

DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 12051

Hearing Date: February 27, 2024
Decision Issued: February 28, 2024

PROCEDURAL HISTORY

On October 19, 2023, Grievant was issued 2 Group III Written Notices and was terminated on October 19, 2023.¹ On October 18, 2023, Grievant filed a grievance challenging the Agency's actions.² The grievance was assigned to this Hearing Officer on December 11, 2023. A hearing was held on February 27, 2024.

APPEARANCES

Agency Advocate
Agency Representative
Witnesses

ISSUES

Did Grievant fail to follow Agency policy, was his behavior disruptive, did he violate DHRM Policy 2.35, Operating Procedure 145.3, Operating Procedure 135.2, and Operating Procedure 135.1?

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.³ 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:

¹ Agency Exh. 1, at 1,4

² Agency Exh. 1, at 7

³ See Va. Code § 2.2-3004(B)

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.

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.⁴ However, proof must go beyond conjecture.⁵ In other words, there must be more than a possibility or a mere speculation.⁶

FINDINGS OF FACT

The date for this hearing was established between Grievant, Agency and me on December 21, 2023. At 3:26 PM, February 26, Grievant sent me an email requesting a continuance for the following reason: *“I am training for at a new job and cannot reschedule the training.”* The hearing had been scheduled for approximately 67 days and this request came 1 hour and 36 minutes before close of business on the day before the hearing. Grievant offered no further reasons for his request. He stated that he would like a new date *“as close to the end of March as possible.”*

At 3:39 PM, the Agency by email to me and the Grievant, objected to this request stating: *“all of the witnesses, including regional leadership staff, have made arrangements to appear for this hearing and it would be a hardship and prejudicial to the Agency to try and reschedule a date for all of the witnesses to appear for another hearing after this case has been on the docket for more than two months.”*

At 4:27 PM, I sent an email to Grievant and the Agency denying this request for a continuance. I found that the request was not timely, the reason given was not sufficient to grant a continuance at this late hour, the Agency objected and there were approximately 10 Agency witnesses that would be inconvenienced by a continuance. It should be noted Grievant wanted a continuance from a hearing date of February 29. I

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

⁵ *Southall, Adm’r v. Reams, Inc.*, 198 Va. 545, 95 S.E. 2d 145 (1956)

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

assumed that was a typographical error. I heard nothing further from Grievant and I asked the Agency Advocate to check his email prior to the commencement of the hearing. He had no correspondence from Grievant.

After reviewing the evidence and observing the demeanor of each witness, I make the following findings of fact: Agency submitted a notebook containing pages 1 through 177 and 1 DVD-R. It was accepted in its entirety as Agency Exhibit 1. Grievant was not present at the hearing. Grievant submitted no evidence. Four witnesses testified on behalf of the Agency: a Human Resources officer (HR), the Warden (W), an assistant Warden (AW), and a Special Agent (SA).

Several Department of Corrections (DOC) policies are relevant to this matter.

Policy 135.1 (XIV)(A), **Standards of Conduct**, states: *“These offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant termination. This level is appropriate for offenses that, include but are not limited to, endangering others in the workplace, constituting illegal or unethical conduct, indicating significant neglect of duty, resulting in disruption of the workplace, or other serious violations of policies, procedures, or laws.”*⁷

Policy 135.1 (XIV)(B)(7)(16)(23) states: *“Group III offenses include: (7) Violating safety rules where there is a threat of physical harm; (16) Refusal to obey instructions that could result in a weakening of security; (23) Violation of Operating Procedure 135.2.”*⁸

Policy 135.2 (II)(A), **Rules of Conduct Governing Employees Relationships with Inmates**, states in part as follows: *“Employees of DOC will exercise professional conduct when dealing with inmates... to ensure the security and integrity of the correctional process, and to promote a Healing Environment within the DOC. Employees are expected to model the Healing Environment in order to promote positive growth for... inmates... and create a culture that supports reentry and public safety.”*⁹

Policy 145.3 (IV)(A), **Workplace Civility**, states in part: *“It is the responsibility of all employees... to maintain a non-hostile, bias-free working environment, and to ensure that employment practices are free from workplace harassment of any kind... bullying... or other inappropriate behavior.”*¹⁰

Policy 145.3 states that **Prohibited Conduct/Behavior** may include *“Demonstrating behavior that is rude, inappropriate, discourteous, unprofessional, unethical, or dishonest.”*¹¹

