



COMMONWEALTH OF VIRGINIA

Department Of Human Resource Management

Office of Employment Dispute Resolution

DECISION OF HEARING OFFICER

In re:

Case number: 12123

Hearing Date: July 1, 2024

Decision Issued: August 6, 2024

PROCEDURAL HISTORY

On March 6, 2024, Grievant was issued a Group III Written Notice of disciplinary action with termination for violation of DHRM Policy 2.35, Civility in the Workplace.

On April 5, 2024, Grievant timely filed a grievance to challenge the Foundation's action. The matter advanced to hearing. On April 29, 2024, the Office of Employment Dispute Resolution assigned this matter to the Hearing Officer. The hearing in the matter was originally scheduled to occur on July 2, 2024. On May 14, 2024, the Foundation's counsel notified the Hearing Officer and the Grievant that a key Foundation witness would be unavailable on July 2nd. Following a pre-hearing conference call with the parties, the hearing was rescheduled to occur one day earlier, so that the Foundation's witness could participate. On July 1, 2024, a remote hearing was held via the Microsoft TEAMS platform.

APPEARANCES

Grievant
Agency Counsel
Agency Party Designee
Witnesses
Office of Employment Dispute Resolution Observer

ISSUES

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

An Equal Opportunity Employer

2. Whether the behavior constituted misconduct?
3. Whether the Foundation'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 Foundation 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 Foundation is an educational institution established to administer certain historical museums, including living-history museums and related programs.

Prior to his termination, Grievant was a historical interpreter for the Foundation at the Site. Grievant had worked with the Foundation for approximately 12 years.

Grievant's position required that he conduct programs, demonstrations, and on-going interpretations for members of the public visiting the Site.¹ Foundation witnesses and Grievant's witnesses testified that members of the public could be rude, offensive, and difficult to deal with at times. Grievant and other Site staff-witnesses testified that they may be subject to racist, sexist, and harassing comments or behaviors from members of the public on a daily basis during the Site's peak tourist season.

By June 2023, Grievant was a participant in a Group Chat on a social media platform. The Group Chat included among its participants Site staff and, through November 2023, at least one acting supervisor for the Site. Throughout the period relevant for this case, the Group Chat was used by the Site staff participants to communicate about work-related matters, including scheduling, training, activities at the Site, status of work projects, work supplies, and other work-related matters.²

¹ See Agency Ex. 9.

² See Agency Ex. 27, see also Hearing Recording at 1:26:00-1:28:00, 1:42:00-1:45:57; Agency Ex. 12 at 4-9.

Witness 1 was a museum educator for the Foundation. Witness 1 worked at the Site during the Summer of 2023. Witness 1 asked to join the Group Chat in June 2023 when she worked at the Site because she learned that information was shared in the Group Chat relating to work schedules and other work-related matters.³ Witness 1 testified that, at times, she had concerns with comments in the Group Chat that she considered inappropriate for work or inappropriate for conversations that included a minor.⁴

On September 1, 2023, the Foundation issued a new policy “to establish agency specific guidelines regarding the removal of vegetation and nuisance animals from Foundation properties.”⁵ The policy set forth the following regarding the removal of vegetation on Foundation properties, including the Site:

Vegetation Policy -- Cutting down, trimming and removal of trees and vegetation on/from [Foundation] properties, are the responsibilities of the [Foundation] Facilities Department, or as contracted to a licensed arborist or tree care company.

Procedures --

Staff members in need of vegetation or tree removal should submit a work order using Asset Essentials (Dude). Submitted and approved requests will be assigned to the appropriate Facilities/Grounds team member and/or a designated contractor for action.

[Foundation’s] Facilities Manager and/or Grounds Supervisor, are the primary contacts for staff on vegetation and/or tree removal needs. Staff is not authorized to proceed with any vegetation removal actions, without guidance from the appropriate facilities staff. Staff should contact the Division of Administrative Operations if they encounter delays in addressing their requests.⁶

Participants in the Group Chat expressed their displeasure with the policy in the Group Chat on that same day.

One participant described the new policy as “siding with [grounds manager].” The Former Acting Site Supervisor commented “Weeeeeeeak” and “I mean . . . everyone read and follow this important policy from [the Foundation].” Another participant commented “Boooo” and another commented “So stupid”.

Grievant wrote:

³ See Hearing Recording at 1:26:00-1:28:00, 1:42:00-1:45:57; see also Agency Ex. 12 at 4-9 and Agency Ex. 27.

