



COMMONWEALTH OF VIRGINIA

Department Of Human Resource Management

Office of Employment Dispute Resolution

DECISION OF HEARING OFFICER

In re:

Case number: 12201

Hearing Date: January 30, 2025

Decision Issued: March 12, 2025

PROCEDURAL HISTORY

On October 9, 2024, Grievant was issued a Group III Written Notice of disciplinary action with termination for inappropriate workplace conduct in violation of Operating Procedure 145.3 (Equal Employment Opportunity, Anti-Harassment, and Workplace Civility), DHRM Policy 2.35 (Civility in the Workplace), and Operating Procedure 135.1 (Standards of Conduct).

On October 23, 2024, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On November 12, 2024, the Office of Employment Dispute Resolution assigned this matter to the Hearing Officer. On January 30, 2025, a hearing was held at a community college near the Agency's District Probation and Parole Office.

APPEARANCES

Grievant
Agency Legal Advocate
Agency Party Designee
Witnesses

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 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 had been an Investigative Analyst with the Agency's Office of Law Enforcement Services. Grievant was employed with the Agency for approximately 12 years. No evidence of prior disciplinary action was presented during the hearing.

Grievant started his role as an Investigative Analyst on June 10, 2024. Prior to becoming an Investigative Analyst for the Agency's Office of Law Enforcement Services, Grievant had been a surveillance officer or assistant probation officer in the District Probation and Parole Office. Grievant had worked in the District Office since approximately 2018.¹

Grievant transferred into his role as an Investigative Analyst on June 10, 2024. As an Investigative Analyst for the Office of Law Enforcement Services, Grievant was considered an Agency Headquarters employee and was no longer considered an employee of the District Office. The Agency, however, allowed Grievant to perform his work from the District Office two days per week.

On the morning of June 11, 2024, after Grievant had begun working in his position as an Investigative Analyst, Grievant and Probation Officer-1 both reported to work in the

¹ Hearing Recording at 5:05:00-5:06:13, 5:12:17-5:14:05. Grievant briefly took outside employment and his Agency employment in the District Office for approximately 3 months during the Spring/Summer of 2022, but based on the evidence he had returned to Agency employment in the District Office by sometime in July of 2022.

District Office. When Probation Officer-1 saw Grievant in the Office, she asked him, "what are you doing here?" Grievant responded that he would continue to work out of the District Office two days each week.²

Following her interaction with Grievant and on that same morning, Probation Officer-1 verbally expressed concern with Grievant's behavior to a senior probation officer. Consistent with the instruction she received from that senior probation officer, Probation Officer-1 then sent an email about Grievant's behavior to the senior probation officer with a copy to the District Chief Probation & Parole Officer and the Deputy Chief Probation & Parole Officer. Probation Officer-1 wrote the following in that email:

So, I have not brought this to anyone's attention until now because I moved to [District satellite office] and then thought that [Grievant] would be leaving the office. It has been going on for quite a while. After talking to other females in the office it is also happening to them as well. I am unsure if they would like their names mentioned.

[Grievant] makes sexual comments to me daily and attempts to throw things down my shirt. For example, [Grievant] and I transported a probationer to [a substance abuse rehabilitation facility] a month or so ago and after he brought me back to get my state car, he sent me a message on [a social media platform] stating, "don't tell anyone that we did it on the way back." Never in a million years would this happen. He is always asking if we can go somewhere to "do it." I have not initiated or condoned this behavior in any way. I do not entertain his statements and usually tell him that is gross or something of that nature.

Last week when I was working in the District Office, he had his personal phone out and was talking to someone on the state phone. He went to lay his personal phone down and there was a photo of a girl who was almost naked on the screen. This made me feel very uncomfortable so I moved into [a District employee's] office so that I would not be in a shared space with him.

I was not going to say anything because I do not want the tension in the office, and I thought that since he was leaving it would be over. As it turns out, he will still be in the District Office which doesn't affect me as much, but it will the other females in that office. I even stopped asking him to go out into the field with me and do not feel comfortable being around him alone.

