworn officer of the Agency, was being trained in the procedures of being a dispatcher. It was his first shift in dispatch.<sup>14</sup> In the presence of others, Grievant asked AB if she was a part of the BDSM (bondage, discipline, dominance, submission, sadism) community. AB testified and stated that she become bright red in the face and stated several times "I cannot believe you said that" followed by "Why would you say that?" AB testified that Grievant replied "I got a vibe." Grievant reported to this work location at 10:00 pm, May 23, 2023. This appears to be the only verbal comment made to AB that was of a sexual nature. I found AB to be a credible witness.

On May 24, at 10:31 pm, AB received a text message from an unknown number.<sup>15</sup> AB responded with a text asking, "Who is this?" At 10:33 pm, Grievant replied with a picture of himself and stated that he was bored. Texts were exchanged and at 11:23 pm, Grievant sent a text which contained a meme that was sexual in nature.<sup>16</sup> He sent 4 more memes with that same time stamp. AB responded with a text at 11:28 pm stating "Lmfao," internet slang for laughing my f\*\*king ass off.<sup>17</sup>

On May 25, at 4:22 pm, Grievant sent 3 memes to AB, 2 of which had sexual connotations.<sup>18</sup> At 6:59 pm, he sent another meme to AB which was explicitly sexual in nature.<sup>19</sup>

On May 26, at 2:33 am, Grievant sent another meme with sexual connotations to AB. Commencing at 11:22 pm and ending at 11:28 pm, May 26, Grievant sent AB 26 memes, 15 of which had sexual connotations and several that were vile.<sup>20</sup>

On May 27, at 12:59, Grievant send a sexually graphic meme to AB.<sup>21</sup> At 12:59 am, May 27, Grievant sent a final meme to AB.<sup>22</sup> Accordingly, this matter commenced with an oral statement after 10:00 pm, May 23 and ended with the last meme at 12:59 am, May 27.

During the 5:00 pm to 5:00 am shift of May 25-26, CD, a sworn employee of the Agency, noticed a change in character in AB. He asked what was wrong and AB stated that she was uncomfortable with the memes that Grievant was sending and she showed some of them to CD. He told her she should report this and CD notified XY, Grievant's supervisor. XY talked with AB and then notified MN, who then spoke with AB on May 26. After that conversation, MN removed Grievant from dispatch on May 26.<sup>23</sup>

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<sup>12</sup> Agency Exhibit 1, Page 164

<sup>13</sup> Agency Exhibit 1, Page 165

<sup>14</sup> Agency Exhibit 1, Page 1

<sup>15</sup> Agency Exhibit 1, Pages 2, 19

<sup>16</sup> Agency Exhibit 1, Page 23

<sup>17</sup> Agency Exhibit 1, Page 26

<sup>18</sup> Agency Exhibit 1, Pages 28,29

<sup>19</sup> Agency Exhibit 1, Page 30

<sup>20</sup> Agency Exhibit 1, Pages 36,37,38,39,46,47,49,51,52,53,55,56

<sup>21</sup> Agency Exhibit 1, Page 62

<sup>22</sup> Agency Exhibit 1, Page 63

<sup>23</sup> Agency Exhibit 1, Page 2,9

An Internal Affairs (IA) investigation was commenced on May 28.<sup>24</sup> It was completed on June 29.<sup>25</sup> During the course of the investigation, AB was questioned. She stated that she knew *[Grievant] strictly through work. She chatted with him occasionally through CAD, just like with any other trooper. In the last three years, prior to [Grievant] coming to the dispatch center, she had approximately an hour of face-to-face time with [Grievant]. She would not classify him as a friend because they don't know each other on a personal level.*<sup>26</sup> AB also told the investigator that she feared retaliation from Grievant because of her complaint. AB's testimony before me supported what she related to IA.

