COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11766

Hearing Date: March 14, 2022
Decision Issued: April 4, 2022

PROCEDURAL HISTORY

On October 12, 2021, Grievant was issued a Group III Written Notice of disciplinary action with removal for absence in excess of three workdays without authorization.

On November 11, 2021, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On November 29, 2021, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 14, 2022, a hearing was held by remote conference.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's Representative
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:

The Virginia Department of Transportation employed Grievant as a Program Manager III. Grievant consistently received favorable work performance evaluations since he began working for the Agency eight years earlier. Grievant supervised eight employees. No evidence of prior active disciplinary action was introduced during the hearing.

In March 2020, the Agency began requiring certain employees including Grievant to work remotely in response to the COVID19 pandemic. Grievant worked well remotely. He performed his duties adequately while teleworking. From March 2021 to May 2021, Grievant reported to the office when necessary to train new employees or for scheduled meetings. Because Agency employees continued to work remotely, Grievant did not encounter many employees in the office and felt safe to work there.

On June 1, 2021, the Agency began Stage Three Part Two of its reopening plan in response to the pandemic. This plan required employees to report to work one day per week. Grievant's unit was to report to work on Wednesdays.

Between June 1, 2021 and September 14, 2021, Grievant complied with the requirement to report to work one day per week. He repeatedly voiced his concerns about health and safety in the office and his fear for his physical well-being.

Governor's Executive Directive 18, Ensuring a Safe Workplace, was issued on August 5, 2021.

In August 2021, Grievant became aware of at least three VDOT central office employees who had contracted COVID19 after the return to work mandate was implemented. Grievant had knowledge that two of the infected employees were in the office just a few days before their positive infections were confirmed. One of those employees reported to Grievant.

Grievant's Wife went on short-term disability because of a health condition. She was immunocompromised. Grievant was concerned about becoming infected with COVID19 and then passing that virus to her.

On September 13, 2021, Grievant reiterated his health and safety concerns to the Supervisor. Grievant said that because of VDOT's noncompliance with policies and procedures, he did not feel safe working in the office. Grievant told the Supervisor that hundreds of employees were working in close proximity to each other and VDOT continually failed to comply with or enforce health and safety protocols since the return to work in-office requirement plan was implemented.

On September 14, 2021, Grievant repeated his health and safety concerns to the Supervisor. Grievant was fearful about the high risk of working in the office, and requested to work from home. In addition, Grievant told the Supervisor that he was willing to use his personal leave days on Wednesdays in lieu of working in the office on his Department's designated day. He was aware that several other VDOT employees requested and were permitted to work from home one hundred percent. On September 15, 2021, the Supervisor approved Grievant's personal leave requests for scheduled in-office Wednesdays. Thus, Grievant was not obligated to report to the office on September 15, 2021. Grievant was allowed to work remotely on September 16, 17, 20, and 21, 2021.

On September 21, 2021, the Supervisor informed Grievant that his use of personal leave to avoid the in-office requirement was "hurting the group."

The Supervisor approved Grievant's request for leave on September 22, 2021, September 23, 2021, and September 24, 2021.

Grievant did not report for work in-person or via telework on Monday, September 27, 2021. The Supervisor called Grievant that day and asked if Grievant was working. The Supervisor told Grievant that he would approve leave through September 27, 2021, but he was not approving any more leave requests and accused Grievant of avoiding the office. The Supervisor told Grievant that Grievant was expected to work in the office on

September 29, 2021, and until Grievant did so, Grievant was prohibited from working remotely.

Grievant failed to report to the office on Wednesday September 29, 2021, Thursday September 30, 2021, Friday October 1, 2021 and Monday October 4, 2021.

On September 28, 2021, the Supervisor sent Grievant an email:

> In followup to our discussion from last week, while I did and have approved leave on both September 8th and the 15th on days that you were scheduled to be in the office, as I informed you on Tuesday, September 21st, effective September 22nd, if you did not report to the office as required then you would need to report on Thursday, and if you failed to report on Thursday then you would be required to report on Friday, in order to meet the Department's requirement of working in the office 1 day a week. Additionally as we discussed, I would be more than willing to change your day in the office to another day, possibly Friday as there are less people in the office on that day to alleviate your concerns about possibly being in close contact with staff. I would encourage you to further consider this option as an alternative.
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> Further, as we discussed yesterday and based on your failure to report to the office as directed last Wednesday, then Thursday and Friday, effective this week I will no longer be approving leave taken in an effort to circumvent the department's mandatory in office requirements for staff. Additionally, your failure to report to the office as required and instructed may result in disciplinary action in accordance with the Commonwealth's Standards of Conduct (DHRM Policy 1.60).[1]

Grievant did not read the email until October 2, 2021 when he first logged into the Agency's computer system.

On October 5, 2021, the Supervisor sent Grievant an email advising Grievant that he could request an accommodation by contacting the Agency's Civil Rights office.

On October 6, 2021, the Agency sent Grievant a due process letter to Grievant's work email address but he did not receive a copy. On October 7, 2021, Grievant received a hard copy of the due process letter.

