



COMMONWEALTH OF VIRGINIA

Department Of Human Resource Management

Office of Employment Dispute Resolution

DECISION OF HEARING OFFICER

In re:

Case number: 12087

Hearing Date: June 27, 2024

Decision Issued: July 9, 2024

PROCEDURAL HISTORY

On January 4, 2024, Grievant was issued a Group III Written Notice of disciplinary action with termination for violation of: Operating Procedure 135.1, Standards of Conduct, Operating Procedure 135.5, Workplace Violence, Operating Procedure 145.3, Equal Opportunity, Anti-Harassment, and Workplace Civility, DHRM Policy 2.35, Workplace Civility and Operating Procedure 135.3, Standards of Ethics and Conflict of Interest. The Written Notice described the offense as arising from the Agency's investigation of allegations that Grievant had grabbed another officer from behind and placed her in a chokehold.¹

On February 3, 2024, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On March 4, 2024, the Office of Employment Dispute Resolution assigned this matter to the Hearing Officer. A pre-hearing conference call was scheduled for April 8, 2024. Because the Grievant did not appear for the April 8, 2024 pre-hearing conference, the Hearing Officer continued the pre-hearing conference to April 26, 2024. Both parties were notified of the date and time for both pre-hearing conference calls. The Grievant did not appear for the pre-hearing conference call on April 8, 2024, nor the pre-hearing conference call on April 26, 2024. The hearing was scheduled for June 27, 2024, and both parties were notified of the date, time, and location of the hearing by a hearing confirmation letter dated April 26, 2024. On June 27, 2024, a hearing was held at the River North Correctional Center. The Grievant did not appear for the hearing and the Grievant did not contact the

¹ Agency Ex. at 1-4.

Hearing Officer at any time prior to the hearing date to request a continuance of the hearing.

APPEARANCES

Agency Advocate
Agency Party Designee
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Group III Written Notice of disciplinary action?
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:

Prior to his termination, Grievant was a Corrections Officer at an Agency facility (Facility 1). Grievant had been employed by the Agency for more than two years.

Grievant sometimes worked at other Agency facilities, including Facility 2.

On or about July 16, 2023, Witness 1 was an officer-in-training at Facility 2. Witness 1 testified that on that day she was assigned to work with Grievant in commissary so that he could help her complete her training on commissary.²

At some point that day, inmates on a Pod were agitated such that a decision was made that the inmates would be fed in their cells rather than being released to the dining hall. Witness 1 and Grievant retrieved food carts containing food trays for the inmates from the kitchen to take to the Pod.

In order to get the food trays to the inmates, Witness 1 and Grievant had to transport the food carts via an elevator. Witness 1 described that she and Grievant pushed the food carts into the elevator and then they both also entered the elevator. Witness 1 testified that Grievant entered the elevator first and stood behind her in the elevator. Witness 1 stood at the front of the elevator with her back toward Grievant. No one else was in the elevator with Witness 1 and Grievant. Witness 1 recalled pushing the button for the floor where Witness 1 and Grievant were to take the food carts. Witness 1 testified that after she pushed the button, as she started to feel the elevator move, Grievant's arm came around her at her throat. She described that she recalled panicking, fighting to free herself from his grip, and having a feeling that everything was closing in on her. Witness 1 testified that as she struggled to free herself, she felt her feet lifting off the elevator floor. Witness 1 recalled biting Grievant on his right forearm and that he screamed out. Witness 1 stated that she was then able to pivot her body and pull down such that Grievant loosened his grip, she kicked him in his thigh, and she shoved him back into the cart. Witness 1 testified that the elevator doors then opened, she exited the elevator, and Grievant pushed the food carts out of the elevator. Witness 1 testified that Grievant then commented to her that he "guessed she was not into CNC." When Witness 1 asked him what he meant, Grievant told her that "to give you an idea, I used to hold a loaded gun to my ex-girlfriend's head during sex." Witness 1 said that they pushed the carts toward the Pod and before they entered the Pod, a Sergeant instructed Witness 1 to relieve an officer working in the control room rather than enter the Pod with Grievant.³ Witness 1 described feeling stunned by the incident and unsure as to what she should do. Witness 1 also described that in the days that followed she felt panicked, suffered panic attacks, and did not want to return to work.⁴

Witness 1 did not report the incident to Agency management on the day it occurred. Witness 1 testified that she felt ashamed and embarrassed that she had struggled to fight back against Grievant while in the elevator. Witness 1 testified that each time she came into contact with Grievant she felt that he antagonized her, including making comments that she "couldn't fight" and mocking her in front of other officers.⁵

On or about July 26, 2023, Witness 1 made Lieutenant 1 and Lieutenant 2 aware of the incident that occurred with Grievant in the elevator. Lieutenant 1 and Lieutenant 2 provided statements during the Agency's investigation and testified during the hearing that Witness 1 reported to them "horseplay" or "schoolyard rough housing" by Grievant

² Hearing Recording at 10:00-11:10.

