DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case Nos: 12188

Hearing Date: January 10, 2025
Decision Issued: January 14, 2025

PROCEDURAL HISTORY

On September 17, 2024, Grievant was issued a Group III Written Notice with termination.[1] On September 19, 2024, Grievant filed a grievance challenging the Agency's action.[2] The grievance was assigned to this Hearing Officer on October 15, 2024. A hearing was held on January 10, 2025.

APPEARANCES

Agency Advocate
Agency Representative
Grievant
Grievant Advocate
Witnesses

ISSUES

Did Grievant violate DHRM Policies 2.05, 2.35 and VADOC Operating Procedureso 135.1 and 145.3?

AUTHORITY OF HEARING OFFICER

Code Section 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code Section 2.2-3005.1 provides that the Hearing Officer may order appropriate remedies including alteration of the Agency's disciplinary action. By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.[3] Implicit in the Hearing Officer's statutory authority is the ability to independently determine whether the employee's alleged conduct, if otherwise properly before the Hearing Officer, justified termination. The Court of Appeals of Virginia in *Tatum v. VA Dept of Agriculture & Consumer Servs,* 41VA. App. 110, 123, 582 S.E. 2d 452, 458 (2003) held in part as follows:

[1] Agency Exh. 1, at 1
[2] Agency Exh. 1, at 25
[3] See Va. Code § 2.2-3004(B)

> While the Hearing Officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy…the Hearing Officer reviews the facts de novo…as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action. Thus, the Hearing Officer may decide as to the appropriate sanction, independent of the Agency's decision.

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 proof for establishing any affirmative defenses to discipline such as retaliation, discrimination, hostile work environment and others, and any evidence of mitigating circumstances related to discipline. A preponderance of the evidence is sometimes characterized as requiring that facts to be established that more probably than not occurred, or that they were more likely than not to have happened.[4] However, proof must go beyond conjecture.[5] In other words, there must be more than a possibility or a mere speculation.[6]

FINDINGS OF FACT

After reviewing the evidence and observing the demeanor of each witness, I make the following findings of fact. The Agency submitted a notebook containing pages 1 through 88. Without objection it was accepted as Agency Exhibit 1. Grievant submitted a notebook containing pages 1 through 30. Without objection, it was admitted as Grievant Exhibit 1.

The following people testified at the hearing:
Greenville Warden = WJC
Agency Representative = WFR
EEO Director = PZO
EEO Supervisor = KRO
Corrections Major (formerly Captain) = MTJ
Corrections Officer = COB
Chief of Housing = CCC
Corrections Captain = CFS
Corrections Captain = CAB

On October 22, I held a Pre-Hearing call with both Advocates. During that call, I explained the necessary procedure to compel the attendance of a potential witness. Those

[4] *Ross Laboratories v. Barbour*, 13 Va. App. 373, 377, 412 S.E. 2d 205, 208 1991
[5] Southall, Adm'r v. Reams, Inc., 198 Va. 545, 95 S.E. 2d 145 (1956)
[6] *Humphries v. N.N.S.B., Etc., Co.*, 183 Va. 466, 32 S.E. 2d 689 (1945)

instructions were restated on October 23, in the Scheduling Order sent to both Advocates. It stated in part as follows: *(4) If you wish for me to compel the attendance of a witness who is an Agency employee, I will need, before **COB**, **Friday, November 22,** their full name and the name, email, and phone number of the Human Resource officer to whom that witness reports. Otherwise, before **COB**, **Friday, November 22,** I need the full name, home address, and email of non-Agency employee witnesses. **If this information is not provided in the request, the witness(es) will not be compelled.** If you wish for me to compel a witness, please so indicate on the list of witnesses provided***.**

The Advocate for Grievant did not request that any witnesses be compelled to attend.

OP 135.1(I)(F)(6), **Procedure**, states in part: "*Enable the DOC to fairly and effectively discipline, and/or terminate employees… where the misconduct and/or unacceptable performance is of such a serious nature, that a first offense warrants termination*.[7]

OP 135.1(XIV), **Third Group Offenses**, states that such offenses include but are not limited to: *(20) Violation of DHRM Policy 2.35, Civility in the Workplace or Operating Procedure 145.3, Equal Employment Opportunity, Anti-Harassment, and Workplace Civility, considered a Group III offense, depending upon the nature of the violation*; *(21) Violation of DHRM Policy 2.05 Equal Employment Opportunity, or Operating Procedure 145.3, Equal, Employment Opportunity, Anti-Harassment, and Workplace Civility, considered a Group III offense, depending upon the nature of the violation*[8]

OP 145.3(IV)(A), **Expectations and Prohibited Conduct**, states in part: It is the responsibility of all employees… to maintain a non-hostile, bias free, working environment, and to ensure that employment practices are free from workplace harassment of any kind,… bullying, retaliation, or other inappropriate behavior.[9]

OP 145.3(IV)(D), **Expectations and Prohibited Conduct, states in part:** *Any employee who engages in conduct determined to be harassment, discrimination, retaliation… bullying, and or other appropriate behavior… will be subject to disciplinary action under Operating Procedure 135.1 Standards of Conduct, which may include termination from employment.*[10]

