



COMMONWEALTH OF VIRGINIA

Department Of Human Resource Management

Office of Employment Dispute Resolution

DECISION OF HEARING OFFICER

In re:

Case number: 12203

Hearing Date: February 13, 2025

Decision Issued: March 19, 2025

PROCEDURAL HISTORY

On August 13, 2024, Grievant was issued a Group I Written Notice of disciplinary action.¹ The Agency described the nature of the offense as:

On Saturday, July 6, 2024, [Grievant] was observed yelling and utilizing vulgar and insolent language toward [Probationer-1 and Probationer-2] that were working in the chow hall during the lunch meal. She did not foster a respectful workplace culture and healing environment. This use of obscene language demonstrates an unsatisfactory work performance by [Grievant]. This behavior is a violation of Operating Procedure 135.1, Standards of [Conduct].²

On September 9, 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 November 25, 2024, the Office of Employment Dispute Resolution assigned the matter to the Hearing Officer. On February 13, 2025, a hearing was held remotely via the Microsoft TEAMS platform.

APPEARANCES

Grievant
Grievant's Advocate

¹ Agency Ex. at 1-2.

² Agency Ex. at 1.

Agency Advocate
Agency Party Designee
Witnesses

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 Lieutenant at a Department of Corrections Community Corrections Alternative Program Facility. At the time of these disciplinary actions, Grievant had been employed by the Agency for more than 17 years. No evidence of prior active disciplinary action was introduced during the hearing. The evidence presented during the hearing indicated that aside from the matters giving rise to this disciplinary action, Grievant's performance had been satisfactory to the Agency.³

As part of the Agency's Community Corrections Alternative Program, the Facility provides probationers with treatment, programs, and education in a structured setting. Although the Facility provides on-site services, including meals, some probationers may work offsite as they advance through the Facility's programs. A few probationers work on-site in the Facility's Chow Hall providing food services to other probationers.⁴

³ Hearing Recording at 2:16:13-2:17:06 and see Grievant's Ex. L and M.

⁴ Hearing Recording at 52:00-55:09, 2:36:42-2:38:51.

On July 6, 2024, Grievant and Officer-1 were on-duty in the Chow Hall overseeing the lunch meal service. Grievant and Officer-1 were seated next to each other at a table near the food service line. Probationers, including Probationer-1 and Probationer-2, were working in the food service line serving the meal to the probationer-diners. Grievant and Officer-1 both observed that there were problems with the food service. The food service line was moving slow. The Probationers serving the food were using the wrong utensils such that they were providing some probationer-diners with too much food which would risk running out of certain foods before all probationer-diners had received their lunch. Additionally, the mashed potatoes that were being served that day were dry and had been burnt.⁵

Grievant questioned the Probationers working the food service line about the problems with the service and directed them to move faster and use the correct utensils.⁶

Grievant testified that Probationer-2 was rude and disrespectful to Grievant when Grievant provided directions to the Probationers to address the problems with the food service.⁷

Officer-1 testified that there was a back and forth between Grievant and the Probationers as Grievant tried to direct them. Officer-1 described Grievant as yelling from the table and getting upset with the Probationers.⁸ During the verbal exchange, Grievant said something along the lines of, "What the fuck?" or [Probationer-2's] "telling me to shut the fuck up."⁹ Officer-1 testified that Grievant made the statement, including the vulgar language, to the Probationers, not to Officer-1.¹⁰

Grievant testified that she then decided to de-escalate the situation and stopped engaging in the exchange with the Probationers. After the food service concluded, Grievant spoke with Probationer-1 and Probationer-2 regarding the problems with the food service and her concerns with the disrespectful manner in which they had spoken to her.¹¹

The Superintendent first became aware of the incident when a Lieutenant reported to the Superintendent that Probationer-1 and Probationer-2 had made verbal complaints about the July 6, 2024, incident with Grievant in the Chow Hall. The Superintendent directed the Lieutenant to have the Probationers put their complaints in writing.¹²

After she received the written statements from the Probationers about the incident, the Superintendent began her investigation of the incident. As part of her investigation,

⁵ Hearing Recording at 28:26-29:51, 34:06-36:19, 39:38-41:00, 3:14:20-3:20:29.

