

DEPARTMENT OF HUMAN RESOURCE MANAGEMENT  
DIVISION OF HEARINGS  
DECISION OF HEARING OFFICER  
In Re: Case Nos: 12239

Hearing Date: March 28, 2025  
Decision Issued: March 31, 2025

**PROCEDURAL HISTORY**

On November 13, 2024, Grievant was issued a Group III Written Notice.<sup>1</sup> On November 18, 2024, Grievant filed a grievance challenging the Agency's action.<sup>2</sup> The grievance was assigned to this Hearing Officer on February 10, 2025. A hearing was held on March 28, 2025.

**APPEARANCES**

Agency Advocate  
Agency Representative  
Grievant  
Witnesses

**ISSUES**

Did Grievant violate DHRM Policy 2.35 and DOC Operating Procedures 145.3, 135.1 and 135.3?

**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.<sup>3</sup> 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:

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,

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<sup>1</sup> A. Ex. 1, at 1

<sup>2</sup> A. Ex. 1, at 8

<sup>3</sup> See Va. Code § 2.2-3004(B)

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.<sup>4</sup> However, proof must go beyond conjecture.<sup>5</sup> In other words, there must be more than a possibility or a mere speculation.<sup>6</sup>

### **FINDINGS OF FACT**

After reviewing the evidence and observing the demeanor of each witness, considering their motive, potential bias, and corroborating or contradictory evidence, I make the following findings of fact. The Agency submitted a notebook containing pages 1 through 122. Without objection it was accepted as Agency Exhibit 1 (A Ex.). Grievant submitted a notebook containing pages 1 through 122. It was determined that the Grievant's notebook was identical to that of the Agency. Accordingly, it was agreed by both Grievant and Agency that only the Agency's notebook would be used throughout the course of this hearing.

The following people testified at the hearing:

Regional Administrator = RA

Warden = W

Major and Chief of Security = M

Unit Manager = UM

Lieutenant = LT

EEO Manager = EE

Grievant

Former employee = FO

**DOC OP 135.3(II)(D)** states: Employees in DOC supervisory and managerial positions must be especially mindful of how their words and deeds might be perceived or might affect or influence others. Therefore, they may be held to a higher standard for misconduct and violations of this operating procedure based on their scope of authority and influence, status as a role model, and ability to significantly impact the employment status and direct the work of others.<sup>7</sup>

**DOC OP 135.1(XIV)(A) "Third Group Offenses"** states: These offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant termination. This level is appropriate for offenses that, include but are not limited to, endangering others in the workplace, constituting illegal or unethical conduct, indicating significant neglect of duty; resulting in disruption of the workplace; or other serious violations of policies, procedures, or laws.<sup>8</sup>

**DOC OP 135.1(XIV)(B)(17)** states: Disruptive behavior or disruption in the workplace, may be considered a Group I, II or III offense depending on the nature circumstances of the violation.<sup>9</sup>

**DOC OP 145.3 "Purpose"** provides in part: DOC fosters a culture that demonstrates the principles of civility, diversity, inclusion, and equity to ensure a safe and civil workplace based on an awareness of all employees' responsibility to conduct themselves in a manner that cultivates mutual respect, inclusion, and a healthy work environment.<sup>10</sup>

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<sup>4</sup> *Ross Laboratories v. Barbour*, 13 Va. App. 373, 377, 412 S.E. 2d 205, 208 1991

<sup>5</sup> *Southall, Adm'r v. Reams, Inc.*, 198 Va. 545, 95 S.E. 2d 145 (1956)

<sup>6</sup> *Humphries v. N.N.S.B., Etc., Co.*, 183 Va. 466, 32 S.E. 2d 689 (1945)

<sup>7</sup> A Ex. at 40

<sup>8</sup> A Ex. at 100

<sup>9</sup> Id. at 101

<sup>10</sup> A Ex. At 57

**DOC OP 145.3(I)(F)(1) “Procedure”** states: Behaviors that undermine team cohesion, employee morale, individual self-worth, productivity, and/or safety are not acceptable.<sup>11</sup>

**DHRM Policy 2.35(A)(1) “Prohibited Conduct”** states: ...Behaviors that undermine team cohesion, staff morale, individual self-worth, productivity, and safety are not acceptable.<sup>12</sup>

Grievant worked as an assistant warden at the Department of Corrections. On October 9, 2024, Grievant asked M to make rounds with him. M is the Chief of Security at this location. She testified that she made part of the rounds with Grievant, but, because of necessary paperwork that she needed to complete, she asked UM if he would finish the rounds with Grievant. M testified Grievant then said to her: *“What’s wrong? You go with the ‘white man.’ You always say, ‘Yes sir, yes sir’ to the white man.”* M was offended, hurt, and embarrassed by this statement. This is similar to her written response to W on October 9, 2024<sup>13</sup> and her statement to RA and EE when interviewed on November 4.<sup>14</sup>

LT and UM were also present when this interaction took place. LT stated that Grievant told M *“you walk with the white man.”* This is similar to her written response to W on October 9, 2024<sup>15</sup> and her statement to RA and EE when interviewed on November 4.<sup>16</sup>

UM testified he heard Grievant say *“If white man was here, you would walk with him.”* This is similar to his written response to W on October 9, 2024<sup>17</sup> and his statement to RA and EE when interviewed on November 4.<sup>18</sup> UM testified that while he was not offended by the statement when it was made, in hindsight, he now felt it was inappropriate.

W testified that he is “the white man.” He was not present when the conversation took place. He held a Due Process meeting with Grievant and EE on October 21.<sup>19</sup> W had reviewed the statements of M, UM, and LT. W stated that Grievant’s statement was insubordinate, undermined the office of the Warden and the Chief of Security and it hurt moral. Grievant questioned if W could provide a fair hearing in this matter and it was transferred to RA, who became involved after the Due Process meeting.

On November 4, RA personally interviewed LT, UM, and M. Pursuant to these interviews, RA issued the Group III Written Notice. He stated there was no useful camera footage of the interaction between Grievant and M. He stated that Grievant had violated OP 135.3(II)(D), and 135.1(XIV)(17). RA stated that Grievant’s actions justified termination, but because of his longevity and spotless record, he was demoted 4 steps to sergeant with an approximate 20% reduction in pay.

Grievant was called as a witness by the Agency. He testified that M, LT, and UM all committed perjury when they testified before me, and they lied in their written statement and what they told RA when interviewed. Grievant implied that M was trying to get him fired.

In his Grievance Form A, Grievant wrote: *“What I remember saying was if it was anybody else you would walk with no problem, but you can go back on and finish your stacked up paper work because*

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<sup>11</sup> Id. at 57

<sup>12</sup> A Ex. at 69

<sup>13</sup> A Ex. at 13

<sup>14</sup> A Ex. at 23

<sup>15</sup> A. Ex. at 15

<sup>16</sup> A Ex. at 21

<sup>17</sup> A. Ex. at 16

<sup>18</sup> A Ex. at 21

<sup>19</sup> A. Ex. at 18

*you have excuses when it comes to me.”*<sup>20</sup> On October 17, Grievant, in a written statement said “*you make time for everyone else but when it comes to me you make excuses and I walked off.*”<sup>21</sup>

FO was not present when this matter occurred. He testified to a statement made by M near the end of November 2024. I find that the testimony of FO is not relevant to the matter before me.

I find that the Agency has proven by a preponderance of the evidence that Grievant made the statement as testified to by M, LT, and UM, and in so doing, violated the Policies and Operating Procedures set forth above. I find that all 3 were creditable witnesses.

### **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 Notice with reduction in rank and pay was proper.

### **APPEAL RIGHTS**

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<sup>20</sup> A Ex. at 7

<sup>21</sup> A Ex. 25

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 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 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.<sup>[1]</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].

*William S. Davidson*  
William S. Davidson, Hearing Office

Date: March 31, 2025

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