



# COMMONWEALTH OF VIRGINIA

*Department Of Human Resource Management*

*Office of Employment Dispute Resolution*

## DECISION OF HEARING OFFICER

In re:

**Case number: 12149**

**Hearing Date: November 19, 2024**

**Decision Issued: January 22, 2025**

### PROCEDURAL HISTORY

On June 6, 2024, Grievant was issued a Group III Written Notice of disciplinary action with termination. The Agency described the nature of the offense in the Written Notice as follows:

On April 9, 2024, [Grievant] admitted he used an unprofessional, sexually offensive term when speaking to a female officer. When the female officer was in the key room [of the Control Booth], [Grievant] made a statement referencing "a rape could happen in there" as there are no cameras in the small room. [Grievant] stated he was joking when he made the statement. This behavior is a violation of DOC Operating Procedure 135.1, Standards of Conduct, \* violation of DOC Operating Procedure 135.5, Workplace Violence, \* violation of DOC Operating Procedure 145.3, Equal Employment Opportunity, Anti-Harassment, and Workplace Civility, violation of DHRM Policy 1.60 Standards of Conduct, and violation of DHRM Policy 2.35 Workplace Civility.<sup>1</sup>

On June 21, 2024, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On July 8, 2024, the Office of Employment Dispute Resolution assigned this matter to the Hearing Officer.

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<sup>1</sup> Agency Ex. at 1.

The Hearing Officer held a pre-hearing conference call with the parties on August 7, 2024, and the matter was scheduled for hearing on September 27, 2024. The Agency agreed to provide an interpreter for the hearing as requested by the Grievant.

On September 10, 2024, the Agency advised the Grievant and the Hearing Officer that a new legal advocate would be representing the Agency during the hearing and requested a continuance to allow the new legal advocate to become familiar with the case. The Grievant did not object to a continuance and the hearing was continued to October 24, 2024.

On October 3, 2024, the Agency advised the Grievant and the Hearing Officer that the Agency's party designee had a conflict with the hearing date and the Agency requested another continuance. The Grievant did not object to a second continuance and the hearing was continued to November 19, 2024.

On November 15, 2024, the Agency advised the Grievant and the Hearing Officer that the Agency and its vendor had been unable to confirm the services of an interpreter fluent in Kirundi for the hearing. The Grievant agreed to the Agency seeking the services of a French interpreter as an alternative.

On November 18, 2024, the Agency notified the Grievant and the Hearing Officer that the Agency had been unable to secure an interpreter to provide services on the scheduled hearing date. The Grievant indicated his preference that the hearing proceed as scheduled without an interpreter and proposed specific parameters for the Grievant to request assistance in English if he had trouble understanding or communicating during the hearing. The Agency agreed to the Grievant's proposed parameters for requesting assistance during the hearing and the matter proceeded to hearing as scheduled.

On November 19, 2024, a hearing was held at the Facility.

## **APPEARANCES**

Grievant  
Grievant's Advocate  
Agency Legal Advocate  
Agency Legal Advocate  
Agency Party Designee  
Witnesses

## **ISSUES**

1. Whether Grievant engaged in the behavior described in the Group III 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:

Prior to his dismissal, Grievant was a Senior Corrections Officer at the Facility. Grievant had been employed at the Facility for over a year.<sup>2</sup> No evidence of prior disciplinary action was introduced during the hearing.

The Facility is one of four Agency facilities that houses an inmate population of women.<sup>3</sup>

Facility staff, including Grievant, received training on Agency policies prohibiting harassment and inappropriate behaviors both among staff and among staff and inmates. Such policies and prohibited behaviors were discussed regularly with the corrections officers during meetings and pre-shift briefings.<sup>4</sup> The Warden testified that because of the inmate population the Facility serves, the Facility staff also were trained to be trauma aware and gender responsive so that they would be cognizant of, and empathetic to, the potential trauma experienced by many of the inmates in their care.<sup>5</sup>

On April 9, 2024, Grievant was on duty working in the Control Room of a Unit in the Facility. The Unit Control Room is a secured area of the Facility that is not accessible to inmates housed at the Facility. There is an Equipment Closet inside the Unit Control Room. The Equipment Closet includes various keys and equipment, including restraints.<sup>6</sup>

At approximately 7:25 a.m., Grievant was working alone in the Unit Control Room when Officer 1 entered the Unit Control Room to retrieve items from the Equipment Closet. While Officer 1 was inside the Equipment Closet, Grievant stood in the doorway

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<sup>2</sup> Hearing Recording at 2:36:34-2:37:17.

<sup>3</sup> Hearing Recording at 1:32:58-1:33:50.