On June 22, IA spoke with an Agency employee (E) who was present on May 23 when the verbal comment was made to AB by Grievant. [E] did not remember the exact wording of the comment made by Grievant but told the IA ... *it was about the sexual things that AB was into. [E] stated there was a conversation going on which had no sexual nature. Grievant simply threw it out there as a statement. [E] does not know what [Grievant] was trying to do. [E] does not know if he was trying to be intentionally harmful or joking. [E] stated I mean, obviously that stuff should not be said at the workplace. Following [Grievant's] comment, it was obvious to [E] that AB was very uncomfortable. [E] said Grievant would not stop laughing and AB was getting red in the face, while Grievant kept laughing, and it was all very uncomfortable. AB tried to ignore it.*<sup>27</sup>

On May 8, IA interviewed Grievant. Regarding the verbal comment, *[Grievant] stated: there was an "office banter conversation" going on in the room. [Grievant] said 'I do recall it occurred, but I don't recall the exact wording, which is unfortunate.'*<sup>28</sup> IA reported that Grievant was unable to recall any specifics about the conversation going on in the room or as to exactly what he said. He only remembered that his comment was sexual in nature pertaining to AB's sexual preferences. When asked if he noticed any change in AB's appearance or behavior, Grievant stated: ***I mean, aside from her initial reaction, no. Grievant advised, the conversation seized after his initial comment and normal operations and other activities resumed.***<sup>29</sup> **(Emphasis added)**

Regarding the memes, Grievant confirmed that he sent them to AB and because he *"did not get any negative comment or vibe from AB, he did not think there was a problem."*<sup>30</sup> Grievant takes a position that seems to be that no matter what is said or sent, unless the recipient complains, then all is well.

On June 26, IA interviewed CD. Grievant showed CD some sexual memes on his phone and CD did not think it was appropriate as this was the first time he had ever met Grievant. CD ignored Grievant. Regarding the verbal comment made to AB, CD stated *"In my experience, when a woman gets up and just makes a quick exit, when the room gets quiet all of a sudden, something is wrong. This happened after Grievant's comments."*<sup>31</sup> I found the testimony of CD to be credible.

In his written statement, on June 28, Grievant confirmed he made the oral statement and that he sent the memes. He admitted both the statement and the memes were of a sexual nature. While admitting to the allegations made in this matter, he stated: ***"With a constant changing work culture and having to adapt to so many personalities, not to mention the nature of Law Enforcement as a whole, it's unfortunate that dark humor is a coping skill to deal with some of the traumas that are experienced."***<sup>32</sup> **(Emphasis added)**

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<sup>24</sup> Agency Exhibit 1, Page 14

<sup>25</sup> Agency Exhibit 1, Page 1

<sup>26</sup> Agency Exhibit 1, Page 3

<sup>27</sup> Agency Exhibit 1, Page 4

<sup>28</sup> Agency Exhibit 1, Page 5

<sup>29</sup> Agency Exhibit 1, Page 6

<sup>30</sup> Agency Exhibit 1, Page 7

<sup>31</sup> Agency Exhibit 1, Page 9

<sup>32</sup> Agency Exhibit 1, Page 68

On July 18, a First Sergeant reviewed this matter prior to the issuance of the Group III Notices. He recommended that both the allegations regarding the oral statement and the memes be **Sustained**. He stated that it appears Grievant does not comprehend that his behavior was unwelcome. He recommended that this matter be handles with a Group III Written Notice and Grievant be terminated.<sup>33</sup> The recommendation was forwarded up the chain of command.

On August 2, a higher-ranking officer (O1), after reviewing the report made by IA, and considering the recommendation of the First Sergeant, also found that both allegations should be **Sustained**. O1 then went into what appears to be a consideration of disparate treatment in this matter. He pointed out in his recommendation that between July, 2017, and July, 2022, there had been 5 sustained allegations of sexual harassment. The five sustained allegations led to the issuance of one Group III and three Group II Written Notices. One employee retired prior to the issuance of their discipline. In two instances, the employee was transferred in addition to receiving a written notice. O1 deemed there was precedent to issue a single Group II Written Notice with a disciplinary transfer and that was his recommendation.<sup>34</sup>