³ Hearing Recording 11:10-16:06.

⁴ Hearing Recording 11:10-16:06.

⁵ Hearing Recording 17:16-18:37.

that Witness 1 told them she had “handled.” Their description of the “horseplay” that Witness 1 reported was of “chokehold” or a “headlock.” Lieutenant 2 recalled Witness 1 stating that she bit Grievant to get him to release her. The lieutenants testified that, at the time she reported the incident to them, Witness 1 indicated that she did not want them to report the incident to human resources staff.⁶

Human Resources Assistant testified that she first became aware of the incident between Witness 1 and Grievant when Witness 2 (Witness 1’s roommate) called her one evening to report an incident at Facility 2 involving Witness 1. Human Resources Assistant testified that she then spoke with Witness 1 during that same call and Witness 1 described the incident to Human Resources Assistant. Human Resources Assistant testified that Witness 1 told her at that time that Witness 1 and Grievant had been feeding inmates and Grievant had made rude comments and put Witness 1 in a chokehold when they were in an elevator. Witness 1 also told Human Resources Assistant that Witness 1 bit Grievant. Human Resources Assistant testified that she then called Facility 2 Warden.⁷

Human Resources Assistant and Facility 2 Warden met with Witness 1 on August 10, 2023. Facility 2 Warden testified that Witness 1 told them that Grievant put her in a chokehold and she kicked him or stomped on him to free herself.⁸ Facility 2 Warden then contacted Assistant Chief with the Special Investigations Unit to investigate the matter. Facility 2 Warden also contacted Facility 1 Warden to advise him of what had happened and to arrange for Grievant to be called back to Facility 1 while the investigation into the matter was conducted.⁹

Assistant Chief investigated the allegations Witness 1 made regarding Grievant and the incident that occurred in the Facility 2 elevator and prepared a report of the findings of his investigation. Assistant Chief also contacted the County’s Commonwealth’s Attorney’s office regarding the incident.¹⁰

In November 2023, Grievant was indicted on criminal charges related to the incident in the elevator with Witness 1. Grievant entered a plea of “guilty” to a misdemeanor charge of assault and battery on June 7, 2024.¹¹

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “include acts of minor misconduct that require formal disciplinary action.” Group II offenses “include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action.” Group III offenses “include

⁶ Agency Ex. at 25 and 34, Hearing Recording at 19:31-21:57, 32:16-38:07.

⁷ Hearing Recording at 1:08:55-1:11:06.

⁸ Agency Ex. at 60, Hearing Recording at 1:11:06-1:14:47, 1:17:30-1:18:04.

⁹ Hearing Recording at 1:18:04-1:18:54.

¹⁰ Agency Ex. at 12-47, Hearing Recording at 45:30-50:37.

¹¹ Agency Ex. at 144-145, Hearing Recording at 50:37-53:26.

acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.”¹²

The Agency’s Operating Procedure 135.5, Workplace Violence, “establishes rules of conduct prohibiting intimidation harassment, threats, or actual violence in the workplace areas.”¹³ The policy sets forth the expectation that employees are to “refrain from fighting, “horseplay”, and any other conduct that could endanger the safety of others in the workplace.”¹⁴ The policy specifically prohibits:

1. Injuring another person physically.
2. Engaging in behavior that creates a reasonable fear of injury to another person.
3. Engaging in behavior that subjects another individual to extreme emotional distress. . . .¹⁵

Virginia Department of Corrections Operating Procedure 145.3, Equal Employment Opportunity, Anti-Harassment, and Workplace Civility, specifically prohibits

Employment discrimination, harassment to include sexual harassment, bullying behaviors, threatening or violent behaviors, retaliation for participating in a protected activity, or other displays of inappropriate behavior toward any employee, applicant for employment, vendor, contractor, or volunteers. ...Behaviors that undermine team cohesion, employee morale, individual self-worth, productivity, and/or safety are not acceptable. . . .¹⁶

Attachment 1 of Operating Procedure 145.3 provides Guidance on Prohibited Conduct and lists prohibited conduct and behaviors, as including, among other things:

- Invading personal space
- Subjecting others to communication or innuendoes of a sexual nature
- Demonstrating behavior that is rude, inappropriate, discourteous, unprofessional, unethical, or dishonest
- Behaving in a manner that displays a lack of regard for others and/or significantly distresses, disturbs, and/or offends others
- Making unwelcome or suggestive comments or jokes
- Engaging in prohibited behaviors as outlined in Operating Procedure 135.5, Workplace Violence, including but not limited to injuring another person physically, engaging in behavior that creates a reasonable fear of injury to another person; threatening to damage or vandalize or intentionally damaging or vandalizing property; making threats to injure another person; assaultive behavior such as pushing, shoving, grabbing, hitting, kicking, or spitting toward another person;

¹² See Virginia Department of Corrections Operating Procedure 135.1.