<sup>4</sup> Hearing Recording at 1:08:20-1:09:04, 1:21:36-1:23:56, 2:20:51-2:21:34.

<sup>5</sup> Hearing Recording at 1:50:09-1:55:05.

<sup>6</sup> See Agency Ex. at 16.

of the Equipment Closet and made a comment to Officer 1. Although Officer 1 and Grievant have differing accounts of the exact words Grievant used, all accounts include Grievant referring to a “rape” that “could” happen in the Equipment Closet because “there are no cameras” in the Equipment Closet.<sup>7</sup> After Grievant first made the comment, Officer 1 asked Grievant what he said, and Grievant repeated the statement.<sup>8</sup>

Officer 1 testified that Grievant’s statement made her concerned about the absence of cameras in the Equipment Closet and nervous for her own safety.<sup>9</sup> Because Grievant was standing in the doorway, Officer 1 described “squeezing” herself by Grievant to exit the Equipment Closet. Officer 1 then exited the Unit Control Room.<sup>10</sup>

Officer 1 testified that after she exited the Unit Control Room, she was instructed to complete her security rounds which were due at that time. After completing her security rounds, Officer 1 reported the incident to her supervisor, a Sergeant.<sup>11</sup>

After she first verbally reported the incident, Officer 1 wrote a statement of the incident which she signed and dated at 7:52 a.m. on April 9, 2024, and provided to the Human Resource Officer that morning. Officer 1 wrote the following:

0725 – When I, [Officer 1] stepped into [the Unit Control Room] to grab the [keys] to open the storage closet in [the Unit], [Grievant] followed me into the [Equipment Closet] and made the comment of “There are no cameras in here you know that right? Like I could rape you” and then repeated the statement of “I could rape you.”<sup>12</sup>

Later that same morning, at approximately 8:23 a.m., Officer 1 submitted an Internal Incident Report regarding her interaction with Grievant. Officer 1 described the incident as occurring on April 9, 2024, at 7:25 a.m. and described the incident as follows:

On Tuesday, April 9th 2024, I, [Officer 1] entered [the Unit Control Room] at approximately 7:24 am to grab the [Unit keys] to open a storage closet in [the Unit], at which point I was approached by [Grievant] at the door of the [Equipment Closet] inside [the Unit Control Room]. At approximately 7:25 am [Grievant] stood directly in front of the door leading back into [the Control Room] blocking my path out of the door. At which point he, [Grievant] made the comment “There are no cameras in here, you know that right? Like I could rape you right now.” I, [Officer 1], then made the statement “What?” to which [Grievant] repeated the statement “I could rape you.” At that point I, [Officer 1] exited [the Control Room] and made rounds in [two parts of the Unit] as is required being the floor officer. After completion of my round [in part of the Unit] I, [Officer 1], informed [Sergeant], who is the [Building] Sergeant and my supervisor at the time and [Sergeant] instructed me to call

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<sup>7</sup> Agency Ex. at 4, 12, 11, 13.

<sup>8</sup> Agency Ex. at 4, 12 and Hearing Recording at 20:17-21:50.

<sup>9</sup> Hearing Recording at 32:25-34:20.

<sup>10</sup> Hearing Recording at 41:03-42:27, 51:55-53:29

<sup>11</sup> Hearing Recording at 29:10-32:30.

<sup>12</sup> Agency Ex. at 12 and Hearing Recording at 21:50-22:58, 57:16-58:55.

watch command. I reported to the watch office and notified [Captain], who informed the Major. For this reason, this report is written.<sup>13</sup>

The Warden met with Grievant at approximately 9:50 a.m. that same morning regarding Officer 1's report of her interaction with Grievant in the Unit Control Room that morning. Grievant provided a hand-written statement to the Warden regarding the incident, Grievant wrote:

On 9<sup>th</sup> of April 2024, I, [Grievant] was called to report to the Warden conference room and [Warden], [Major] asked me about what happened in the [Unit Control Room] with [Officer 1]. I stated that [Officer 1] came in [the Unit Control Room] to look for a set of keys in the [Equipment Closet] in [the Unit Control Room], and I talked to her that there is no camera in that small room and said "Do you know if there can be a rape in that small room because there is no camera." I was surprised to hear that she reported that I talked straight to her that I tried to rape her. That is a misunderstanding I'm disappointed, I'm [shocked], she knows well that I can't do that or speak that intentionally she knows well that I respect her, and others as well; she knows well that was a joke. Please, believe me, I'm not that kind of person, I know how bad is that word or that act, I respect my wife and my family that can never happen to me even in my dreams. That is totally a misunderstanding.<sup>14</sup>

On April 12, 2024, Grievant submitted a typed statement regarding the incident with Officer 1, that stated:

Note explaining the incident at the workplace on April 9<sup>th</sup>, 2024

Before I get into details of what happened on April 9<sup>th</sup>, please allow me to first express my sincere apology to everyone, and particularly to my colleague [Officer 1] whom I unintentionally offended.

