



COMMONWEALTH OF VIRGINIA

Department Of Human Resource Management

Office of Employment Dispute Resolution

DECISION OF HEARING OFFICER

In re:

Case number: 12302

Hearing Date: August 18, 2025

Decision Issued: August 22, 2025

PROCEDURAL HISTORY

On May 20, 2025, Grievant was issued a Group III Written Notice with termination for exposing his penis to a co-worker while at work in violation of the Department of Corrections Operating Procedure 145.3, Equal Employment Opportunity, Anti-Harassment, and Workplace Civility and Operating Procedure 135.1, Standards of Conduct.¹

On May 29, 2025, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On June 16, 2025, the Office of Employment Dispute Resolution assigned this matter to the Hearing Officer. On August 18, 2025, a hearing was held at the Agency's Central Regional Office in the Richmond metropolitan area.

APPEARANCES

Grievant
Agency Advocate
Agency Party Designee
Witnesses

ISSUES

¹ Agency Ex. at 1-3.

1. Whether Grievant engaged in the behavior described in the Group III Written Notice of disciplinary action?
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 Lead Corrections Officer at a Department of Corrections Community Corrections Alternative Program Facility. At the time of his dismissal, Grievant had been employed by the Agency for almost eight years and had been working at the Facility for approximately one year. No evidence of prior active disciplinary action was introduced during the hearing.

As part of the Agency's Community Corrections Alternative Program, the Facility provides probationers an alternative to prison by providing treatment and programs in a structured setting. The Facility houses an all-female probationer population.

At the time of the events at issue in this case, Grievant and Office Specialist were not engaged in any romantic or sexual relationship.

On May 7, 2025, Grievant and Office Specialist were both working at the Facility. After working together in the Dorm area, Grievant and Office Specialist both left the Dorm area and went to Office Specialist's office. While they were in Office Specialist's office, Grievant pulled his penis out of his pants and stood up so that Office Specialist was able to see Grievant's penis. Office Specialist and Grievant provided differing accounts of Office Specialist's behavior while they were in Office Specialist's office.

On the evening of May 7, 2025, Office Specialist called a Facility Lieutenant and described the incident with Grievant. The Lieutenant asked Office Specialist to write a statement about the incident. The Lieutenant also called the Superintendent.

Office Specialist provided the Agency with a written statement dated May 7, 2025. Office Specialist's written statement described the incident as occurring at approximately 1:30-2:00 on May 7, 2025. Office Specialist summarized the incident as follows:

Prior to incident [Grievant] and [Office Specialist] were sitting in [Dorm]. [Grievant] made statements of having to stroke one off... [Office Specialist] didn't pay attention to it...[Grievant] continued to make comments. [Office Specialist] stated she was heading to office to check emails. [Grievant] left before her. Entered through Watch office. [OSS] took the long route to secure door. [Office Specialist] enters office...[Grievant] is already there... [Office Specialist] proceeds to open email...Focused on screen and hears strange noise. Looks under screen to see [Grievant's] penis. Confused asked what are you doing...He says "oh I thought you was about that life." [Office Specialist] says naw...that's not cool...[Grievant] then stands up with penis still exposed... [Office Specialist] states what you doing. [Grievant] places it back and proceeds to rub on it. [Office Specialist] states that its not appropriate to do such things. He leaves after that [Office Specialist] shuts down...locking both entrances to office. Using coping skills provided through therapy.²

When Superintendent asked Grievant about the incident, Grievant initially denied that he exposed his penis to Office Specialist. Grievant provided a written statement to Superintendent on May 8, 2025, that stated:

On Wednesday May 7th, I [Grievant] and [Office Specialist] [were] doing commissary in [Dorm]. Went to her office and talked about life and health issues pertaining to my back and leg. At no point did I expose any body parts to her.³

On May 8, 2025, Superintendent contacted the Agency's Special Investigations Unit and Special Agent was assigned to investigate the incident.

On May 12, 2025, Grievant contacted Superintendent to schedule a time to meet with her because he wanted to tell her the truth about the incident.

On May 15, 2025, Special Agent interviewed Office Specialist and then Grievant about the incident.

Special Agent video recorded his interviews with Office Specialist and Grievant.⁴

² Agency Ex. at 10-11.

³ Agency Ex. at 12.

⁴ See Agency Ex. 15 and 16.

Grievant admitted to Special Agent and to Superintendent that he exposed his penis to Office Specialist on May 7, 2025. Grievant asserted that he had shown Office Specialist his penis in response to her request that he do so after she had shown him her pierced nipples through her shirt.