On August 22, a yet higher-ranking officer (O2), pursuant to policy, wrote to Grievant and offered an opportunity for Grievant to review the evidence supporting the charges against him and to allow the Grievant to make an oral response. The various reports were provided to Grievant and Grievant was advised that his counsel may be present. This meeting was to take place on September 5.<sup>35</sup>

On September 7, Grievant sent O2 a response to the September 5 meeting. Grievant stated in this letter: As I have already stated several times, I regret my actions. It was never my intention to make anyone uncomfortable. As I stated in my interview with IA, I was simply making conversation with the comment. The **pictures though inappropriate**, were not directed at [AB] and only meant to make [AB] laugh not give [AB] bad vibes; **had [AB] said to stop**, I would have absolutely respected that and apologized on the spot.<sup>36</sup> **(Emphasis added)** Again, Grievant confirms that he thinks there is a burden on AB to tell him to not send inappropriate pictures or make inappropriate statements.

On November 1, O2 sent his recommendation forward to his superior (O3).<sup>37</sup> As his recommendation, O2 stated: *Therefore, in consideration of the investigative outcomes, their presentation of absolutely repulsive behavior by an employee towards their coworkers, the past pattern of policy violations and their resulting discipline, the lack of mitigating factors, the absence of truly acknowledging the impact his behavior had, and the likelihood the behavior or something similar will be repeated, I recommend both allegations be sustained and that [Grievant] be issued a single Group III Written Notice for each, as a violation of General Order ADM 11.01, paragraph 1, for Workplace Harassment- Sex and his employment with the Department be TERMINATED.*<sup>38</sup>

On November 6, O2 sent Grievant a memorandum summarizing the IA report and all the various procedural steps taken in this matter. Grievant was told that he would be terminated, effective at close of business on November 8, 2023.<sup>39</sup>

Grievant did not testify or call any witnesses. Agency presented a witness who served as a Training Officer. He testified that Grievant, on August 9, 2022, attended a class on Diversity and Inclusion Training.<sup>40</sup> This witness testified that this training made the attendees aware of sexual harassment, hostile work environment harassment and the possible corrective actions for violations.

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<sup>33</sup> Agency Exhibit 1, Page 72

<sup>34</sup> Agency Exhibit 1, Pages 73-76

<sup>35</sup> Agency Exhibit 1, Pages 77-78

<sup>36</sup> Agency Exhibit 1, Page 79

<sup>37</sup> Agency Exhibit 1, Pages 80-85

<sup>38</sup> Agency Exhibit 1, Page 84

<sup>39</sup> Agency Exhibit 1, Page 92

<sup>40</sup> Agency Exhibit 1, Page 105

Both AB and CD testified and confirmed what was said in the IA report. AB testified that she was embarrassed by the oral comment made about her in the presence of others and she was afraid of the Grievant. AB stated that she did not solicit the memes and that her only relationship with Grievant was that of a co-worker. They had no personal relationship.

General Order ADM 11.01 for this Agency is the equivalent of DHRM Policy 2.35, Civility in the Workplace. The Grievant here relies heavily on the fact that it was not his intention to offend AB. The Director of EDR addressed that contention in his Administrative Review Ruling Number 2021-5194. In that Ruling, the Director stated “*while the intent of the accused is certainly relevant to any such charge and may be an aggravating factor in determining the appropriate penalty, we found nothing in the policy to support the grievance assertion that policy 2.35 specifically requires that the declarant actually intend to offend. Similarly, we do not interpret the policy to support the Grievant’s assertion that offensiveness depends not in the ear of the hearer, but in the intention of the declarant.*”<sup>41</sup>

**General Order ADM 11.01 (3)(c)(2)** states in part as follows: **Sexual Harassment** – *Any unwelcome sexual advance...or verbal, written...conduct of a sexual nature by...co-workers.*<sup>42</sup> The oral comment made by Grievant to AB was clearly not welcome. The memes sent to Grievant were also not welcome by AB, nor were they solicited. Both verbal and written were sexual in nature and, as O2 described, were repulsive.