On October 7, 2021, Grievant sent an email to the Supervisor stating, in part:

> However, in an abrupt fashion and without adequate explanation, you informed me you would no longer be approving my leave to circumvent the 8 hour a week in-office requirements, and that an in-office 8 hour work day

[1] Agency Exhibit p. 11.

would be required prior to being allowed to remote Telework again. At the conclusion of that telephone conversation I understood I would be denied the opportunity to work in any capacity until I physically sat at the office for 8 hours a week. I again requested you consider allowing usage of personal leave balance and asked how the denial of my leave usage was equitable in light of my proven commitment to work uncompensated overtime and the lack of evidence showing that the use of my leave negatively impacted the department. I attempted to sacrifice leave once a week to accommodate a safer work environment and to minimize the risk of exposure to my family and myself, but have continually been denied this accommodation without reason. I confirmed I would not report to the office unless specific business needs are established, which cannot be successfully completed from remote locations. Despite my willingness to work remotely, I have been denied the opportunity to work since September 28, 2021. ***

Numerous telephone calls and emails with you indicated that I would only be allowed to work again once I worked 8 hours physically in the office. I made it clear, unless specific business needs are established which cannot be successfully completed from remote locations, I will not report to the office location for work duties. I have shown that my work responsibilities can be efficiently handled remotely. For this reason, I again request consideration of my reasonable accommodation appeal. I maintain that the restrictions you have placed on me have denied me the opportunity to work. However, I did not fail to report to work without proper notice. Ample notification of my intentions has been provided to you and I have followed the restrictions you are continuing to enforce. It is my hope that the pandemic will soon be under better control and I will only temporarily need to avoid in-office work. Until that time, I remain willing to immediately resume my Telework responsibilities.[2]

CONCLUSIONS OF 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."[3] 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."

[2] Agency Exhibit p. 14.

[3] The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

Absences in excess of three workdays without authorization is a Group III offense.[4] Grievant was required to report to work in person on Wednesday September 29, 2021, Thursday September 30, 2021, Friday October 1, 2021 and Monday October 4, 2021. Grievant did not report to work as scheduled. He was not authorized to telework and was not authorized to be absent from work for any other reason. The Agency has established that Grievant was absent from work in excess of three workdays without authorization thereby justifying the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

The Agency instructed Grievant to report to work in the office and also denied him permission to telework until he began reporting to the office one day per week. The Agency denied Grievant's request to use leave on the days he was to report to the office.[5] The Agency had discretion to take these actions. The Agency was authorized to compel its employees including Grievant to report to work one day per week.[6] The Agency had discretion to determine which employees may telework and when they may telework. The Supervisor was not obligated to authorize Grievant to take leave simply because he had leave balances available.

Grievant had legitimate concerns about contracting the coronavirus and infecting his Wife. What Grievant has not established is that the Agency was obligated to permit him to telework in response to his concerns. Grievant did not seek an accommodation from the Agency's Civil Rights division. It Grievant had applied for accommodation, it is not likely an accommodation would have been granted. The Hearing Officer cannot conclude that Grievant was entitled to an American's with Disability Act accommodation because of his Wife's illness. The EEOC has advised:

> D.13. Is an employee entitled to an accommodation under the ADA in order to avoid exposing a family member who is at higher risk of severe illness from COVID-19 due to an underlying medical condition? *(6/11/20)*
>
> No. Although the ADA prohibits discrimination based on association with an individual with a disability, that protection is limited to disparate treatment or harassment. The ADA does not require that an employer accommodate an employee without a disability based on the disability-related needs of a family member or other person with whom the employee is associated.[7]

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[4] See, Attachment A, DHRM Policy 1.60.

[5] Grievant had ample available accrued leave to use to avoid reporting to work on Wednesdays. See Grievant Exhibit 2.

[6] A Hearing Officer cannot disregard an agency or State policy simply because the Hearing Officer disagrees with the policy.

[7] https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws

Grievant has not established that he is entitled to leave under the Family Medical Leave Act or DHRM Policy 4.20. Grievant did not have a serious health condition and was not providing care to his Wife for any serious health condition she may have had.

Grievant argued other employees were reporting to work even though they may have had COVID19 or been exposed to someone with COVID19. Although Grievant's concerns were understandable, the Agency remained authorized to compel Grievant to report to work one day per week. The Agency implemented procedures to allow and require employees who posed a risk to other employees to remain away from work. The Hearing Officer cannot conclude that the Agency created an unsafe workplace.

Va. 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 …."[8] 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.

Grievant asserted he engaged in protected activity when he reported concerns about other employees reporting to work while infected with coronavirus or exposed to people infected with the virus. The evidence showed that the Agency did not take action against Grievant because of his protected activity.

The Hearing Officer does not agree with the Agency's decision to remove Grievant. The consequences of permitting Grievant to continue teleworking were minimal. Grievant was not seeking permanent telework status. This case is an example of where progressive discipline should have been attempted. The essence of Grievant's behavior was a failure to follow a supervisor's instruction which is a Group II offense. The Agency could have issued Grievant a Group II Written Notice and allowed Grievant to consider whether he would begin complying with the supervisor's instruction or face a second Group II Written Notice with removal. Grievant is a highly skilled employee whose job performance was satisfactory to the Agency with exception of failing to meet the weekly office attendance requirement. Grievant's concerns about his and his Wife's health were reasonable and rational. Nevertheless, the Hearing Officer will not modify the Agency's disciplinary action because it exercised its judgment in accordance with the Standards of

[8] Va. Code § 2.2-3005.

Conduct and other State policies. State agencies are encouraged but not required to use progressive discipline.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal 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 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.[1]

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

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

/s/ Carl Wilson Schmidt

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Carl Wilson Schmidt, Esq.
Hearing Officer