

COMMONWEALTH OF VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 12240

Hearing Date: April 10, 2025
Decision Issued: April 21, 2025

PROCEDURAL HISTORY

On September 12, 2024, Grievant was issued a Group II Written Notice of disciplinary action for lack of civility in the workplace, as a violation of both state and agency policy. On September 26, 2024, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to a hearing. On February 18, 2025, the Office of Employment Dispute Resolution assigned this matter to the Hearing Officer. On April 10, 2025, a hearing was held at the Agency's office.

At the hearing, the Agency was represented by its advocate and the Grievant was represented by law student advocates. The Hearing Officer received documentary exhibits of the parties into evidence at the hearing, namely, pages 001-059 from the Agency and pages 1-95 from the Grievant.¹

ISSUES

1. Whether the Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law and policy?
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 evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. The employee has the

¹ References to the agency's exhibits will be designated as "Agency Ex." followed by the exhibit/page number. References to the Grievant's exhibits are designated "Grievant Ex." followed by the exhibit/page number.

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.

APPEARANCES

Representative for Agency
Grievant
Legal Advocates
Witnesses

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer sets forth her findings of fact below:

1. During the time relevant to this proceeding, the Grievant was employed by the Agency as a Correctional Lieutenant at one of its facilities. He had worked for the Agency for approximately seven years.
2. Grievant consistently received an overall rating of “Contributor” on his evaluations and had never received formal disciplinary action before this incident.
3. On June 18, 2024, the facility needed to run a medical transport to the hospital for an inmate experiencing a medical emergency. Grievant was called to assist with coordination efforts.
4. Grievant needed to locate officers to go on the transport and met Officer 1 and Officer 2 at the sallyport. He began to give instructions to both officers regarding the transport.
5. Grievant was in a supervisory position over both Officers. Officer 2 was relatively new and was receiving training that day.
6. Grievant gave a directive to Officer 2.
7. Officer 1 told Officer 2 that she should do something other than the instructions given by Grievant.
8. Grievant said something to the effect that he was the one running the shift, and Officer 2 needed to do what he had instructed. A disagreement between Grievant and Officer 1 ensued.
9. Grievant became angry and told Officer 1 to “get the f—k out of [his] face” and to leave the facility. Grievant put his hand on Officer 1’s arm.
10. Officer 1 started to leave the facility but felt upset and subsequently decided to go to the Major’s office to report the incident.

11. The Major was in her office with the Assistant Warden. Officer 1 told both about Grievant's actions. Officer 1 conveyed that he was frustrated and angered by the incident.
12. Officer 1 wrote a statement two days later describing the incident from his perspective. Agency Ex., p. 8-9.
13. Grievant wrote a statement on the day of the incident, stating, in part, that "I lost my temper briefly and told [Officer] to get the f-k out of my face and go home. As I was walking past, I placed my hand on his shoulder in the escort position." Agency Ex., p. 7.
14. Grievant testified consistently with this statement and took responsibility for his actions.
15. The facility's Warden does not approve of or tolerate cursing in the workplace, and frequently holds staff meetings in which employees are reminded of the civility policies enacted by the Commonwealth and by the Agency.
16. Following an investigation, Assistant Warden recommended the issuance of a Group III Written Notice, with termination, to Grievant. Agency Ex., p.10.
17. After review, the Regional Administrator did not approve a Group III Written Notice, but approved the issuance of a Group II Written Notice. *Id.*
18. The Group II Written Notice was issued to Grievant on September 12, 2024.

CONCLUSIONS OF LAW AND POLICY

The General Assembly enacted the Virginia Personnel Act, *Va. Code* § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Va. Code § 2.2-3000(A) sets forth the Commonwealth's grievance procedure and provides:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . . 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 which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

Pursuant to § 2.2-1201 of the *Code of Virginia*, the Virginia Department of Human Resource Management promulgated Standards of Conduct, Policy 1.60. Policy 1.60 provides a set of rules governing professional

and personal conduct and acceptable standards for work performance of employees, and establishes a fair and objective process for correcting or treating unacceptable conduct or work performance.