I believe that this behavior is unacceptable and needs to be addressed if he is going to remain in the District Office. I don't want him to lose his job or anything like that, but I would like for this behavior to cease. I hate bringing this to light because I do not want anyone to get into trouble, but I cannot

² Agency Ex. at 7 and 26 and Hearing Recording at 24:55-25:54.

continue to work in an environment where I must hear or see things of this nature.³

Given the nature of the complaint against Grievant, Employee Relations Manager investigated the allegations. Employee Relations Manager issued an Investigation Report dated September 17, 2024, setting forth her analysis and conclusions from the investigation. The Report included Employee Relations Manager's summary of her interviews with various individuals, including Grievant, Probation Officer-1, Office Services Assistant, Former Probation Officer, and others.⁴

Probation Officer-1, Office Services Assistant, and Former Probation Officer also testified during the hearing.

Probation Officer-1 began working as a probation officer in the District Office in April 2022. At some point during her time working in the District, Probation Officer-1 started working primarily out of a District satellite office, but she continued to work in the District Office approximately one day every other week. During this time, Probation Officer-1 did not have an assigned workspace in the District Office, so she would work in Grievant's office.⁵ Probation Officer-1 described Grievant as generally a good person with whom she had a friendly work relationship, but, according to Probation Officer-1, when they were alone he would say and do things that made her uncomfortable.⁶ Probation Officer-1 testified that on several occasions Grievant said to her "let's go out into the field and do it." He also sent messages to her via social media referring to them "doing it." As a specific example, she recalled a message from Grievant to her after they had returned from a field visit in which he wrote, referring to their field visit, "don't tell anyone we did it." Probation Officer-1 understood "do it" to mean "have sex." Probation Officer-1 said that when Grievant first made the statement to her she thought he was joking but then he continued to make the same or a similar statement to her "all the time."⁷ Probation Officer-1 also testified that on several separate occasions Grievant threw small objects, like paper clips, coins, or candy wrappers, at her chest. Probation Officer-1 testified that when Grievant would throw a small object at her chest, he would aim the item to try to throw it so that it would go down the front of her shirt. According to Probation Officer-1, if the item did go down her shirtfront, Grievant would laugh and say something like "Score!"⁸ Probation Officer-1 did not provide specific dates when these incidents occurred, but she described the incidents as occurring frequently over approximately a year and a half.⁹ Probation Officer-1 testified that she did not report Grievant's behavior sooner because she did not want to "create ripples" in the workplace or risk retaliation. According to Probation Officer-1, she just wanted to "get out" of the situation. Probation Officer-1 said that she did not think she would see Grievant again after he took the position with the Office of Law Enforcement Services. On June 11, 2024, when she saw Grievant and learned that he would continue to work in the District Office, she went to a senior probation

³ Agency Ex. at 38-39.

⁴ Agency Ex. at 24-36.

⁵ Hearing Recording at 36:02-39:00.

⁶ Hearing Recording at 22:42-23:48, 28:30-29:09, 41:35-42:22.

⁷ Hearing Recording at 29:15-29:47, 40:10-40:50 and see Agency Ex. at 26.

⁸ Hearing Recording at 39:00-40:15 and see Agency Ex. at 26.

⁹ Hearing Recording at 22:42-26:18, 37:23-40:50 and see Agency Ex. at 25-27.

officer to report Grievant's behavior. Probation Officer-1 testified that, at that time, she felt like she had reached her "breaking point" and that she did not want to work in that environment anymore.¹⁰

Office Services Assistant started working in the District Office in September 2023. Office Services Assistant described her relationship with Grievant as friendly and a "normal, co-worker relationship." Office Services Assistant testified that she had a pleasant relationship with Grievant except when he would make comments that made her uncomfortable.¹¹ In describing the comments that made her uncomfortable, Office Services Assistant testified that Grievant made inappropriate sexual jokes and comments, including comments about her breasts and how she looked in different shirts. During the Agency's investigation, Office Services Assistant reported to Employee Relations Manager that Grievant started making those types of jokes and comments in December 2023 and then continued to do so frequently throughout the time they worked together.¹² Grievant did not make those jokes or comments to Office Services Assistant in front of anyone else.¹³ Office Services Assistant also testified regarding her recollection of a specific incident when Grievant threw a quarter down the front of her shirt. According to Office Services Assistant, when she pulled the quarter out of her shirt, Grievant said something along the lines of "that's my lucky quarter now."¹⁴ When Office Services Specialist described the incident with the quarter to Employee Relations Manager, she recalled it occurring in May 2024. According to Office Services Assistant, Grievant also would send her messages on social media that she described as "jokes" requesting that she send to him topless or nude photos of herself using the social media application.¹⁵ Office Services Assistant did not respond to those messages from Grievant. Office Services Assistant testified that she did not report Grievant's behavior to Agency management because she never felt that she needed to report it and she did not want Grievant to lose his job. Office Services Assistant said that she told Probation Officer-1 about what she had experienced after Probation Officer-1 told Office Services Assistant about her experience with Grievant's behavior.¹⁶