Policy 2.35, **Civility in the Workplace** states as its **Policy**: "*It is the policy of the Commonwealth to foster a culture that demonstrates the principles of civility, diversity, equity, and inclusion. In keeping with this commitment, workplace harassment (including sexual harassment), bullying (including cyber bullying), and workplace violence of any kind are prohibited in state government agencies*."[11]

[7] Agency Exh. 1 at 38
[8] Agency Exh. 1 at 52
[9] Agency Exh. 1 at 66
[10] Agency Exh. 1 at 67
[11] Agency Exh. 1 at 70

Policy 2.35, **Civility in the Workplace** states as its **Purpose**: "*The purpose of this policy is to ensure that agencies provide a welcoming, safe, and civil workplace for their employees… and to increase awareness of all employees' responsibility to conduct themselves in a manner that cultivates mutual respect, inclusion, and a healthy work environment.*[12]

Policy 2.35, **Prohibited Conduct Application** states: "*The Commonwealth strictly forbids harassment…, bullying behaviors, and threatening or violent behaviors of employees… in the workplace… Behaviors that undermine team cohesion, staff morale,* ***individual self-worth****, productivity, and safety are not acceptable.*[13] (Emphasis added)

Policy 2.35, **Engaging in Prohibited Conduct** states: "*Any employee who engages in conduct prohibited under this policy… shall be subject to corrective action, up to, and including termination, under Policy, 1.60, Standards of Conduct."*[14]

On June 10, 2024, COB went to Housing Unit 2 lower booth to relieve the day shift. He performed an equipment check and determined that 2 paint rollers were missing. COB requested the officer he was replacing to come into the booth to help him find the missing equipment. She refused and the end result was that she was detained for approximately 20 minutes because COB would not open the appropriate door to allow her to leave. COB called the watch office seeking a direct order from a superior to open the door as he thought he was following Agency policy to require all equipment to be accounted for prior to a shift change.[15] Grievant, a lieutenant, was sent from the watch office to deal with this problem. **What took place between COB and the detained correctional officer is not the matter before me**. The issue before me is language used by Grievant in dealing with COB. COB ultimately sent an email complaint to WJC who forwarded it to PZO. This resulted in KRO performing an investigation and filing a report with WJC on August 9.[16]

KRO stated that COB told her that sometime prior to the event before me, Grievant asked COB to write a letter of recommendation for her, reminding him that she worked in the watch office and that she could "look out "for him and that "This is America." COB told KRO that this latter statement made him feel scared and that he did not belong here.[17] COB also stated it was "like she knows I am from Africa and maybe Africans are second-class."[18] COB wrote a letter.

A couple of weeks later, Grievant asked COB to write a second letter on a different topic. He refused and stated problems began with Grievant on June 10.[19] On the morning of June 11, as COB was returning the building key to master control, he stated Grievant confronted him

[12] Agency Exh. 1 at 70
[13] Agency Exh. 1 at 71
[14] Agency Exh. 1 at 73
[15] Agency Exh. 1 at 11
[16] Agency Exh. 1 at 7-11
[17] Id. at 7
[18] Id. at 8
[19] Id. at 8

and said "This is not Africa. This is America."[20] COB testified that the statements made by Grievant made him fearful, were demeaning, and caused him to request a transfer to another housing unit. His testimony was substantially the same as stated in the report filed by KRO.

KRO interviewed CAB. He stated that on the morning of June 11, he brought COB, Grievant, and another MTJ, into the watch office to deal with this matter. Both stated they heard Grievant say "**you are in America**" when she was discussing this matter with them and COB. Grievant also said "**This is America, and you can't hold people hostage**"[21] KRO found COB and all others that she interviewed to be credible.[22] PZO testified she reviewed this report and found it required no changes.

A Correctional Officer Procedural Guarantee Investigation Notice was issued to Grievant on August 22.[23] A Due Process Notification was issued to Grievant on August 22.[24] Pursuant to these notifications, Grievant provided the names of potential witnesses.

WFR sent written questions to these witnesses. LPC, in her written response to what she may have heard during the time frame of June 10-13, stated: The only statement I heard once was "***If you don't like working here, you can go back to where you came from***."[25] LPC did not testify at the hearing. The balance of her written statement clearly identifies COB as the person identified as "you."

CFS, in answer to the written questions, wrote that Grievant, in the presence of COB, CAB and another Captain said: "***In the United States, you cannot hold people hostage. In the United States, it's against the law to hold a person against their will***." CAB stated that [Grievant] can't say that to me."[26]

MTJ testified that while in the watch office on June 11, he heard Grievant say "**This is America.**" MTJ told Grievant not to say this. CAB testified that on June 11 he heard Grievant twice say in the presence of COB, "*This is America."* CAB also stated that MTJ told Grievant to stop saying "**This is America, or you will be fired**." No witnesses, other than COB, testified hearing comments about the word "Africa."