Further, the Department of Human Resource Management has promulgated Policy 2.35, *Civility in the Workplace*, to establish expectations for appropriate behaviors in the workplace and “increase awareness of all employees’ responsibility to conduct themselves in a manner that cultivates mutual respect, inclusion, and a healthy work environment.” Policy 2.35 prohibits “workplace harassment (including sexual harassment), bullying (including cyber-bullying), and workplace violence of any kind... in state government agencies.”

Did the Grievant engage in the behavior, and did the behavior constitute misconduct?

The facts in this case were largely undisputed. Regardless of the circumstances leading up to the argument between Grievant and Officer 1, Grievant’s written statement and testimony were consistent in admitting that he told Officer 1 to “get the f—k out of my face” and put his hand on Officer 1’s arm. Such comments violate DHRM Policy 2.35, *Civility in the Workplace*, and by their nature, undermine team cohesion, staff morale, and productivity and are not acceptable in the workplace. Likewise, the Agency has enacted its Operating Procedure 145.3, *Equal Employment Opportunity, Anti-Harassment, and Workplace Civility*, which echoes Policy 2.35 and 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...

Behaviors that undermine team cohesion, employee morale, individual self-worth, productivity, and/or safety are not acceptable.” Agency Ex., p. 27.

The Agency has met its burden of proving that Grievant engaged in misconduct.

Was the discipline 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.” 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.”

Though violations of DHRM Policy 2.35 can be classified at any level according to severity, a violation of policy is normally considered a Group II offense. See DHRM Policy 1.60, Attachment A (which gives examples of offenses grouped by level). In this case, Agency management initially intended to charge Grievant with a Group III Written Notice, with termination, the most severe disciplinary action that the Grievant could have been issued. The Assistant Warden testified that he considered Grievant’s role as a supervisor in assessing the severity of the offense, and believed that Grievant should have been able to remove himself from the situation once it escalated.

EDR has addressed this policy consideration in Ruling No. 2015-3953, holding as follows:

The issue of whether an agency can hold a supervisor to a higher standard is a policy issue as well as a procedural issue...DHRM has previously determined that “agencies may hold supervisors and managers to a higher degree of responsibility and leadership than non-management employees.” [Footnote omitted]. The *Rules for Conducting Grievance Hearings* require that a hearing officer must show deference to how the agency weighs the supervisory status of an employee in determining the appropriate level of discipline...

EDR cited to the *Rules for Conducting Grievance Hearings* VI(B)(2), which state that “a hearing officer must give deference to the agency’s consideration and assessment of any mitigating and aggravating circumstances.” Thus, even if hearing officers disagree with an agency’s assessment of severity of the offense, they are not free to substitute their judgment for that of the agency, as long as the discipline was consistent with law and policy.

State policy specifically classifies a policy violation, in general, as a Group II offense. Thus, in this instance, the Agency’s discipline was consistent with law and policy.

Mitigation

Va. Code § 2.2-3005.1 authorizes hearing officers to order appropriate remedies, including “mitigation or reduction of the agency disciplinary action.” As with all mitigating factors, the grievant has the burden to raise and establish any mitigating factors. See e.g., EDR Rulings Nos. 2010-2473; 2010-2368; 2009-2157.

Under the *Rules for Conducting Grievance Hearings* VI (A), “a hearing officer is not a ‘super-personnel officer’ ...[and] the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy.” Accordingly, a hearing officer may mitigate the agency’s discipline only if, under the record evidence, the agency’s discipline exceeds the limits of reasonableness. Because reasonable persons may disagree over whether and to what extent discipline should be mitigated, a hearing officer may not simply substitute his or her judgment on that issue for that of agency management.

A non-exclusive list of factors to consider 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. While past service to the agency may be a consideration, EDR has previously ruled that it will be an extraordinary case in which an employee’s length of service and/or past work experience could adequately support a finding by a hearing officer that a disciplinary action exceeded the limits of reasonableness. EDR Ruling No. 2008- 1903; EDR Ruling No. 2007-1518; and EDR Ruling 2010-2368.

Here, Grievant asserts that the discipline should be mitigated due to a number of factors, including the emergency nature of the situation, as well as his past work history and strong work ethic. He provided statements from other Agency employees attesting to his work performance. Grievant Ex., p. 11-17, 82-85. However, as mentioned above, length of service and past work history alone are not enough to support a finding by the hearing officer that the disciplinary action exceeded the limits of reasonableness.

Additionally, the Grievant argues that the Agency disciplined similarly situated employees inconsistently. In support of that position, he provided two comparator disciplinary actions, as well as statements from

other employees who admitted to using profanity at work and were not disciplined at all. Grievant Ex., p. 18-21. The Hearing Officer finds that the two employees receiving disciplinary actions were not similarly situated due to the nature of their offenses, both of which involved social media posts rather than an in-person conflict with another employee. Notably, one employee received a more severe corrective action than did the Grievant. Finally, the Agency can only discipline offenses of which it is aware. There was no evidence provided that would show that Agency leadership or Human Resources knew about the behavior of the particular employees who did not receive disciplinary action for using obscene language.

If an agency does not consider mitigating factors, the hearing officer should not show any deference in the mitigation analysis. In this proceeding, the Department did consider mitigating factors in disciplining the Grievant.² The Warden who issued the disciplinary action testified that the original recommendation was a Group III Written Notice, with termination. However, the Regional Administrator made the decision to reduce the proposed Group III to a Group II. Under “Circumstances considered,” the Written Notice states that the grievant had been with the agency for six years, provided positive statements from others about his work performance, apologized for his actions, and had no other disciplinary issues. Agency Ex., p. 1. As outlined above, the Agency also argued that Grievant’s position as a supervisor constitutes an aggravating circumstance, as he may be held to a higher standard of conduct.

That the Agency could have further mitigated the discipline based on the facts of this case, but determined that it was inappropriate to do so, is not a reason for the Hearing Officer to conclude that the discipline was unreasonable, and the Hearing Officer is not free to substitute her judgment for that of the Agency. In this proceeding, the Agency’s actions were consistent with law and policy and, accordingly, the exercise of such professional judgment and expertise warrants appropriate deference.

In summary, the hearing officer determines for the Written Notice and the offenses specified in the Written Notice (i) the Grievant engaged in the behavior described in the written notice; (ii) the behavior constituted misconduct; (iii) the Department’s discipline was consistent with law and policy and that there are no additional mitigating circumstances justifying a further reduction or removal of the disciplinary actions.

DECISION

For the reasons stated herein, the Agency has sustained its burden of proof, by a preponderance of the evidence, and the Group II Written Notice is **upheld**.

APPEAL RIGHTS

Either party 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 from the date the decision was issued.

² That the Agency may not have agreed with all of the potentially mitigating factors the Grievant sets forth (i.e., that the situation could have been considered an emergency) is not controlling, as the Agency did consider mitigation and did, in fact, mitigate the discipline.

Please address your request to:

Office of Employment and Dispute Resolution
Department of Human Resource Management

101 North 14th St., 12th Floor
Richmond, VA 23219

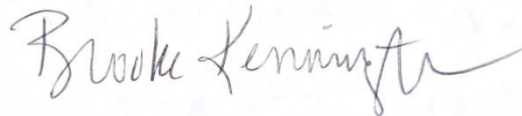
or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

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 day when the decision becomes final.³

ENTER: April 21, 2025



Brooke S. Kennington, Hearing Officer

cc: Each of the persons on the Attached Distribution List (by e-mail transmission as appropriate, pursuant to *Grievance Procedure Manual*, § 5.9).

³ Agencies must request and receive prior approval from EDR before filing a notice of appeal.