Former Probation Officer no longer works for the Agency. Former Probation Officer worked for the Agency for approximately 15 years and worked in the District Office until October 2023. Former Probation Officer described that she "meshed well" with Grievant, they were friends in the workplace, and that she thought highly of him.¹⁷ Former Probation Officer testified that Grievant made comments that "one could consider inappropriate now." Former Probation Officer testified that she never made any complaints about those comments.¹⁸ Former Probation Officer testified that Grievant would comment about "female appearances regarding breasts."¹⁹ Former Probation Officer also testified that Grievant suggested that she should join [OF social media platform] which is a

¹⁰ Hearing Recording at 24:55-26:18.

¹¹ Hearing Recording at 1:10:24-1:11:28.

¹² Hearing Recording at 1:01:15-1:02:06, 1:04:03-1:04:39, 1:10:24-1:11:28 and Agency Ex. at 27.

¹³ Hearing Recording at 1:10:48-1:11:28 and Agency Ex. at 27.

¹⁴ Hearing Recording at 1:01:15-1:02:06, 1:04:03-1:04:39 and Agency Ex. at 27.

¹⁵ Hearing Recording at 1:04:03-1:04:39, 1:06:35-1:08:17 and Agency Ex. at 27.

¹⁶ Hearing Recording at 1:11:53-1:13:21.

¹⁷ Hearing Recording at 1:25:25-1:25:48, 1:26:26-1:30:40 and Agency Ex. at 28.

¹⁸ Hearing Recording at 1:25:25-1:26:26.

¹⁹ Hearing Recording at 1:25:45-1:26:25, 1:26:26-1:30:40.

subscription-based social media platform known for sexually explicit content. Former Probation Officer testified that she understood Grievant's comment to suggest that she should join what she described as a pornographic website. Former Probation Officer testified that she did not report Grievant's behavior to Agency management because she was not one to cause trouble in the workplace, had no interest in being a "whistleblower," and did not want to cause someone to lose their job.²⁰

On October 9, 2024, the Agency issued a Group III Written Notice of disciplinary action with termination to Grievant. The Written Notice described the nature of the offense as:

Violations of Operating Procedure (OP) 145.3, Equal Employment Opportunity, Anti-Harassment, and Workplace Civility, to include Attachment 1, Guidance on Prohibited Conduct, Department of Human Resource Management Policy 2.35, Civility in the Workplace, and Operating Procedure 135.1, Standards of Conduct, for severely inappropriate workplace conduct, where you subjected colleagues to multiple comments of a sexual nature, and threw objects [at] female workers.

The Office of Human Resources, Employee Relations Unit (ERU) investigated claims of sexual harassment against you, as well as reports that you threw small objects (paper clips, quarters, etc.), down the shirt/blouse of female coworkers, while you were working at [the District]. The ERU investigation found corroborating evidence to demonstrate that you engaged in highly inappropriate and unprofessional conduct, subjecting multiple coworkers to inappropriate comments and jokes of a sexual nature between October 2023 and June 2024. The comments of a sexual nature were described by co-workers as frequent, making comments about their breasts, bras sizes, sexual content, as well as direct comments such as "let's go out in the field and do it."

During your reasonable opportunity to respond, you admitted to joking around frequently and flicking of small objects at co-workers. While you admitted to flicking small objects at coworkers, you indicate that it was never with sexual intent. You further indicated that you do not recall any specific joking of a sexual nature.

After a comprehensive review of the ERU investigation and the information you presented during your response to these charges, I find your behavior was inappropriate, highly unprofessional, in direct violation of established expectations and policies for workplace civility and anti-harassment. The evidence indicates that you did subject coworkers to multiple communication or innuendos of a sexual nature, with comments about their breasts and/or other sexually inappropriate comments. This inappropriate conduct was confirmed by multiple female coworkers, was unwelcome,

²⁰ Hearing Recording at 1:28:10-1:30:40.

offensive, and sometimes suggestive. Your behavior was unacceptable, displaying a lack of regard for others as well as established Operating Procedures and Standards of Conduct.