I have worked with [Officer 1] and spent so many hours together on the road transporting inmates, at the hospital, and at the facility. Not at any given time [Officer 1] would say that I ever said or done anything that made her uncomfortable. Same is true with all my colleagues, males, or females, they would attest that I have conducted myself with upmost respect and professionalism.

Regarding what happened on April 9<sup>th</sup>, it is very unfortunate that I made a statement that came across terribly different than my actual intention.

The reference to "a rape could happen in there as there are no cameras" intended to express the fact that security needs to be improved for that control room including installing security cameras.

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<sup>13</sup> Agency Ex. at 4.

<sup>14</sup> Agency Ex. at 11.

There has been a misunderstanding from what officer heard and what I really meant to say.

This comment came across poorly due to my level of English when I am thinking in a different language but speaking in another. I realize that languages do not translate 100% to each other.

I am a man of faith to God, I am husband and father of four children, I love my family and I would never ever dishonor God, my family, and myself with such a despicable behavior.

During the first meeting I was in a huge shock, shaking, and did not really think straight with my answers. Again, due to my deficiency expressing myself I said that “was a joke” but I should have said that we were having a simple conversation about the need for more security measures.

I have always considered and treated [Officer 1] professionally, even on that day, after the comment I asked her for a favor to help taking my trash out as we always do when one of us is exiting the control room and she did help me.

In conclusion, I came before you to please consider the fact that there has been miscommunication and a misunderstanding between me and [Officer 1]. All the time I have worked with her or/and other colleague I never said or did anything to cause harm but conducted myself professionally. As I said, I realize that conversation among different cultures and different languages can lead to big misunderstandings. I would like to make sure you have my promise that this kind of miscommunications will not happen.<sup>15</sup>

### **CONCLUSIONS OF POLICY**

The Agency’s Operating Procedure 145.3 specifically prohibits “employment discrimination, harassment to include sexual harassment, bullying behaviors, threatening or violent behaviors, retaliation for participating in protected activity, or other displays of inappropriate behavior toward any employee.” The policy makes clear that “[b]ehaviors that undermine team cohesion, employee morale, individual self-worth, productivity, and/or safety are not acceptable.”<sup>16</sup>

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

Grievant engaged in misconduct on April 9, 2024, when he stated to Officer 1 that a rape “could” happen in the Equipment Closet “as there are no cameras in here.”

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<sup>15</sup> Agency Ex. at 13.

<sup>16</sup> See Virginia Department of Corrections Operating Procedure 145.3, Equal Employment Opportunity, Anti-Harassment, and Workplace Civility, Procedure I.F.

Grievant's statements were inappropriate, offensive, intimidating, and unprofessional. Grievant's behavior showed a lack of regard for Officer 1 and caused her reasonable concern for her safety. Grievant's behavior violated Operating Procedure 145.3.

Grievant testified that he understood the meaning of the word "rape" and did not dispute that he told Officer 1 that a "rape could" happen in the Equipment Closet "as there are no cameras."<sup>17</sup> Grievant argued that English is not his first language and that because he was thinking in one language but speaking in another his statements were misunderstood and taken out of context. Grievant asserted that before reporting to their posts on April 9, 2024, he and other correctional officers, including Officer 1, had been discussing rumors of an alleged rape of a staff member or an inmate at the Facility. Grievant argued that when he made the statements to Officer 1 in the Equipment Closet, he was referencing that earlier conversation and identifying a security concern.<sup>18</sup> Grievant did not provide evidence from any other witnesses to support his assertions about a conversation earlier in the morning on April 9, 2024. Even if, as Grievant argued, he intended his statement to reference an earlier conversation with Officer 1, there is no evidence to suggest that Grievant provided that context to Officer 1 at the time he made his statements to her in the Equipment Closet. Additionally, after Grievant first made the statement to Officer 1 that a "rape" "could" happen in the Equipment Closet "as there are no cameras," Officer 1 responded by asking Grievant "what" he had said. Rather than providing any clarification or additional context to Officer 1 at that time, Grievant repeated his statement that a "rape" "could" happen in the Equipment Closet. There was no evidence to suggest that Grievant made any reference at that time to an earlier conversation about a rumor of a rape or to a concern about security. The context that was available at the time Grievant made his statements to Officer 1 was that Officer 1 was alone in the Equipment Closet with Grievant standing in the doorway of that closet stating to her that a "rape" "could happen" in the Equipment Closet "as there are no cameras." Officer 1 testified that Grievant's statements to her made her concerned about the absence of cameras in the room and nervous for her own safety.<sup>19</sup> Officer 1 did not understand Grievant's statements to be an effort to point out a gap in security. This Hearing Officer found Officer 1's testimony to be credible. Officer 1's testimony was clear and consistent with the action she took to report the incident on the same morning it happened. Officer 1's testimony during the hearing about her interaction with Grievant also was consistent with the written statements she provided on the day of the incident.