**General Order ADM 11.01 (3)(c)(4)** states in part as follows: **Hostile work environment** – *A form of sexual harassment when a victim is subjected to **unwelcome and severe** or pervasive **repeated sexual** comments, **innuendos**...or other conduct of a sexual nature that **creates an intimidating or offensive** place for the employees to work.*<sup>43</sup> Grievant sent numerous unwelcome memes that were either explicitly sexual in nature or were innuendoes that were sexual in nature and in so doing created an offensive workplace for AB. Further, as the IA report indicated, this was also true for other employees.

While Grievant did not testify or call any witnesses, his able counsel, in cross examination of O1, elicited testimony that O1 proposed a single Group II Written Notice, with disciplinary transfer, as appropriate in this matter. Even though O1’s recommendation was not followed by the Agency, I considered this issue of inconsistent discipline. As with all affirmative defenses, the Grievant has the burden to raise and establish any mitigating factors.<sup>44</sup> The Grievant must show “enough similarity between both the nature of the misconduct and the other factors to lead a reasonable person to conclude that the Agency treated similarly situated employees differently”<sup>45</sup>

Over a period of 5 years, there were five sustained sexual misconduct allegations that led to the issuance of one Group III and three Group II Written Notices. One employee retired prior to the issuance of their discipline. In two instances, the employee was transferred in addition to receiving a written notice. Grievant presented no evidence that would allow any form of comparison between this matter and those. What was said or done, how often was it said or done, how severe were the words or memes, was only one person the victim of the harassment or were others present, did it rise to the level of creating a hostile work environment? Without such comparators, I cannot substitute my opinion for the substantial discretion that is afforded Agency management.

### **MITIGATION**

Va. Code § 2.2-3005(C)(6), authorizes and grants Hearing Officers the power and duty to receive

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<sup>41</sup> Ruling Number 2021-5194, Page 8

<sup>42</sup> Agency Exhibit 1, Page 141

<sup>43</sup> Agency Exhibit 1, Page 141

<sup>44</sup> Grievance Procedure Manual §5.8; Rules for Conducting Grievance Hearings § VI(B)(1); Administrative Review Ruling 2024-5636, Page 14

<sup>45</sup> Administrative Review Ruling 2024-5636, Pages 14-15

and consider evidence in mitigation or aggravation of any offense charges by an Agency in accordance with rules established by EDR. The Rules for Conducting Grievance Hearings (“Rules”), provide that a Hearing Officer is not a super personnel officer. Therefore, in providing any remedy, the Hearing Officer should give the appropriate level of deference to actions by the Agency management that are found to be consistent with law and policy. Specifically, in disciplinary grievances, if the Hearing Officer finds that (1) the employee engaged in the behavior described in the Written Notice; (2) the behavior constituted misconduct; and (3) the Agency’s discipline was consistent with law and policy, then the Agency’s discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.

Hearing Officers are authorized to make findings of fact as to the material issues of the Case and to determine the grievance based on the material issues and the grounds and the records for those findings. The Hearing Officer reviews the facts *de novo* to determine whether the cited actions constitute misconduct and whether there were mitigating circumstances to justify a reduction or removal of the disciplinary action, or aggravating circumstances to justify the disciplinary action. The Hearing Officer has the authority to determine whether the Agency has established by a preponderance of the evidence that the action taken was both warranted and appropriate under all the facts and circumstances.

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, (3) the disciplinary action was free of improper motive, (4) the length of time that Grievant has been employed by the Agency, and (5) whether or not Grievant has been a valued employee during the time of his/her employment at the Agency.

Because I find that the Grievant engaged in the behavior described in the Written Notice; the behavior constituted misconduct; and the Agency’s discipline was consistent with law and policy, and because I find the discipline did not exceed the limits of reasonableness, I find no reason to mitigate.

### **DECISION**

I find that the Agency has borne the burden of proof in this matter and that the issuance of two Group III Written Notices with termination was proper.

### **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 that 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 where 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].

*William S. Davidson*  
William S. Davidson, Hearing Officer

Date: January 24, 2024

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<sup>[1]</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.