For this inappropriate conduct of such a serious nature, you are being issued a Group III Written Notice with termination effective immediately.²¹

CONCLUSIONS OF POLICY

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 Agency.

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.

Behaviors that undermine team cohesion, staff morale, individual self-worth, productivity, and safety are not acceptable.²²

Pursuant to DHRM Policy 2.35, prohibited conduct/behaviors²³ may include, but are not limited to:

- Invading personal space;
...
- 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;
...
- 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;
- Making demeaning/prejudicial comments/slurs or attributing certain characteristics to targeted persons based on the group, class, or category to which they belong;
...

²¹ Agency Ex. at 1-3.

²² See DHRM Policy 2.35, Civility in the Workplace.

²³ See DHRM Policy 2.35, Civility in the Workplace, Policy Guide.

- 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.

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.

The Agency has adopted Operating Procedure 145.3 which also sets forth the Agency’s prohibition on “displays of inappropriate behavior.” The policy makes clear that “[b]ehaviors that undermine team cohesion, employee morale, individual self-worth, productivity, and/or safety are not acceptable.”²⁴ The policy also makes clear that “[a]ny employee who engages in conduct determined to be harassment, discrimination, retaliation, cyber-bullying, bullying, and/or other inappropriate behavior, or who encourages or ignores such conduct by others will be subject to disciplinary action under Operating Procedure 135.1, Standards of Conduct.”²⁵

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

The preponderance of the evidence showed that Grievant engaged in misconduct that violated DHRM Policy 2.35, Operating Procedure 145.3, and the Standards of Conduct.

The preponderance of the evidence showed that Grievant made comments to Office Services Assistant about her breasts and her appearance and that he made comments to Former Probation Officer regarding women’s breasts and suggesting that she join a sexually explicit social media platform. In addition to being sexual in nature, Grievant’s comments were rude, inappropriate, unprofessional and demeaning. The comments showed a lack of respect and lack of regard for Office Services Assistant and Former Probation Officer. The preponderance of the evidence also showed that Grievant attempted to throw small objects down the shirtfronts of Probation Officer-1 and Office Services Assistant and that when he was successful, he would make comments celebrating that success indicating that the goal of his behavior was to get the small object down their shirtfront. Grievant’s behavior was not only rude, inappropriate, and

²⁴ DOC Operating Procedure 145.3, Equal Employment Opportunity, Anti-Harassment, and Workplace Civility, Procedure I.F.

²⁵ DOC Operating Procedure 145.3, Equal Employment Opportunity, Anti-Harassment, and Workplace Civility, Procedure IV.D.

unprofessional, but it inappropriately invaded their personal space and showed a lack of respect and lack of regard for Probation Officer-1 and Office Services Assistant.

Grievant argued that he did not engage in sexual harassment and that the accusations against him were false. Grievant noted that the Agency had no physical evidence to support the allegations against him and that there were no other witnesses to the incidents described by Probation Officer-1, Office Services Assistant, and Former Probation Officer.

Grievant argued that Probation Officer-1 was jealous of his promotion and motivated to lie and get him into trouble because, according to him, they had argued on the morning of June 11, 2024. Grievant also argued that Probation Officer-1's testimony that he engaged in behavior that was inappropriate and made her uncomfortable was inconsistent with Probation Officer-1's behavior because she remained friendly toward him throughout their time at the District Office, chose to share office space with him on days when she was working in the District Office, discussed personal matters, like her marriage with him, and brought her young daughter around him. Grievant also argued that Probation Officer-1 was known to make her feelings clear such that if she had not liked him or had been uncomfortable with his behavior, she would have made it known at the time any alleged behavior occurred.

Grievant argued that the statements made by Office Services Assistant were "coerced." Grievant also argued that Office Services Assistant's statements about his behavior making her uncomfortable were inconsistent with her continued friendly behavior toward him and the "Shout-Out,"²⁶ an internal District Office accolade, that she gave to him on May 30, 2024 in which she thanked him for being helpful, described him as an "amazing" coworker, and indicated she would "especially miss [his] sense of humor."

With respect to Former Probation Officer, Grievant argued that her statement may have been "coerced" or based on jealousy or discrimination and negative stereotyping of him as a veteran. Grievant also appeared to argue that Former Probation Officer's statements regarding Grievant's behavior were inconsistent with her continued friendly behavior toward him.