⁶ Hearing Recording at 3:14:20-3:20:29 and see Hearing Recording at 28:26-29:51, 34:06-36:19.

⁷ Hearing Recording at 3:18:53-3:20:29.

⁸ Hearing Recording at 28:26-29:51, 34:06-36:19.

⁹ Hearing Recording at 28:26-29:51, 34:06-35:20, 36:19-36:55, 37:15-38:06, 3:14:20-3:20:29 and see Agency Ex. at 18.

¹⁰ Hearing Recording at 28:26-29:51, 34:06-35:20, 36:19-36:55, 37:15-38:06 and Agency Ex. at 18.

¹¹ Hearing Recording at 3:20:29-3:21:42.

¹² Hearing Recording at 2:04:32-2:06:59, 2:26:55-2:28:56.

the Superintendent spoke with Officer-1 and Grievant. Officer-1 testified that she had not reported the incident to anyone prior to being called in to speak with the Superintendent after the Probationers made their complaints of the incident.¹³

Grievant provided the Superintendent with statements from Probationer-1 and other probationers that Grievant asserted had been in the Chow Hall at the time of the incident. The written statement that Grievant provided from Probationer-1 indicated that Probationer-1 wanted to recant her initial written statement about the incident.¹⁴

After Grievant provided the written statement from Probationer-1 indicating that Probationer-1 wanted to recant her previous written statement, Superintendent met with Probationer-1. Probationer-1 provided another written statement to Superintendent indicating that the facts of the incident were as set forth in her original statement.¹⁵

On August 13, 2024, the Agency issued a Group I Written Notice of disciplinary action to Grievant. The Written Notice described the nature of the offense as:

On Saturday, July 6, 2024, [Grievant] was observed yelling and utilizing vulgar and insolent language toward [Probationer-1 and Probationer-2] that were working in the chow hall during the lunch meal. She did not foster a respectful workplace culture and healing environment. This use of obscene language demonstrates an unsatisfactory work performance by [Grievant]. This behavior is a violation of Operating Procedure 135.1, Standards of [Conduct].¹⁶

CONCLUSIONS OF POLICY

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

The preponderance of the evidence shows that Grievant engaged in misconduct on July 6, 2024, when she used vulgar language during her verbal exchange with the Probationers in the Chow Hall.

Grievant admitted that she used the word “fuck” while on duty overseeing the food service in the Chow Hall.¹⁷ Grievant also admitted that she knew the word “fuck” was a “curse” word that is considered vulgar or obscene.¹⁸ Grievant testified that she said, “she’s telling me to shut the fuck up” and asserted that she made the statement to Officer-1, not the Probationers.¹⁹ Officer-1 was clear, however, that when Grievant used the vulgar language, it was not as a statement or comment to Officer-1, but it was a response to the

¹³ Hearing Recording at 29:51-30:08, 38:06-39:38.

¹⁴ Grievant Ex. E.

¹⁵ Hearing Recording at 2:07:37-2:08:28, 2:29:30-2:31:14 and Agency Ex. at 58.

¹⁶ Agency Ex. at 1-2.

¹⁷ Hearing Recording at 3:14:20-3:20:29, 3:34:55-3:38:35.

¹⁸ Hearing Recording at 3:34:55-3:37:04.

¹⁹ Hearing Recording at 3:14:20-3:20:29.

Probationers. This Hearing Officer found the testimony of Officer-1 to be credible. Officer-1's testimony was credible and consistent during the hearing and her testimony was consistent with the complaints that were made by the Probationers. Officer-1 described a back and forth between Grievant and the Probationers and described Grievant as yelling and upset.²⁰ Although the Probationers did not testify, their reporting of the incident to the Facility was consistent with the credible testimony provided by Officer-1 and reflected their observation that Grievant used vulgar language that they understood to be directed toward them.²¹

Grievant appeared to argue that the complaints made by the Probationers should not be believed because the Probationers were "pressured" to provide their written statements to the Agency. Grievant argued that the "recant" statement by Probationer-1 supported her argument.²² Whether the Probationers felt "pressured" or not, Officer-1 provided credible testimony of her observations of the incident. Further, to the extent there was any "pressure" on the Probationers, it was the instruction by Superintendent that the Probationers put their complaints in writing. That instruction or "pressure," however, did not prompt the initial verbal complaints made by the Probationers because that instruction was given after the Probationers made their verbal complaints regarding the incident and Grievant's language.