Grievant testified and said she did not use the term "American." Rather, she used the term "United States." She denied stating: "*If you don't like working here, you can go back to Africa."*

On March 8, 2024, the Director of EDR issued Qualification Ruling 2024-5665. This Ruling involved policy 2.35. The Director stated: "*In cases involving conduct that an objective reasonable person would consider to be severely inappropriate or obscene, the employing*

[20] Id. at 9
[21] Id. at 9
[22] Id. at 10
[23] Agency Exh. 1 at 4
[24] Agency Exh. 1 at 5
[25] Agency Exh. 1 at 16
[26] Agency Exh. at 17

agency is entitled to substantial difference in concluding that such conduct rises to the level of a terminable offense under DHRM Policy 2.35 and DHRM Policy 1.60, Standards of Conduct."[27]

On February 2, 2021, The Director of EDR issued Administrative Review Ruling Number 2021-5194. In that Ruling, the Director stated *"…misconduct under Policy 2.35 is not necessarily conditional on the intent of the accused employee.…* While *the intent of the accused is certainly relevant to any such charge and may be an aggravating factor in determining the appropriate penalty, we found nothing in the policy to support the grievance assertion that policy 2.35 specifically requires that the declarant actually intend to offend. Similarly, we do not interpret the policy to support the Grievant's assertion that offensiveness depends not in the ear of the hearer, but in the intention of the declarant. Discriminatory harassment is any unwelcome, verbal, written, or physical conduct, that either denigrates or shows, hostility or aversion, towards a person on the basis of race, or other protected class; non-discriminatory harassment is any targeted or directed, unwelcome, verbal, written, social, or physical contact that either denigrates or shows, hostility or aversion, toward a person, not predicated on the persons protected class*."[28]

On November 3, 2021, The Director of EDR issued Qualification Ruling Number 2021-5275. The Director cited in footnote 12 DHRM Policy Guide-Civility in the Workplace, where it stated: "A reasonable person standard is applied when assessing if behavior should be considered offensive or inappropriate. Whether an environment is hostile or abusive, can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; it's severity; whether it is physically threatening, or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.[29]

Policy guidance from DHRM provides further examples of specific behaviors that may be considered misconduct under Policy 2.35 and are implicated in this case, including, for example:
- Behaving in a manner that displays a lack of regard for others, and significantly distresses, disturbs, and/or offends others,
- Making culturally insensitive remarks,
- Making demeaning/prejudicial comments/slurs, or attributing certain characteristics to targeted persons based on the group, class, or category to which belong.[30]

After considering the veracity of all the witness, and the evidence in Agency Exhibit 1, which was introduced without objection, I find that the Agency has proved by a preponderance of the evidence that Grievant did violate Policy 2.35. Using the term "this is America, or this is the United States" with nothing more to a person of African heritage portrays a clear implication that you are inferior. Couple that with WFR's written statement: "*If you don't like*

[27] Administrative Review Ruling 2024-5665 at 9
[28] Administrative Review Ruling 2021-5194 at 8
[29] Qualification Ruling 2021-5275 at 2
[30] Administrative Review Ruling 2022-5355 at 8, footnote 27

working here, you can go back to where you came from" and there is a clear and unambiguous violation of Policy 2.35 and OP 145.3(IV)(A).

Grievant has an active Group II Written Notice[31] and an active Group I Written Notice.[32] Both dealt with Civility in the Workplace.

MITIGATION

Va. Code § 2.2-3005(C)(6), authorizes and grants Hearing Officers the power and duty to receive and consider evidence in mitigation or aggravation of any offense charges by an Agency in accordance with rules established by EDR. The Rules for Conducting Grievance Hearings ("Rules"), provide that a Hearing Officer is not a super personnel officer. Therefore, in providing any remedy, the Hearing Officer should give the appropriate level of deference to actions by the Agency management that are found to be consistent with law and policy. Specifically, in disciplinary grievances, if the Hearing Officer finds that (1) the employee engaged in the behavior described in the Written Notice; (2) the behavior constituted misconduct; and (3) the Agency's discipline was consistent with law and policy, then the Agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.

Hearing Officers are authorized to make findings of fact as to the material issues of the Case and to determine the grievance based on the material issues and the grounds and the records for those findings. The Hearing Officer reviews the facts *de novo* to determine whether the cited actions constitute misconduct and whether there were mitigating circumstances to justify a reduction or removal of the disciplinary action, or aggravating circumstances to justify the disciplinary action. The Hearing Officer has the authority to determine whether the Agency has established by a preponderance of the evidence that the action taken was both warranted and appropriate under all the facts and circumstances.

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, (3) the disciplinary action was free of improper motive, (4) the length of time that Grievant has been employed by the Agency, and (5) whether or not Grievant has been a valued employee during the time of his/her employment at the Agency.

I find no reason to mitigate this matter.

DECISION

I find that the Agency has borne its burden of proof in this matter and the issuance of the Group III Written Notice with termination was proper.

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[31] Agency Exhibit 1 at 23

[32] Agency Exhibit 1 at 24

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 that 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 where the grievance arose within **30 days** of the date when the decision becomes final.[1]

[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].

William S. Davidson
William S. Davidson, Hearing Officer

Date: January 14, 2025

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