In support of his arguments, Grievant offered the testimony of other current and former Agency employees who generally testified that they had not observed behavior by Grievant that they considered inappropriate or that made them uncomfortable.²⁷ Regional HRO also observed that Grievant and Probation Officer-1 appeared to have a friendly relationship and Probation Officer-1 chose to work in Grievant's office when other work space appeared to be available.²⁸ Office Services Supervisor observed that Office Services Assistant was friendly with Grievant and that Probation Officer-1 chose to work in Grievant's office when other work space appeared to be available.²⁹ Senior Probation Officer-1 and Probation Officer-2 both observed that Grievant appeared to get along well

²⁶ Grievant Ex. 2 and Agency Ex. at 11.

²⁷ Hearing Recording at 2:15:00-2:15:39, 2:47:53-2:48:46, 4:54:30-4:55:07.

²⁸ Hearing Recording at 2:18:20-2:20:09, 2:21:55-2:23:04.

²⁹ Hearing Recording at 4:39:18-4:40:30, 4:40:30-4:42:06 and Grievant Ex. 1.

with Probation Officer-1 and Former Probation Officer.³⁰ Regional HRO and Senior Probation Officer-1 both observed that Probation Officer-1 had made complaints to them when she had a concern about or was unhappy with other issues in the workplace.³¹ Although Grievant's witnesses appeared credible in their testimony of their observations and experiences, this Hearing Officer did not find their testimony to undermine or refute the credible testimony of Probation Officer-1, Office Services Assistant, and Former Probation Officer regarding Grievant's behavior when they were alone with him.

This Hearing Officer found the testimony of Probation Officer-1, Office Services Assistant, and Former Probation Officer regarding Grievant's behavior to be credible and consistent. They each testified that they generally liked Grievant but that at times he engaged in behavior that was inappropriate and that made them uncomfortable. Probation Officer-1 and Office Services Assistant both credibly testified regarding Grievant throwing small objects at their chests and making celebratory-type comments if he was successful in throwing the object down the front of their shirts. The testimony of Office Services Assistant and Former Probation Officer was consistent regarding Grievant's comments about appearances and women's breasts. And all three witnesses provided consistent testimony that Grievant's comments and innuendos may have been cast as "jokes" and were of a sexual nature. The testimony of Probation Officer-1, Office Services Assistant, and Former Probation Officer also was consistent with the information that probation officer-2 reported to Employee Relations Manager that Grievant frequently made comments of a sexual nature, including comments about women's breasts that made probation officer-2 uncomfortable.³² That the witnesses did not immediately report Grievant's behavior and continued to be friendly toward Grievant does not negate the credibility of their testimony regarding their observation of certain behavior by Grievant that was inappropriate or that made them uncomfortable. All three witnesses testified that they liked Grievant and that they did not want to get him into trouble or cause trouble in the Office, but that certain behavior by Grievant made them uncomfortable.

To the extent that Grievant appeared at times to suggest that the allegations against him and the Agency's discipline were untimely under DHRM Policy 2.35 and Operating Procedure 145.3, this Hearing Officer is not persuaded. In this case, the Agency became aware of Grievant's behavior in June 2024 and immediately took steps to investigate the complaint it received and then issued discipline based on the findings from the investigation. Similarly, with respect to a policy instruction to report misconduct as soon as possible after the incident occurs, such language is designed to encourage early reporting but is not a barrier to reporting and would not be grounds for an Agency to ignore a complaint. Although delays in reporting and enforcement can impair an Agency's ability to manage its workforce efficiently, an Agency must nevertheless investigate reports of violations of these policies and address sustained allegations of misconduct.

A reasonable person would have found Grievant's behavior to be inappropriate and offensive. The Agency has met its burden of proving that Grievant engaged in

³⁰ Hearing Recording at 4:48:25-4:48:45, 4:55:07-4:55:32.

³¹ Hearing Recording at 2:18:20-2:20:09, 4:47:43-4:48:25.

³² See Agency Ex. at 27-28 and Hearing Recording at 3:30:11-3:33:01.

misconduct and that his misconduct violated DHRM Policy 2.35, Operating Procedure 145.3, and the Standards of Conduct.

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

The preponderance of the evidence showed that the Agency's issuance of a Group III Written Notice with termination was reasonable and consistent with law and policy.