The preponderance of the evidence showed that Grievant engaged in misconduct on July 6, 2024, when she used vulgar language during her verbal exchange with the Probationers in the Chow Hall. Grievant's use of vulgar language during her interaction with Probationer-1 and Probationer-2 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 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."²³

Grievant used vulgar language during an interaction with Probationers in the Chow Hall. Grievant's language was unprofessional and disrespectful. Unprofessional or disrespectful conduct and use of obscene or abusive language are Group I offenses.²⁴

As a Lieutenant at the Facility, Grievant was in a supervisory role and it was reasonable for the Agency to expect that Grievant would set an example of behavior for the probationers in her care and the staff she supervised. Because of Grievant's

²⁰ Hearing Recording at 28:26-29:51, 34:06-35:20, 36:19-36:55, 37:15-38:06 and Agency Ex. at 18.

²¹ See Hearing Recording at 2:03:37-2:08:28, 2:09:16-2:11:26 and Agency Ex. at 64-72.

²² Grievant's Ex. at E.

²³ See Virginia Department of Corrections Operating Procedure 135.1.

²⁴ See Virginia Department of Corrections Operating Procedure 135.1, Standards of Conduct, Procedure, XII.A and B.2, 4, and 5.

supervisory role, the Agency reasonably could have held Grievant to a higher standard of conduct.

The Agency's issuance of a Group I Written Notice of disciplinary action was consistent with law and policy.

Mitigation

Grievant argued that the Agency disciplined her for a "slip of the tongue" and failed to appropriately consider mitigating factors, including Grievant's years of service and history of good work performance.

The Standards of Conduct provide that an Agency may reduce the level of a disciplinary action if there are mitigating circumstances, such as conditions that compel a reduction to promote the interests of consistency, equity and objectivity, or based on an employee's otherwise satisfactory work performance.

In this case, the Agency considered mitigating factors, including Grievant's years of service and history of satisfactory performance, but the Agency determined that it was not appropriate to reduce the discipline.²⁵ That the Agency could have mitigated the discipline but determined that it was inappropriate to do so, is not a reason for the Hearing Officer to conclude that the Agency's action exceeds the limits of reasonableness.

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...."²⁶ 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.

Grievant argued that the absence of disciplinary actions at the Facility for staff cursing or using vulgar language showed that the Agency applied discipline inconsistently. Grievant did not provide any specific examples or evidence of other similarly situated Facility staff receiving no discipline or less discipline for cursing or using vulgar language in front of, or toward, probationers. Superintendent and the Major both acknowledged that Facility staff may at times have cursed or used vulgar language in conversations with each other and for which they were not disciplined. But they both made

²⁵ Hearing Recording at 2:16:13-2:17:06, 2:19:11-2:21:26 and Agency Ex. at 1-2.

²⁶ Va. Code § 2.2-3005.

clear the distinction they drew between vulgar language used in private conversations among staff that could not be overheard by probationers or the public versus the use of vulgar language that could be overheard by, or was directed at, probationers or that was directed at other staff. Both the Superintendent and the Major testified that they were not aware of any situations where staff had cursed or used vulgar at each other or where they had used such language in front of, or toward, probationers and they both considered such behavior to be misconduct that would be disciplined.²⁷ Indeed, Grievant testified that she understood that she was not allowed to curse or use vulgar language in the workplace and she appeared to distinguish between cursing or using vulgar language in conversations with other staff versus using such language with, or toward, probationers.²⁸ Grievant has not shown that the Agency's discipline was inconsistent or otherwise exceeds the limits of reasonableness.

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

²⁷ Hearing Recording at 1:25:20-1:26:53, 1:34:45-1:36:26, 2:21:27-2:22:57, 2:23:13-2:25:19, 2:47:50-2:49:42.

²⁸ Hearing Recording at 3:32:40-3:33:28, 3:34:55-3:37:04.

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.²⁹

Angela Jenkins

Angela Jenkins, Esq.
Hearing Officer

²⁹ 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.