



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11795 / 11796

Hearing Date: May 13, 2022

Decision Issued: June 2, 2022

PROCEDURAL HISTORY

On November 15, 2021, Grievant was issued a Group II Written Notice of disciplinary action with a five workday suspension for failure to follow policy. On December 9, 2021, Grievant was issued a Group II Written Notice of disciplinary action with removal for failure to follow policy.

On January 9, 2022, Grievant timely filed a grievance to challenge the Agency's actions. The matter advanced to hearing. On February 7, 2022, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 13, 2022, a hearing was held by remote conference.

APPEARANCES

Grievant
University Counsel
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notices?

2. Whether the behavior constituted misconduct?
3. Whether the University'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 University 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:

Virginia Tech employed Grievant as an Academic Advising and Enrollment Manager. She began working full time for the University in February 2017. Other than the facts giving rise to these disciplinary actions, Grievant's work performance was satisfactory to the University.

In March 2020, Grievant and several other University employees began teleworking full time in response to the COVID-19 pandemic.

On August 19, 2021, the University President sent University employees Presidential Policy Memorandum No. 317 regarding "REVISED COVID Vaccination and Testing Requirements." This memorandum provided:

Virginia Tech remains concerned about the health and wellness of our university community. To accomplish our goal of an in-person fall semester that offers the fullest possible learning experience for students and enables faculty and staff to accomplish our teaching, research, and outreach missions, it is necessary that we continuously monitor the status of the pandemic and adapt our policies and operations to address emerging health safety issues.

Our operating policies, procedures, and practices are informed by the Centers for Disease Control and Prevention (CDC), the Virginia Department of Health (VDH), and our own public health experts and COVID modeling team. In accordance with updated public health guidance confirming the importance of vaccination in slowing the spread of highly transmissible COVID variants, the Virginia Tech vaccination mandate will be expanded to include all employees. ***

Effective immediately, all university employees (faculty, staff, and wage employees), regardless of the location of their Virginia Tech employment, will be required to be vaccinated.

a. Employees must upload their vaccination card, indicating they have received the COVID19 vaccination(s), by Oct. 1, 2021.

b. This vaccination requirement is a condition of employment at Virginia Tech. Failure to provide proof of vaccination may result in disciplinary action, up to and including termination of employment.

c. Employees who have an approved medical or religious exemption will be required to participate in the surveillance testing program as outlined below.¹

On October 1, 2021, the Supervisor spoke with Grievant. Grievant said she did not intend to become vaccinated for COVID-19 and did not intend to file a request for religious or medical exemption. Grievant indicated she was aware of Presidential Policy Memorandum No. 317.

On October 6, 2021, the Supervisor sent Grievant an email with a Group II Written Notice² attached. Grievant was disciplined for failure to comply with Presidential Policy Memorandum No. 317. The Supervisor wrote in the email:

Presidential Policy Memorandum No. 317 requires all university employees, regardless of their Virginia Tech employment location, to show proof of vaccination or file for a vaccination exemption by October 1, 2021.³

On October 26, 2021, Grievant met with the Supervisor and stated that she did not intend to become vaccinated for COVID-19 and did not intend to request a religious or medical exemption from the University's policy. Another meeting was held on November 12, 2021. Grievant indicated she had not become vaccinated.

¹ University Exhibit p. 107.

² Grievant did not appeal this Written Notice.

³ University Exhibit p. 52.

On October 26, 2021, Grievant sent an email to the University's Office of Equity and Access "to inquire about the process for a religious exemption for the COVID-19 vaccination. Can you please provide information about the process and steps for that?" On October 27, 2021, the Office of Equity and Access sent Grievant an email with a form "to request an exemption from receiving the COVID-19 vaccine due to a sincerely held religious belief"⁴

On December 6, 2021, the Supervisor spoke with Grievant. Grievant indicated she did not intend to become vaccinated and did not intend to request a religious or medical exemption.

Prior to Grievant's removal, she did not show proof of vaccination for COVID-19 or request a religious or medical exemption to the University's policy. Grievant did not complete and return the form she received from the Office of Equity and Access.

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."⁵ 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."

Failure to follow policy is a Group II offense.⁶ Presidential Policy Memorandum No. 317 required Grievant to show proof of vaccination for COVID-19 or request a religious or medical exemption from the policy's requirements. Grievant did not show proof of vaccination and did not seek a religious or medical exemption. Grievant was aware of the policy and repeatedly reminded to comply with the policy. She did not do so. The University has presented sufficient evidence to support the issuance of disciplinary action.

Grievant had a prior active Group II Written Notice issued October 6, 2021. Upon the accumulation of two or more Group II Written Notices, an agency may remove an employee or suspend an employee for up to 30 work days. The University has presented sufficient evidence to support the issuance on November 15, 2021 of a Group II Written Notice with a five workday suspension. The University has presented sufficient evidence to support the issuance on December 9, 2021 of a Group II Written Notice with removal.

⁴ University Exhibit p. 122.

⁵ The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

⁶ See, Attachment A, DHRM Policy 1.60.

Grievant argued that the University did not fully explain the policy requirements to Grievant and that she did not understand those requirements. She did not believe she could make an informed decision without answers to all of her questions. She argued that the Supervisor did not clarify or define workplace safety “so it was impossible for me to rectify the issues.” She asserted no one made genuine attempts to alleviate her concerns. She asserted the Supervisor made some “brash, off-handed comments.” Grievant expressed concerns regarding how her private information would be handled.

It is not necessary for the University to show that it answered all of Grievant’s questions to her satisfaction before issuing disciplinary action. Grievant was notified adequately of the University’s policy requiring her to show proof of vaccination or request a religious or medical exemption. The University repeatedly informed her of that obligation. Grievant chose not to comply with the University’s instruction. Harsh comments from her supervisor would not form a basis to reverse the disciplinary actions.

Grievant argued the discipline was too harsh and discriminated against her as a Christian mother. The University’s discipline, however, was consistent with the Standards of Conduct. Grievant did not present sufficient evidence to show that she was discriminated against. The evidence showed the University took disciplinary action against Grievant because she failed to comply with the University’s policy. The University had discretion whether to allow Grievant to continue working remotely without vaccination but it chose not to do so. There is no policy authorizing or basis for the Hearing Officer to reverse the University’s decision.

During the hearing, Grievant asserted that the University’s vaccination requirement was not consistent with her religious beliefs. Grievant did not seek a religious accommodation from the University prior to her removal. The University’s discipline is evaluated based on the information it had at the time the disciplinary action was issued. Thus, Grievant’s evidence about her religion presented at the time of the hearing does not affect the outcome of this case.

Grievant raised concern to the University about whether she was properly paid during her suspension. The University resolved those concerns. In any event, Grievant has not established the nature of the University’s actions regarding her suspension that remain in error.

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 ...”⁷ 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

⁷ Va. Code § 2.2-3005.

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 University’s issuance on November 15, 2021 to the Grievant of a Group II Written Notice of disciplinary action with a five workday suspension is **upheld**. The University’s issuance on December 9, 2021 to the Grievant of a Group II 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]

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

[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].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer