COMMONWEALTH OF VIRGINIA

Department Of Human Resource Management

Office of Employment Dispute Resolution

DECISION OF HEARING OFFICER

In re:

Case number: 12213

Hearing Date: March 25, 2025
Decision Issued: May 7, 2025

PROCEDURAL HISTORY

On September 16, 2024, Grievant was issued a Group I Written Notice of disciplinary action for using "obscene language that was derogatory" about management and co-workers during an interview for another position in the Agency.[1]

On October 14, 2024, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and the matter advanced to hearing. On December 16, 2024, the Office of Employment Dispute Resolution assigned the matter to the Hearing Officer. On March 25, 2025, a hearing was held at an Agency facility in Fairfax, Virginia.

APPEARANCES

Grievant
Agency Advocate
Witnesses
Interpreter[2]

[1] Agency Ex. at 11-13.
[2] At the request of the Grievant, a language interpreter was available during the hearing to assist Grievant as needed. Because the interpreter was more than an hour late arriving to the hearing, Grievant indicated his preference that the hearing begin without the interpreter. Once the interpreter arrived, they participated in the hearing to assist the Grievant as requested by him.

ISSUES

1. Whether 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 (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:

Grievant is a Transportation Operator II with the Virginia Department of Transportation. At the time of this disciplinary action, Grievant had been employed by the Agency for almost ten years.

Witness 1 and Witness 2 also are Agency employees but work in different Agency facilities from Grievant and each other. On August 14, 2024, Witness 1 and Witness 2 conducted interviews for an Agency job position. Grievant was an applicant for the position and was interviewed by Witness 1 and Witness 2 at an Agency facility.

During their interview of Grievant, Witness 1 and Witness 2 asked Grievant to "Tell [them] about a time when you worked with someone who was difficult to get along with." Both Witness 1[3] and Witness 2[4] testified that while responding to the question, Grievant referred to his management and co-workers as "assholes." According to the witnesses, Grievant did not identify by name a particular co-worker or manager as an "asshole," but generally referred to his co-workers and management as "assholes" or "a bunch of assholes." Witness 1's notes of Grievant's response to the question included a notation

[3] Hearing Recording at 12:27-28:17, 34:30-42:25.
[4] Hearing Recording at 49:50-1:00:15.

at the bottom of the page that stated: "* Used offensive language towards management."[5] Witness 2's notes of Grievant's response to the question also included a notation at the bottom of the page that stated: "*Used profanity describing management and crew members."[6] Neither Witness 1 nor Witness 2 included a direct quote of Grievant's use of the word "assholes" in their notes of Grievant's interview responses.

Witness 1 and Witness 2 did not stop the interview, and they did not ask Grievant to stop using inappropriate language. Both Witness 1 and Witness 2 testified that the rest of the interview was uneventful.

After the interview with Grievant concluded, Witness 1 walked to his manager's office, reported the incident to his manager, and asked his manager what he should do when inappropriate language is used during an interview.

Witness 1's manager reported the incident to an Agency human resources manager.

On August 19, 2024, Witness 1 was asked by the Agency human resources manager to provide a written statement regarding the interview and Grievant's use of inappropriate language. Witness 1 prepared the statement jointly with Witness 2 and both Witness 1 and Witness 2 signed the statement which described the events as follows:

> [Witness 2] and I were conducting interviews on Wednesday 8/14/2024 with [Grievant]. During the interview he got very explicit referencing his management team and fellow teammates. [Grievant] stated that management were a "bunch of assholes" since they did not provide him with the proper tools needed to complete the job. [Grievant] went on to state that fellow employees were "assholes" as well because they did not want to take recommendations from him about things related to work. We found this to be unsuitable given the fact that he was conducting an interview with fellow VDOT employees and management.[7]

CONCLUSIONS OF POLICY

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

The preponderance of the evidence showed that Grievant engaged in misconduct when he referred to his management and co-workers as "assholes" during an interview with other Agency employees (Witness 1 and Witness 2) at an Agency facility.

[5] Agency Ex. at 5.
[6] Agency Ex. at 7.
[7] Agency Ex. at 8 and see Hearing Recording at 12:27-28:17, 34:30-42:25, 49:50-1:00:15.

Witness 1 and Witness 2 both credibly testified to their observations that Grievant referred to his management and co-workers as “assholes” during their interview of him on August 14, 2024.