⁴ Witness 1 testified that one of the participants in the Group Chat turned 18 years old in October 2023. Hearing Recording at 1:28:03-1:28:30.

⁵ Grievant Ex. 26.

⁶ Grievant Ex. 26.

"Imma put in a bunch of work orders for every bit of fucking vegetation there is in the entire goddamn site"

"My first work orders will be for the weeds around the gardens, I mean that's vegetation that I'm not allowed to pull"

"Also for the entire area in the middle of the town"

"Oh look, here's a stick on the ground"

"But what am I allowed to do about that stick? I'm not part of grounds" ⁷

Another participant responded "God and they wonder why the [Site] doesn't vibe with the rest of the foundation." ⁸

In reply to another participant's comment to "Watch, then they'll put limits on how often you can put in a work order," Grievant responded:

"I'd like to see them fucking try" and "I'm absolutely pissed rn"

"I'm also a petty bitch, surprising, I know"

"I'm definitely putting in some work orders for the weeds around the fence on the field though"

"And if they fuck up any of our crops, I'll hold that against them" ⁹

Later that day after another participant wrote "Put in work orders about every privet plant," Grievant wrote:

"If [grounds manager] wants a war, I'll fucking give her a war"

"We're gonna leave a red tomahawk outside the grounds garage"

"Again, this is fucking war" ¹⁰

On September 22, 2023, Grievant had another issue with the Foundation's grounds department. In response to learning that grounds staff had removed logs that the grounds manager had told Grievant would not be removed, Grievant wrote in the Group Chat:¹¹

"Imma fucking fight someone"

"Like literally"

"I can't take this shit anymore" ...

"I'm literally fucking pissed rn"

"How incompetent can you be?"

"Like can you be any more than this?"

"Honestly, I don't want them to answer that" ¹²

⁷ Grievant Ex. 25, Agency Ex. 27 at 322-324.

⁸ Grievant Ex. 25, Agency Ex. 27 at 322-324.

⁹ Grievant Ex. 25, Agency Ex. 27 at 322-324.

¹⁰ Grievant Ex. 25, Agency Ex. 27 at 322-324.

¹¹ Grievant Ex. 28, Agency Ex. 13 at 1-2, 8, Agency Ex. 13 at 3, Agency Ex. 27 at 288-290.

¹² Grievant Ex. 28, Agency Ex. 13 at 1-2, 8, Agency Ex. 13 at 3, Agency Ex. 27 at 288-290.

And, replying to another participant sharing photographs from the Site related to the log removal, Grievant wrote “Those fuckers.”¹³

On November 19, 2023, in response to learning that Former Acting Supervisor was leaving the Foundation, Grievant wrote:

I’ll also take the moment to be honest. I’ve been thinking about leaving for a bit now as well. Shit, some of yall remember how I told them after they failed to even send a “Thanks for your application” after my first attempt at full time that I would leave if that happened again considering I had been there and worked in the [Site] for nearly a decade by that point. That led me into one of the worst period of depression I’ve ever had from the feelings of rejection that gave me.¹⁴

Later that same evening, Grievant wrote:

Anyways all of that is to say that the past few years or so worth of inaction from, lying to, and complete disregard of interpreters’ opinions, feelings, and “personal truths,” especially us in the [Site], committed routinely by [Director] and [Senior Director] especially, has made me quite honestly actively dislike much of my job. The main thing holding me back from leaving currently is not having a license and a car as well as the utter lack of jobs in my field that don’t require me to move across the country or pay me a living wage, something I also currently don’t have. The only way I’m able to work at [Foundation] rn is that I haven’t had to pay rent/mortgage, car payments, and stuff of that sort¹⁵

Also, [Director’s] statements at that meeting the other night such as “Get a thick skin” have made my opinions of him stronger . . .¹⁶

On the evening of December 10, 2023, Grievant learned from Former Acting Supervisor that Former Acting Supervisor, who was no longer working for the Foundation, had not been invited to a Foundation meeting. Some of the Site staff previously had requested that Former Acting Supervisor be included in the meeting. Grievant wrote in the Group Chat:

Of course you weren’t, [Director] can’t read

I like how we specifically asked for the meeting to include you, preferably before you left, and my man keeps playing by his own rules¹⁷

¹³ Grievant Ex. 28, Agency Ex. 13 at 1-2, 8, Agency Ex. 13 at 3, Agency Ex. 27 at 288-290.

¹⁴ Grievant Ex. 34, Agency Ex. 27 at 167-170.

¹⁵ Grievant Ex. 34, Agency Ex. 27 at 166.

¹⁶ Grievant Ex. 34 & 47, Agency Ex. 27 at 166.

¹⁷ Grievant Ex. 39, Agency Ex. 27 at 117.

On January 26, 2024, Grievant wrote in the Group Chat that “. . . I will officially be joining the fun that is [an education staff member’s] class” and “He is a special special man.”¹⁸

On the evening of February 6, 2024, Grievant referred to [a programs manager] as “This bitch...” in the Group Chat in response to questions from Former Acting Supervisor about the Site’s use of a facility during an upcoming event because the programs manager had advised Former Acting Supervisor that his group would not be able to participate in the event. When Former Acting Supervisor wrote about programs manager, “Like why? Does she enjoy me shutting her down so much.” Grievant replied “Maybe she’s into degradation, who knows.”¹⁹

The next morning on February 7, 2024, some participants of the Group Chat were attending a training class. The participants began discussing an educator co-worker attending the training and his hat. During the hearing, witnesses testified that Group Chat participants believed the hat resembled a Nazi hat and had concerns about a co-worker wearing such a hat on the Site and around the visiting public. While Group Chat participants were attending the training on February 7, 2024, one Group Chat participant wrote that she wanted to set the hat on fire. Grievant responded, “Wait till he puts it back on then light it up.”²⁰

Witness 1 testified that she became particularly concerned about comments in the Group Chat on the morning of February 7, 2024, when she read the messages from the previous evening regarding the programs manager, including Grievant’s reference to the programs manager as “This bitch...” and Grievant’s suggestion that the programs manager may be “into degradation” which Witness 1 believed was a suggestion that the programs manager received sexual gratification from being “told off.” Witness 1 testified that she considered Grievant’s comment regarding the programs manager being “into degradation” a “wildly inappropriate escalation” of the dispute.²¹

Witness 1 testified that after reading the messages about the programs manager in the Group Chat, she decided to speak to an education supervisor about the Group Chat. When she was showing the education supervisor the messages about the programs manager from the evening of February 6, they also read the messages from that morning regarding setting the educator co-worker’s hat on fire.

Witness 1 testified that she had not come forward sooner about some of the messages of concern to her in the Group Chat because she considered co-workers in the Group Chat to be friends and, for at least some time during the Summer and Fall of 2023, Witness 1 was interested in working at the Site permanently. Witness 1 testified that by December 2023, she had decided that she did not want to work at the Site because of

¹⁸ Agency Ex. 13 at 18, Agency Ex. 27 at 41.

¹⁹ Grievant Ex. 48, Agency Ex. 13 at 18-19, Agency Ex. 27 at 15-17.

²⁰ Grievant Ex. 48, Agency Ex. 27 at 14-15.

²¹ Hearing Recording at 1:28:36-1:33:00, Grievant Ex. 48, Agency Ex. 13 at 18-19, Agency Ex. 27 at 15-17.

what she considered to be an increasing level of toxicity and unprofessional behavior in the Group Chat.²²

On February 14, 2024, Grievant received a counseling for speaking to co-workers in a “derogatory and demeaning way, including swearing” during an incident that occurred at the Site on February 7, 2024.²³

On March 6, 2024, Grievant was issued a Group III Written Notice of disciplinary action with termination for violation of DHRM Policy 2.35, Civility in the Workplace related to Grievant’s comments in the Group Chat.

CONCLUSIONS OF POLICY

Section 2.2-3000 of the Code of Virginia provides that state employees “shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management. To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes that may arise between state agencies and those employees who have access to the procedure.”²⁴ An employee’s right to discuss their concerns with management, must be balanced against the agency’s need to efficiently conduct its operations and business.²⁵

Therefore, although state employees have the right to discuss freely, and without retaliation, their concerns with their immediate supervisor and management, the Standards of Conduct also set forth the expectation that state employees demonstrate respect for their agency and toward other employees and support efforts that ensure a safe and healthy work environment. Consistent with Virginia Code § 2.2-3000, the Standards of Conduct also set forth the expectation for state employees to resolve work-related issues and disputes in a professional manner and through established processes.²⁶

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 Foundation.

DHRM Policy 2.35 makes clear that

[t]he 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.

²² Hearing Recording at 1:48:33-1:49:00, 2:19:17-2:19:30.

²³ Agency Ex. 10.

²⁴ Va. Code § 2.2-3000.

²⁵ See Va. Code 2.2-3004(B).

²⁶ See DHRM Policy 1.60, Standards of Conduct.

Behaviors that undermine team cohesion, staff morale, individual self-worth, productivity, and safety are not acceptable.²⁷

Pursuant to DHRM Policy 2.35, prohibited conduct/behaviors²⁸ may include, but are 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;
- Cornering people or blocking egress;
- Invading personal space;
- Stalking;
- Possessing, brandishing, or using a weapon that is not required by the individual's position while on state premises or engaged in state business;
- 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 significantly distresses, disturbs, and/or offends others;
- Making disparaging remarks, spreading rumors, or making innuendos about others in the workplace;
- Raising one's voice inappropriately or shouting at another person;
- Swearing or using obscene language or gestures toward another person;
- Making obscene phone calls or delivering obscene messages to another person;
- Humiliating others; making public statements with the intent of embarrassing a targeted person; impugning one's reputation through gossip;
- Making unwelcome or suggestive comments or jokes;
- Displaying symbols associated with hostile/violent groups or inappropriate sexual connotations toward another person;
- Making culturally insensitive remarks; displaying culturally insensitive objects, images, or messages;
- Making demeaning/prejudicial comments/slurs or attributing certain characteristics to targeted persons based on the group, class, or category to which they belong;
- Retaliating against one who, in good faith, reports a violation of this policy or participates in related investigations;

²⁷ See DHRM Policy 2.35, Civility in the Workplace

²⁸ See DHRM Policy 2.35, Civility in the Workplace, Policy Guide.

- Posting or discussing sensitive, private information about someone to others;
- Pretending to be someone else online in order to make that person look bad;
- Using photo shop tools to create harassing images; posting videos to intimidate or harass someone;
- Publishing jokes or demeaning comments electronically about another person;
- Sending e-mails or using social media to convey inappropriate messages about someone.

Any employee who engages in conduct prohibited under this policy or who encourages or ignores such conduct by others shall be subject to corrective action, up to and including termination, under Policy 1.60, Standards of Conduct.

Disciplinary actions to address prohibited behaviors may be taken on a progressive basis or actions may be taken upon the first occurrence, depending upon the nature and seriousness of the conduct. The context of the behaviors, nature of the relationship between the parties, frequency of associated behaviors, and the specific circumstances must be considered in determining if the behavior is prohibited. A “reasonable person” standard is applied when assessing if behaviors should be considered offensive or inappropriate.

DHRM Policy 2.35 defines the “workplace” as “any location, either permanent or temporary, where an employee performs any work-related duty or is representing the agency in this capacity. This includes, but is not limited to, the buildings and surrounding perimeters, including the parking lots, field locations, alternate work locations, clients’ homes or offices, outside meetings, conferences and conventions, and travel to and from work assignments. It also applies to written, verbal, or graphic communications delivered in person, via phone, message, computer, or social media.”²⁹

Violations occurring outside the workplace may be grounds for disciplinary actions, up to and including termination if the conduct committed has a sufficient nexus to the workplace or the agency’s operations, services, or reputation to be addressed by this DHRM Policy 2.35.

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

The Group Chat was comprised of Foundation employees who worked at the Site and the Group Chat was utilized by those employees to advise each other of the status of work projects, identify needed work supplies, communicate schedules or scheduling conflicts, and to generally communicate about work-related matters.

²⁹ See DHRM Policy 2.35, Civility in the Workplace.

Grievant did not dispute that he made the comments in the Group Chat that were attributed to him. Grievant also did not dispute that the comments were inappropriate for the workplace.

Grievant argued that the comments were made as a result of the Foundation's poor treatment of him and other Site employees and his frustrations with the workplace that he stated had been ignored by the Foundation.

Grievant argued that he and other staff who worked at the Site believed that the Foundation's vegetation policy was negatively "targeted" at the Site.³⁰ Executive Director credibly testified that the vegetation policy was a response by the Foundation to State requirements associated with the removal of vegetation on State properties. Even if the vegetation policy had been "targeted" at the Site, as Grievant suggested, that might explain his frustration, but does not justify or excuse Grievant's behavior. Grievant also argued that he had experienced what he considered sexually discriminatory or harassing behavior from grounds manager in the past.³¹ It was unclear during the hearing what may have occurred and whether Grievant had ever reported such concerns to Foundation management. But again, grounds manager's behavior toward Grievant, or other staff at some point in the past, does not justify or excuse Grievant's behavior. Grievant commented to his co-workers in the Group Chat that "If [grounds manager] wants a war, I'll fucking give her a war" and "We're gonna leave a red tomahawk outside the grounds garage . . . Again, this is fucking war." In addition to being rude, vulgar, disrespectful, inappropriate and unprofessional, Grievant's comments were aggressive and his comments that he would "fucking give her a war" and leave a tomahawk outside the grounds garage could reasonably be interpreted as threatening or suggestive of violence.

A few weeks later, Grievant again had concerns with issues related to the work of the Foundation's grounds staff. Although Grievant may reasonably have been frustrated by what appeared to be the grounds manager's breach of a commitment she had made to him to leave logs at the Site, grounds manager's actions did not justify or excuse Grievant's behavior. Grievant commented to his co-workers in the Group Chat that "Imma fucking fight someone" ... "like literally." Again, Grievant's comments were vulgar, aggressive, threatening and suggestive of violence, in addition to being rude, inappropriate, and unprofessional.

In January 2024, Grievant advised co-workers in the Group Chat that he would "officially be joining the fun that is [an education staff member's] class" and then stated that the education staff member "is a special special man." The term "special" can be used to refer to something as being different from what is ordinary or usual; this can be positive or negative. In this case, Grievant was not being complimentary. Grievant's use of the term would reasonably be interpreted as intended to demean or humiliate as a negative suggestion about the co-worker's capabilities. According to Grievant he had historic concerns with the content of the training that this education staff member provided.³² That Grievant may have had concerns with the content of a particular work-

³⁰ See Grievant Ex. 5.

³¹ See Grievant Ex. 5.

³² See Grievant Ex. 5.

related training does not justify or excuse his comments to other co-workers that were demeaning and disparaging of the staff member providing that training.

On the evening of February 6, 2024, Grievant referred to [a programs manager] as “This bitch...” in the Group Chat and then suggested that the programs manager may be “into degradation.” Grievant argued that the programs manager had treated him and others at the Site badly over the years. Grievant gave as examples that the programs manager refused to let Site staff warm themselves near a fire during extremely cold weather and that the programs manager had accused a Group Chat participant of “stealing” candy. Even accepting that programs manager may have treated Grievant and others badly in the past, does not justify or excuse his behavior which was offensive, derogatory, and demeaning.

The next morning on February 7, 2024, when a Group Chat participant wrote that she wanted to set an educator co-worker’s hat on fire. Grievant responded “Wait till he puts it back on then light it up.” Grievant argued that, although the hat was not in fact a “Nazi” hat, he and others still had concerns about the hat, and they disagreed with a Foundation manager’s decision not to prohibit a co-worker from wearing the hat at work and believed the manager’s response to their concerns was dismissive. Again, Grievant’s concerns with the hat do not justify or excuse his suggestion to his co-workers about setting the hat on fire that they “Wait till he puts it back on then light it up.” Again, Grievant’s comment was aggressive and suggestive of violence.

Grievant argued that he was “burned out” and frustrated because he believed that his concerns were ignored or dismissed by Director and that he was “unheard” by the Foundation. This Hearing Officer does not dismiss or doubt the witness testimony that working at the Site could be hard and stressful and that employees at the Site frequently experienced racist, sexist and harassing comments and behaviors from the visiting public. This Hearing Officer also does not doubt or minimize the frustration that Grievant may have felt. Grievant’s concerns and frustrations with the workplace and the actions or inactions of Foundation management might explain the context of his behavior, but it does not justify or excuse that behavior. Grievant chose to make comments to the other participants in the Group Chat that were inappropriate, disparaging, demeaning and, at times, aggressive toward other co-workers. Some of Grievant’s comments also would reasonably be interpreted as threatening and suggestive of violence toward other co-workers.

Grievant noted his belief that work stressors exacerbated issues related to his mental health. Grievant did not appear to argue that a disability impacted his behavior, however, to the extent such argument had been made, it is important to note that while the Americans with Disabilities Act requires employers to provide reasonable accommodations for an employee’s disability, it does not broadly shield employees from disciplinary action for their own misconduct.³³

³³ See EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities, EEOC Notice Number 915.002 (March 25, 1997).

Grievant's comments in the Group Chat were rude, inappropriate, unprofessional and they were, at times, disparaging and demeaning of other co-workers. As noted above, some of Grievant's comments in the Group Chat also were aggressive, threatening, and suggestive of violence. Throughout the relevant period, from September 2023 through February 2024, the Group Chat was consistently used by Site staff members to discuss and conduct work matters and the comments for which Grievant was disciplined related to the workplace and work matters.

The preponderance of the evidence shows that Grievant's behavior violated DHRM Policy 2.35, Civility in the Workplace.