Grievant also provided a written statement to the Agency dated May 15, 2025. In his written statement, Grievant stated that:

I [Grievant], did expose my penis to [Office Specialist]. After she showed, me her nipple piercing through shirt, and also asking me to expose my penis to her. After the incident we heard a noise and I went back to post. [Office Specialist] helped me pass out commissary and went to the ice cream social together afterward.⁵

Video footage of Special Agent's interview of Office Specialist showed that her description of events was consistent with the written statement she provided to the Agency dated May 7, 2025.⁶ When Office Specialist spoke with Special Agent, she described being surprised when Grievant exposed his penis to her. When Special Agent asked Office Specialist how Grievant knew that her nipples were pierced, Office Specialist stated that her nipple piercings may have been something that was discussed in front of Grievant at some other time.⁷

On May 20, 2025, the Agency issued Grievant a Group III Written Notice with termination. The Written Notice described the offense as "[o]n Wednesday, May 7, 2025 [Grievant] exposed his penis to [Office Specialist] in her office in [Building]." As circumstances considered, the Agency noted the following:

On Thursday, May 15, 2025 [Grievant] admitted verbally and in writing to [Superintendent] that he did expose his penis to [Office Specialist] in her office in [Building] on Wednesday, May 7, 2025. This action is violation of VADOC policy OP 145.3, Equal Employment Opportunity, Anti-Harassment, and Workplace Civility – prohibits subjecting others to communication or innuendos of sexual nature, demonstrating behavior that is rude, inappropriate, discourteous, unprofessional, or unethical, behaving in a manner that displays a lack of regard for others and/or significantly distresses, disturbs, and/or offends others. Violation of Operating Procedure 135.1 – Standards of conduct – Conduct themselves at all times in a manner that supports the mission of the DOC and the performance of their duties. Demonstrate respect for the agency and behave in a civil and professional manner toward agency coworkers, supervisors, managers, subordinates, and customers, etc. and Violation of Operating Procedure 135.3 Standard of Ethics and Conflict – The DOC expects all employees to conform to a high professional, ethical, and moral standard of conduct. The

⁵ Agency Ex. at 7.

⁶ Agency Ex. 16.

⁷ Agency Ex. 16.

DOC strictly prohibits acts of sexual harassment, retaliation, or inappropriate behavior by any employee.⁸

CONCLUSIONS OF POLICY

The Agency's Standards of Conduct set forth the Agency's expectation that Agency employees will treat other employees with respect, courtesy, dignity, and professionalism.⁹

Operating Procedure 145.3 sets forth the Agency's prohibition on "displays of inappropriate behavior."¹⁰ The Agency specifically prohibits employment discrimination, harassment, including sexual harassment, bullying behaviors, threatening or violent behaviors, retaliation for participating in a protected activity, or other displays of inappropriate behavior toward any employee. Sexual harassment is any unsolicited, unwelcome behavior of a sexual nature including, but not limited, to sexual advances, requests for sexual favors, or verbal, written or physical conduct of a sexual nature by a manager, supervisor, co-worker(s), or non-employee (third party). Operating Procedure 145.3 also makes clear that "[b]ehaviors that undermine team cohesion, employee morale, individual self-worth, productivity, and/or safety are not acceptable."¹¹

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

Grievant admitted that he showed (or exposed) his penis to Office Specialist on May 7, 2025. Grievant also admitted that such conduct was inappropriate and violated the Agency's policies on civility in the workplace and the Standards of Conduct.

Grievant argued that prior to the events of May 7, 2025, he had numerous intimate conversations with Office Specialist, including a sexual conversation earlier that day. Grievant testified that while they were in Office Specialist's office on May 7, 2025, Office Specialist cupped her breasts so that he could see that her nipples were pierced through her shirt. According to Grievant, Office Specialist then requested that he expose himself to her, which he did in response to her request. As further support of his assertion that his conduct was not unwelcomed by Office Specialist, Grievant testified that Office Specialist assisted him with handing out commissary and then they went to an ice cream social at the Facility.

The preponderance of the evidence showed that Grievant's conduct was not solicited or welcomed by Office Specialist. Office Specialist testified that she was "shocked" by Grievant's behavior while they were in her office on May 7, 2025. The video footage of her interview with Special Agent and her demeanor during that interview were consistent with Office Specialist's written statement to the Agency that Grievant's

⁸ Agency Ex. at 1-3.

⁹ See DOC Operating Procedure 135.1, Standards of Conduct.

¹⁰ DOC Operating Procedure 145.3, Equal Employment Opportunity, Anti-Harassment, and Workplace Civility.