Even assuming, as Grievant asserted, that Grievant did not say "*I could rape you*" to Officer 1, but that he said, "a rape could happen" in the Equipment Closet "as there are no cameras," the statement was inappropriate, offensive, intimidating, and unprofessional. A reasonable person in Officer 1's position, standing alone in an Equipment Closet would be offended, concerned for their personal safety, and intimidated by a colleague standing in the doorway stating that "a rape could happen" here "as there are no cameras."

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<sup>17</sup> Hearing Recording at 2:08:08-2:08:33, 2:10:46-2:14:44, 2:22:24-2:23:25, 2:29:11-2:30:54. and see Agency Ex. at 11 and 13.

<sup>18</sup> Hearing Recording at 2:08:33-2:14:44, 2:31:51-2:32:48.

<sup>19</sup> Hearing Recording at 32:25-34:20.

To the extent that Grievant appeared at times to argue that Officer 1's reaction was overblown because Grievant did not actually attempt to assault her, this Hearing Officer is not persuaded. Grievant's statements were inappropriate, offensive, intimidating, and unprofessional, and his statements showed a lack of regard for Officer 1 and reasonably made Officer 1 concerned for her safety.

Grievant asserted that when Officer 1 exited the Unit Control Room she took some trash out at his request. Grievant appeared to argue that because Officer 1 took trash out as she left the Unit Control Room, she was not concerned about Grievant's comments. This Hearing Officer is not persuaded. That Officer 1 took out the trash, as she described was her practice,<sup>20</sup> does not undermine the credibility of Officer 1's account of the events or her statements of her reasonable concern based on what Grievant said.

To the extent that Grievant argued that his statements were made to identify a need for additional security measures at the Facility, this Hearing Officer is not persuaded. There was no evidence to suggest that Officer 1 was an appropriate authority to whom such a security issue should be reported. Further, Grievant did not simply point out that there was a potential security risk because there were no cameras in the Equipment Closet, Grievant specifically stated that a "rape" could happen in the Equipment Closet because there were no cameras.

The preponderance of the evidence shows that Grievant's behavior was inappropriate, offensive, intimidating, and unprofessional. Grievant's behavior showed a lack of regard for Officer 1 and caused her reasonable concern for her safety. Grievant's behavior violated the Agency's Operating Procedure 145.3, Equal Employment Opportunity, Anti-Harassment, and Workplace Civility.

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

Based on the preponderance of the evidence, the Agency's issuance of a Group III Written Notice with termination was reasonable and consistent with law and policy.

Violation of Operating Procedure 145.3 may be a Group I, Group II, or Group III offense depending upon the nature of the violation.<sup>21</sup> Given the severe nature of Grievant's misconduct, the Agency's classification of Grievant's misconduct as a Group III offense was reasonable. Grievant's statements to Officer 1 when she was alone in the Equipment Closet that a "rape" "could" happen here "as there are no cameras" were inappropriate, offensive, intimidating, and unprofessional. The statements showed a lack of regard for Officer 1 and reasonably caused her concern for her safety. The nature of such behavior is to undermine team cohesion, staff morale, individual self-worth and feelings of safety in the workplace.

Grievant appeared, at times, to suggest that the Agency failed to engage in progressive discipline. Grievant argued that he was a good employee with no active prior

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<sup>20</sup> Hearing Recording at 43:33-44:22.

<sup>21</sup> See Virginia Department of Corrections Operating Procedure 135.1, Standards of Conduct, Procedures XII, XIII, and XIV.



disciplinary actions. Although agencies are encouraged to engage in progressive disciplinary action, agencies are not required to do so. The Agency elected to issue Grievant a Group III Written Notice and has presented sufficient evidence to support its decision.

Absent mitigating circumstances, job termination is the normal result of a Group III written notice.

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

### Due Process

Grievant argued that the Agency did not properly investigate the allegations against him and that the Agency made up its mind without giving proper consideration to his response to the allegations. Grievant essentially argued that the Agency 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.

### 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...."<sup>22</sup> 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.

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<sup>22</sup> Va. Code § 2.2-3005.

Please address your request to:

Office of Employment Dispute Resolution  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto: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.<sup>23</sup>

*Angela Jenkins*

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Angela Jenkins, Esq.  
Hearing Officer

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<sup>23</sup> 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.