Whether the Agency's discipline was consistent with law and 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."³⁴ Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

Violation of DHRM Policy 2.35 may be a Group I, Group II, or Group III offense depending upon the nature of the violation.

In this case, Grievant's comments in the Group Chat spanned over approximately five months and reflect a pattern of not only rude, inappropriate, and unprofessional comments, but comments that were demeaning and derogatory toward co-workers. The nature of those types of comments was to undermine team cohesion and staff morale at the Foundation by fueling an "us" versus "them" perspective by Site staff in relation to the rest of the Foundation employees. At times, Grievant's comments in the Group Chat were aggressive, threatening, and suggestive of violence toward co-workers, the nature of such comments is serious and unacceptable in the workplace.

The Agency's discipline was consistent with law and policy.

Due Process

Grievant argued that the Foundation did not properly consider his response to the allegations against him and that the involvement of Director and Senior Director in the disciplinary action was inappropriate because Director and Senior Director also were the subjects of some of Grievant's comments in the Group Chat. Grievant also argued that he initially was provided with only a portion of the comments reviewed by the Foundation as part of its investigation. To the extent Grievant is arguing that the Foundation did not afford him with sufficient due process, the hearing process cures any such deficiency. Grievant had the opportunity to present any evidence and arguments he wished during the hearing.

³⁴ The Department of Human Resources Management ("DHRM") has issued Policy 1.60 setting forth Standards of Conduct for State employees.

Mitigation

The Standards of Conduct provide that an Agency may reduce the level of a disciplinary action if there are mitigating circumstances, such as conditions that compel a reduction to promote the interests of consistency, equity and objectivity, or based on an employee's otherwise satisfactory work performance.

Grievant argued that he did not engage in violence and did not intend to engage in violence. That Grievant did not carry through his threats of violence may have been a factor for the Foundation to consider to mitigate its discipline of Grievant, but the Foundation did not have to wait for Grievant to carry out his threats before disciplining him.

Grievant also appeared to argue that another participant in the Group Chat made some comments that Grievant considered to be comparable to his comments but for which the other individual, Employee X, was not terminated. It is unclear whether Employee X was in a similar or comparable position to Grievant's position. Grievant identified two comments in the Group Chat attributed to Employee X that he considered comparable to the comments for which he had been terminated. Employee X commented in the Group Chat that "HR better run."³⁵ Director credibly testified that he reviewed this comment by Employee X during the investigation of the Group Chat, but based on the information available to him at the time of the investigation, he could not determine the context of Employee X's comment to determine whether the comment was a violation of policy.³⁶ The second Employee X comment that Grievant argued was comparable to comments for which he was terminated, was Employee X's comment that "HA no [grounds manager] can go break an arm I don't care."³⁷ Director credibly testified that he first became aware of this comment by Employee X when Grievant showed it to him during the hearing in this matter.³⁸ This Hearing Officer does not have sufficient information to determine when the Foundation may have been provided a complete copy of the entire Group Chat. Based on the information available to this Hearing Officer, however, Grievant has not met his burden of proving that Employee X is a similarly situated employee who was disciplined less harshly for similar misconduct. Grievant pointed to two comments attributed to Employee X that were made within a period of approximately one month during September-October 2023. One of Employee X's comments suggested that "HR better run" in response to another Group Chat participant indicating that she had two more slices of cold pizza to finish eating before she would be able to then go and exact unspecified "revenge" for not being provided an opportunity to interview for a job. In the other comment Grievant offered, Employee X commented that she "would not care" if a co-worker broke her arm. Employee X did not suggest that she, Employee X, wanted to break the co-worker's arm. This Hearing Officer does not suggest that Employee X's comments are appropriate for the workplace or that now that the Foundation has the full text of comments from the Group Chat that it should not review its actions to ensure that it has issued consistent discipline. But Employee X's two

³⁵ Grievant Ex. 21.

³⁶ Hearing Recording at 1:19:00-1:22:21.

³⁷ Grievant Ex. 29.

³⁸ Hearing Recording at 1:16:09-1:19:00.

comments over an approximate one month period are not sufficiently comparable to Grievant's pattern of multiple comments that were demeaning and derogatory of co-workers and threatening and suggestive of violence toward co-workers over a period of several months.

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...."³⁹ 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 Foundation's issuance to Grievant of a 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:

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.

³⁹ Va. Code § 2.2-3005.

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.⁴⁰

Angela Jenkins

Angela L. Jenkins, Esq.
Hearing Officer

⁴⁰ 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.