¹¹ DOC Operating Procedure 145.3, Equal Employment Opportunity, Anti-Harassment, and Workplace Civility, Procedure I.F.

behavior was unsolicited and unwelcomed by her and consistent with the evidence that Office Specialist reported the incident to a Facility Lieutenant that same evening.

It is inappropriate, unprofessional, and a violation of policy, for an employee to show his penis to another employee while the two employees are supposed to be working. In this case, the preponderance of the evidence showed that Grievant's conduct was unsolicited and unwelcomed. Even if Office Specialist had encouraged Grievant to show her his penis, as Grievant asserted, Grievant should have refrained from doing so. Authorization by a co-worker to engage in inappropriate behavior does not excuse the inappropriate behavior. When Grievant pulled his penis out of his pants and showed it to Office Specialist his behavior was inappropriate and unprofessional. His behavior also violated Operating Procedure 135.1, Standards of Conduct and Operating Procedure 145.3, Equal Employment Opportunity, Anti-Harassment, and Workplace Civility.

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

The Agency has proved by a preponderance of the evidence that its 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."¹²

Violation of Operating Procedure 145.3 may be a Group I, Group II, or Group III offense depending on the nature of the offense.¹³ Agencies are permitted 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 Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Grievant showed his penis to another employee while the two employees were supposed to be working. Such behavior was sexual by its nature and as described by Grievant. The preponderance of the evidence showed that Grievant's inappropriate behavior was unsolicited and unwelcomed by Office Specialist. Even if, as Grievant argued, the behavior was not unwelcomed by Office Specialist, it would not change the outcome of this case. Grievant's behavior was inappropriate, unprofessional, and a severe violation of policy. Such behavior has no place in the workplace. Grievant's misconduct was severe and a Group III level offense.

Grievant argued that the Agency failed to engage in progressive discipline and that termination was too harsh a punishment for a first offense. Grievant argued that he was a good employee with no active prior disciplinary actions. Although agencies are

¹² See Virginia Department of Corrections Operating Procedure 135.1.

¹³ Virginia Department of Corrections Operating Procedure 135.1.

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.

Upon the issuance of a Group III Written Notice, an agency may remove an employee.

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

Due Process

Grievant argued that the Agency did not provide him with an opportunity to face his accuser during the Agency's investigation. Grievant argued that the Agency did not properly investigate the allegations against him and that there were inaccuracies in the Investigative Report prepared by Special Agent. Grievant also argued that the Agency did not give proper consideration to his responses 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 his evidence and arguments 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.¹⁴

Grievant argued that the Agency did not appropriately consider mitigating factors, including his years of good service with no prior disciplinary actions.

The Agency did not provide any testimony regarding its consideration of mitigating factors and the Written Notice did not describe whether or how the Agency may have considered mitigating factors. The Office of Employment Dispute Resolution has previously ruled that it will be an extraordinary case in which an employee's length of service and/or past work experience could adequately support a finding by a hearing officer that a disciplinary action exceeded the limits of reasonableness.¹⁵

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.

¹⁴ Va. Code § 2.2-3005.

¹⁵ EDR Ruling No. 2008-1903; EDR Ruling No. 2007-1518; and EDR Ruling 2010-2368.

Grievant argued that the Agency applied discipline inconsistently because the Agency did not terminate Office Specialist's employment for her behavior on May 7, 2025. There was no direct evidence presented as to how the Agency considered Grievant's allegations regarding Office Specialist's behavior or whether the Agency took any corrective or disciplinary action against Office Specialist based on those allegations. Based on the evidence, Office Specialist is currently employed by the Agency. Grievant did not meet his burden of proving by a preponderance of the evidence that the Agency disciplined similarly situated employees inconsistently. There was insufficient evidence presented for this Hearing Officer to determine that Office Specialist engaged in the behavior alleged by Grievant. Even if Office Specialist had engaged in the behavior as alleged by Grievant, however, their conduct was not sufficiently comparable to warrant mitigation of Grievant's discipline in this case. Grievant reported to the Agency that Office Specialist showed him her nipple piercings through her shirt. At the hearing Grievant testified that Office Specialist cupped her breasts so that he could see that her nipples were pierced through her shirt. Grievant admitted to the Agency during its investigation and during the hearing that he pulled his penis out of his pants and showed it to Office Specialist. By his own testimony, Grievant's behavior differed from Office Specialist's behavior such that they were not similarly situated employees because Grievant did not show Office Specialist his penis through his clothing, Grievant pulled his penis out of his pants and showed his unclothed penis to Office Specialist.¹⁶ This 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 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.

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.

¹⁶ Hearing Recording at 1:43:06-2:05:52.

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.¹⁷

Angela Jenkins

Angela Jenkins, Esq.
Hearing Officer

¹⁷ 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.