Grievant admitted participating in the interview with Witness 1 and Witness 2 but denied using the word “assholes” during the interview. Grievant offered testimony from Witness 3, Witness 4, and Witness 5. Those witnesses testified that Grievant was a good worker who they had never observed using the word “asshole(s)” or other vulgar or derogatory language to refer to Agency management or employees. Grievant argued that it did not make sense for him to use such language while interviewing for a new job and asserted that it was not in his character to use vulgar language. Grievant offered as evidence notes from his other interviews for Agency positions that did not include any report of the use of vulgar or disrespectful language, including in response to the same or similar interview question.[8] Finally, Grievant argued that Witness 1 and Witness 2 may have been motivated to lie because they knew Grievant’s superintendent whom Grievant testified may have retaliatory or discriminatory motives toward Grievant. Grievant offered no other evidence of a motivation for Witness 1 or Witness 2 to lie.

Although Witness 3, Witness 4, and Witness 5 provided credible testimony of their experiences with Grievant, those witnesses did not observe Grievant’s behavior during the interview at issue in this case. Witness 1 and Witness 2 were the only individuals in the room with Grievant during the interview. This Hearing Officer found the testimony of Witness 1 and Witness 2 to be credible and consistent. Both witnesses credibly testified about their observations that Grievant referred to his management and co-workers as “assholes” during that interview. Witness 1 and Witness 2 did not know Grievant and did not have any prior relationships with Grievant. There was no evidence that either Witness 1 or Witness 2 had any motivation to lie. Their inclusion of notations in their interview notes that “offensive language” and “profanity” had been used during the interview and Witness 1 immediately seeking guidance from his manager following the interview were reasonable actions. And their actions were consistent with their credible testimony that during the interview they were unsure about what the Agency expected of them in such a situation. During the hearing, Witness 1 and Witness 2 provided testimony that was consistent with each other and with the statement they provided to the Agency on August 19, 2024.

The preponderance of the evidence showed that Grievant engaged in misconduct on August 14, 2024, when he referred to his management and co-workers as “assholes” during an interview with Witness 1 and Witness 2 at an Agency facility. The use of such vulgar language was unprofessional and disrespectful. The Agency has met its burden of proving that Grievant engaged in misconduct.

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." Group II offenses "include acts of misconduct of a more serious

[8] See e.g. Grievant Ex. at 29-154.

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."[9]

The preponderance of the evidence showed that Grievant used language that was vulgar and disrespectful when referring to his management and co-workers while interviewing for an Agency position with other Agency employees (Witness 1 and Witness 2) at an Agency facility. The use of vulgar or disrespectful language is a Group I offense.

Grievant objected to the Agency's consideration of a prior active Group I written notice (issued March 13, 2024) as part of its determination of the appropriate discipline in this case. Grievant argued that the prior discipline was irrelevant to the allegations related to this disciplinary action and Grievant disputed the basis for the prior written notice. Based on the evidence presented, the Agency did not consider the prior active discipline in determining whether Grievant engaged in the misconduct at issue in this case, but rather the Agency considered the prior active discipline when determining whether to mitigate (or reduce) the discipline. The evidence showed that Manager considered several factors in determining whether to mitigate the discipline, including: Grievant's years of service, work performance, and prior disciplinary actions. After considering those factors, Manager determined that it was inappropriate to mitigate the discipline in this case. The Standards of Conduct allow agencies to consider mitigating factors when determining whether to reduce the level of disciplinary action. The Agency appropriately could consider the fact that Grievant had prior active discipline as a factor in determining whether to reduce the discipline in this case. Further, even in the absence of any consideration of Grievant's prior discipline, the Agency's issuance of a Group I Written Notice in this case was consistent with law and policy and does not exceed the limits of reasonableness.

Grievant, at times, appeared to suggest that the Agency's actions were discriminatory and retaliatory. The Agency, however, showed that it had business reasons for its discipline of Grievant based on Grievant's misconduct and Grievant offered no evidence that would suggest that those reasons were mere pretext for discrimination or retaliation.

The Agency has met its burden of proving by a preponderance of the evidence that the Agency's issuance of a Group I Written Notice of disciplinary action 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…."[10] Under the Rules for Conducting Grievance Hearings, "[a] hearing officer must give deference to the agency's consideration and assessment of any

[9] See DHRM Policy 1.60, Standards of Conduct.
[10] Va. Code § 2.2-3005.

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. 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 a Group I Written Notice of disciplinary action 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.

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.[11]

[11] 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.

Angela Jenkins

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Angela Jenkins, Esq.
Hearing Officer