Violation of DHRM Policy 2.35 and Operating Procedure 145.3 may be a Group I, Group II, or Group III offense depending on the nature of the violation.³³ Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."³⁴

DHRM Policy 2.35 and Operating Procedure 145.3 permit the Agency to assess the severity of an offense and its effect on the workplace in selecting the appropriate level of discipline. These determinations are fact-specific and subject to substantial discretion by Agency management.

The preponderance of the evidence showed that Grievant engaged in behavior that violated DHRM Policy 2.35 and Operating Procedure 145.3 on multiple occasions with different individuals. Agency witnesses testified that Grievant's inappropriate comments and conduct made them uncomfortable. Probation Officer-1 described being at her "breaking point" when she reported the behavior. Grievant's comments and conduct toward the Agency witnesses showed a lack of respect and regard for the witnesses and was rude, inappropriate, unprofessional and demeaning in addition to being sexual in nature. Such conduct is not acceptable in the workplace and is serious as the nature of such misconduct is to undermine team cohesion, individual self-worth and employee morale.

The Agency could have issued separate written notices for Grievant's offenses, but in this case, the Agency decided to combine multiple offenses into a single Group III Written Notice.

Given the serious and repeated nature of Grievant's misconduct, the Agency's classification of Grievant's misconduct as a Group III offense was reasonable.

A Group III written notice normally will warrant termination.

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

³³ See DHRM Policy 2.35, Civility in the Workplace and DOC Operating Procedure 135.1, Standards of Conduct, Procedure XIV.B.20.

³⁴ See DOC Operating Procedure 135.1, Standards of Conduct.

Americans with Disabilities Act and Discrimination

In his Grievance Form A and a rebuttal statement provided to the Agency, Grievant appeared to assert that he is a disabled veteran with post-traumatic stress disorder, anxiety, and depression who uses humor as a coping mechanism.³⁵ There was little information presented during the hearing regarding any assertion by Grievant that a disability or medications used to treat a disability may have impacted Grievant's behavior aside from general testimony that Grievant was known to tell a lot of jokes in the workplace and that humor may be a mechanism for dealing with stress. It is important to note, that the Americans with Disabilities Act requires employers to provide reasonable accommodations for an employee's disability, but it does not broadly shield employees from disciplinary action for their own misconduct. That Grievant may have used humor to cope with stress would not excuse inappropriate conduct in the workplace.

Grievant appeared to argue that his termination was discriminatory in nature. Grievant pointed to the statement of Former Probation Officer as reported in the Investigation Report that "she knew [Grievant] was in the military for a long period of time and believes he became accustomed to speaking to his co-workers or colleagues in the manner she witnessed."³⁶ The statements made by Former Probation Officer appeared to be her understanding or explanation as to why she thought Grievant may make certain comments in the workplace that were reported in the Investigation Report as part of the information provided by Former Probation Officer. Grievant has not shown, however, that the Agency's discipline in this case was discriminatory. The Agency 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.

Other Defenses

Grievant argued that the Agency took too long to complete its investigation and that the information and responses Grievant provided to Employee Relations Manager were not fairly considered. Grievant also argued that following its investigation, the Agency did not provide him with sufficient information to respond to the charges against him because the Agency did not provide him with a copy of the Investigation Report until on or about December 13, 2024, which was after the Agency had terminated his employment. Although a speedier investigation of this matter may have provided quicker resolution for all parties, the length of time that the Agency took to investigate the allegations against Grievant and then issue discipline does not render the Agency's disciplinary action invalid. As to Grievant's other arguments about the Agency's investigation and treatment of Grievant, 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.

³⁵ Agency Ex. at 7.

³⁶ Agency Ex. at 28 and see Hearing Recording at 1:26:26-1:30:40.

Grievant appeared, at times, to suggest that the Agency failed to engage in progressive discipline. Grievant argued that he was a good employee who had received no prior complaints or discipline for his behavior. Although agencies are encouraged to engage in progressive disciplinary action, the Standards of Conduct do not require agencies to do so. The Agency elected to issue Grievant a Group III Written Notice and has presented sufficient evidence to support its decision.

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....”³⁷ 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 a Group III Written Notice 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.

³⁷ Va. Code § 2.2-3005.

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.³⁸

Angela Jenkins

Angela Jenkins
Hearing Officer

³⁸ 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.