¹³ Virginia Department of Corrections Operating Procedure 135.5.

¹⁴ Virginia Department of Corrections Operating Procedure 135.5, Procedure, I.C.

¹⁵ Virginia Department of Corrections Operating Procedure 135.5, Procedure, I.D.

¹⁶ Virginia Department of Corrections Operating Procedure 145.3, Procedure, I.F.

possessing, brandishing, or using a weapon that is not required by the individual's position while on state premises or engaged in state business.¹⁷

The Department of Human Resources Management has issued Policy 2.35, Civility in the Workplace, which applies to all state executive branch employees, including employees of the Department of Corrections and "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."¹⁸

Whether Grievant engaged in the behavior and whether the behavior constituted misconduct

The unrefuted evidence is that on or about July 16, 2023, Grievant approached Witness 1 from behind and grabbed her by wrapping his arm around her throat in a chokehold. While he had her in the chokehold, Grievant started lifting Witness 1 up such that her feet started to come off the floor. Witness 1 testified that this caused her to panic, feel as though things were closing in on her, and "fight" to free herself from his grip. The unrefuted testimony is that Witness 1 had to bite and kick Grievant in order to free herself.

The information provided by Grievant in writing in response to the Written Notice and on the Grievance Form A indicated that if Grievant had participated in the hearing, he may have denied that the events occurred as described by Witness 1 and that there was no evidence to support her assertions.¹⁹ This Hearing Officer found Witness 1's testimony to be credible. Additionally, Witness 1's credible testimony and description of the incident was consistent with statements she made to Lieutenant 1, Lieutenant 2, Witness 2, Human Resources Assistant, Facility 2 Warden, and Assistant Chief in July and August of 2023 and throughout the Agency's investigation of this matter.²⁰ Lieutenant 1 and Lieutenant 2 appeared to have been the first individuals to whom Witness 1 described this incident. The two lieutenants provided statements at the time of the Agency's investigation that were consistent with their testimony during the hearing. Lieutenant 1 and Lieutenant 2 stated that Witness 1 reported to them "horseplay" or "schoolyard rough housing" by Grievant that Witness 1 indicated she had "handled." Their descriptions of the "horseplay" described by Witness 1 at the time were of a "chokehold" and a "headlock" and Lieutenant 2 recalled Witness 1 stating that she bit Grievant to get him to release her.²¹

The Agency has proved that Grievant engaged in misconduct when he grabbed Witness 1 from behind in a chokehold, starting to lift her off the ground, such that she had to fight, bite, and kick him in order to free herself from his grip.

¹⁷ See Virginia Department of Corrections Operating Procedure 145.3, Attachment I.

¹⁸ DHRM Policy 2.35, Civility in the Workplace.

¹⁹ Agency Ex. at 5 and 67, Hearing Recording at 1:22:54-1:23:40, 1:46:25-1:47:02.

²⁰ Agency Ex. at 12-15, 25, 34, 39-40, and 64, Hearing Recording at 11:10-16:06, 32:16-38:07, 39:42-44:11, 48:36-49:20, 1:03:49-1:05:27, 1:08:55-1:12:04.

²¹ Agency Ex. at 25 and 34, Hearing Recording at 32:16-38:07.

Whether the Agency's discipline was consistent with law and policy

Operating Procedure 135.1, Standards of Conduct, provides that violation of DHRM Policy 2.35 or Operating Procedure 145.3 may be a Group I, Group II, or Group III offense depending upon the nature of the violation. Group III offenses include "acts and behavior of such a serious nature that a first occurrence normally should warrant termination."²²

The nature of Grievant's misconduct was serious, violent and assaultive. The Agency's discipline was consistent with law and policy.

Mitigation

Virginia 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...."²³ 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. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

DECISION

For the reasons stated herein, the Agency's issuance to Grievant of Group III Written Notice of disciplinary action with termination 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:

²² Virginia Department of Corrections Operating Procedure 135.1, Procedure, XIV.

²³ Va. Code § 2.2-3005.

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.²⁴

Angela Jenkins

Angela L. Jenkins, Esq.
Hearing Officer

²⁴ 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.