⁷ Agency Exh. 1, at 99

⁸ Agency Exh. 1 at 100

⁹ Agency Exh. 1, at 111

¹⁰ Agency Exh. 1 at 123

¹¹ Agency Exh. 1 at 127

Policy 401.1 (9)(11)(12), **Front Entry/Control**, states in part: “(9) all... visitors... should be subjected to a frisk search and metal detector search. Ensure that all searches of individuals who intend to enter the security compound are conducted in a thorough manner... (11)(a) all individuals entering or exiting the institution will be challenged for proper identification for authorization to enter or leave the institution... (11)(b) The Front Entry/ Control Officer will only permit persons who have been authorized by the Warden... to enter into the unit. All persons entering the unit will be properly identified and searched according to Institutional Policy and this Post Order... The front door will never be opened for any one...who is not approved to be inside the facility... (12) the Front Entry Control Area... is considered a ‘sensitive area’ due to security controls. These areas are to remain locked at all times. Only authorized security staff may enter these areas”.¹²

DHRM Policy 2.35 states **Prohibited Conduct** includes: “Behaviors that undermine team cohesion, staff morale, individual self-worth, productivity, and safety are not acceptable.”¹³

W testified that he issued the Group III Written Notices. The first notice concerned an event that took place on June 26, 2023. On July 6, W received an email from an officer at the Agency (MS) stating that, on July 3, an inmate has approached her and told her know that he had filed a complaint. His complaint was that a former employee of the Agency (X) had been inside a secure area of the Agency and had belittled him. On July 6, MS reviewed the MaxPro camera system and was able to determine Grievant allowed X to enter the Front Gate area at approximately 7:25 PM, June 26.¹⁴

The inmate complained that X belittled him. X told him he should be ashamed of himself, and you are a menace to society.¹⁵

The video MS viewed was played as a part of Agency’s evidence. It showed X entering the Front Entry/Control area, walking around and not through the metal detector, and speaking with someone off camera, while gesticulating with his hands. X had access to a server unit that controlled much of the facility. He had access to the keys that would manually open all locked doors and he was in close proximity to where Agency weapons were stored. X was not frisked. W testified X had no reason to be at the facility.

SA prepared an Investigative Report regarding this issue.¹⁶ SA interviewed Grievant on September 26. SA reported Grievant said “He opened the door and allowed X to enter the building...they went into the Armory/Front Entry Office and talked...he

¹² Agency Exh. 1 at 54,55

¹³ Agency Exh. 1 at 131

¹⁴ Agency Exh. 1 at 48

¹⁵ Agency Exh. 1 at 47

¹⁶ Agency Exh. 1 at 19-45

saw X talking with the inmate...he did not stop X from going around the metal detector, knowing that X should have gone through it and he allowed X to enter the Armory/Front Office... he knew it was absolutely stupid to let X into the front office...and it was a mistake and he took full responsibility for it.”¹⁷

Grievant signed a Written Statement as a part of the Investigative Report. He acknowledged he let X into the Front entry and he saw X talk with the inmate.¹⁸ On October 10, during a COPGA/Due Process notification meeting, Grievant stated *“I’m going to eat that one-that is on me.”*¹⁹ At a Due Process meeting on October 13, HR recorded that Grievant stated *“I’m the one who let [X] in, it is my fault.”*²⁰

Grievant created a situation that could have had catastrophic results. By allowing X into the Front Entry/ Control area he violated Post Orders, potentially put the entire facility in danger, and created an opportunity for an inmate to be verbally abused. The Group III Written Notice for the event of June 26 is well founded.

Regarding the October 2 matter, there was an all-staff meeting regarding the closing of a facility. W testified that during the course of his presentation, Grievant was loud, rude, and finally stated *“I quit, you want me gone.”* At the conclusion of the meeting, W was told Grievant was outside and wanted to talk with him. W asked another officer to accompany him, and he tried to talk with Grievant in the parking lot. W testified Grievant said W was *“full of s*it.”* W testified he felt Grievant was trying to bully him. AS testified that she heard Grievant state during the all-staff meeting that *“this is *ucking crazy and he walked out.”* She found this to be rude and unprofessional.

During the Due Process meeting of October 13, HR took notes. Her notes reflected Grievant stated in referencing W: *“I called you an asshole...I can work with people who are assholes.”*²¹

The behavior exhibited by Grievant at the all-staff meeting was rude, inappropriate, discourteous, and unprofessional. It undermined team cohesion, staff morale, and individual self-worth. The Group III Written Notice for the event of June 26 is well founded.

MITIGATION

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

¹⁷ Agency Exh. 1 at 21,22

¹⁸ Agency Exh. 1 at 28

¹⁹ Agency Exh. 1 at 69

²⁰ Agency Exh. 1 at 70

²¹ Agency Exh. 1 at 71

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.

I find no reason to mitigate this matter.

DECISION

I find that the Agency has borne its burden of proof in this matter and the issuance of 2 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 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 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.^[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].

William S. Davidson
William S. Davidson, Hearing Officer

Date: February 28, 2024

^[1] Agencies must request and receive prior approval from EDR before filing a notice of appeal.