COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11930

Hearing Date: May 8, 2023
Decision Issued: May 31, 2023

PROCEDURAL HISTORY

On January 13, 2023, Grievant was issued a Group III Written Notice of disciplinary action for making threats. On January 13, 2023, Grievant was issued a Group II Written Notice of disciplinary action for making false and misleading statements during an investigation.

On January 30, 2023, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On February 21, 2023, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 8, 2023, a hearing was held by remote conference.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Representative
Witnesses

ISSUES

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

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 Department of Juvenile Justice employed Grievant as a Human Resource Assistant at one of its locations. She had been employed by the Agency for approximately 24 years without prior active disciplinary action. She began working for the Agency as a Juvenile Correctional Officer. She worked at several facilities including one with residents who were developmentally delayed. Grievant's performance evaluations showed she met or exceeded the Agency's performance expectations.

Grievant previously worked as Resident Specialist. As a Resident Specialist, she had the authority to restrain residents if they began fighting.

Grievant suffered an injury in 2020. She had surgery in 2020 and again in September 2021. She was out of work but returned to work in March 2022 to perform light duty. She transitioned to become an HR timekeeper in July or August 2022. Grievant began reporting to the Supervisor. Grievant's salary was reduced approximately $10,000 because of the transition. Grievant believed the Agency misapplied policy by reducing her salary without negotiating the amount of the reduction. Grievant was able to see how many hours staff worked and who was receiving overtime compensation.

Ms. J had been working in the same building with Grievant for approximately one month. Their jobs did not require much interaction between them. They worked on different teams.

On September 16, 2022, Ms. J was in her office. Grievant left Grievant's office and walked to Ms. J's office. Grievant began talking to Ms. J about Grievant's desire to work overtime as a Resident Specialist. Grievant wanted to earn overtime pay. Grievant described how she could perform the duties of the position. Ms. J told Grievant she could submit her resume to the DJJ recruit inbox.

Grievant was frustrated that the Supervisor would not grant Grievant's request to work overtime as a Resident Specialist.

Grievant said she would "slap the s—t out of [Supervisor]." Ms. J was "taken aback" by Grievant's comment. Ms. J "just stared at her." Ms. J became fearful of Grievant. Ms. J did not know what Grievant was capable of doing. Ms. J was not fearful that Grievant would harm her that day. Ms. J was fearful of what Grievant would do given that she worked inside the Human Resources Department.

Grievant told Ms. J that Grievant used to work at O Facility. Grievant said that several years ago she was forced to move to another Facility and was allowed to select that Facility. Grievant said she chose O Facility because it had only 40 residents at that time and they were "retarded muther—kers." O Facility closed several years before Ms. J began working for the Agency.

Grievant remained in Ms. J's office for approximately 30 minutes. The conversation between Grievant and Ms. J ended when Ms. J received a telephone call from her daughter's father. Ms. J began speaking on the telephone and Grievant left Ms. J's office.

Shortly after Grievant left Ms. J's office, Ms. S came to Ms. J's office. Ms. J said that she did not want to be left alone in the office with Grievant because she felt Grievant was crazy.

In the afternoon of September 16, 2022, Ms. J called Mr. C to "vent." Ms. J told Mr. C about Grievant's behavior. She sought advice on how to handle the situation. Mr. C told Ms. J he was a mandatory reporter and had to report it. Ms. J asked Mr. C not to report the incident, but he indicated he would have to do so.

The Agency investigated the incident. Grievant told the Investigator that she did not say she would slap the s—t out of the Supervisor. Grievant told the Investigator she did not say residents at O Facility were retarded mutherf—kers. Grievant said she did not talk like that.

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."[1] 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."

Group III Written Notice

DHRM Policy 2.35 governs Civility in the Workplace. This policy provides:

> The Commonwealth strictly forbids harassment (including sexual harassment), bullying behaviors, and threatening or violent behaviors of employees, applicants for employment, customers, clients, contract workers, volunteers, and other third parties in the workplace. ***
>
> Any employee who engages in conduct prohibited under this policy or who encourages or ignores such conduct by others shall be subject to corrective action, up to and including termination, under Policy 1.60, Standards of Conduct.

On September 16, 2022, Grievant spoke with Ms. J and threatened to slap Grievant's Supervisor. Grievant did not agree with the Agency's reduction in her salary without negotiation and wanted to work overtime to increase her income. Ms. J became uncomfortable and was unsure what Grievant was capable of doing. Slapping another employee would be a violent action. The Agency has established that Grievant threatened violent behavior thereby justifying the issuance of a Group III Written Notice.

Grievant wrote, "I did not make any verbal threats in the workplace, I did not use profanity in the workplace, nor did I make any derogatory remarks about juvenile offenders at the [Facility]." Grievant argued that Ms. J was not credible and was motivated to lie about Grievant.

The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Ms. J's testimony was credible. She was reluctant to report the matter. She had only known Grievant for approximately one month. Grievant's arguments that Ms. J was untruthful were not persuasive. Ms. J testified truthfully.

Group II Written Notice

Under the Agency's Staff Code of Conduct employees are required to:

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

> Refrain from using profane, demeaning, indecent, or insulting language or words with racial or ethnic connotations in the presence of or toward a client either directly or indirectly. This includes during interactions between employees and volunteers in the presence of a client or outside of the presence of a client.

When Grievant spoke to the Investigator, Grievant corroborated most of the details of her conversation with Ms. J. This showed that Grievant recalled the conversation and knew or should have known that she told Ms. J that she would slap the s—t out of the Supervisor and that residents at O Facility were “retarded mutherf—kers.”

Interference with a formal investigation can be a Group III offense. Grievant interfered with the Agency’s investigation by failing to accurately inform the Investigator of Grievant’s conversation with Ms. J. In this case, the Agency issued Grievant a Group II Written Notice. The Agency has presented sufficient evidence to support the issuance of the Group II Written Notice. With the accumulation of a Group II and Group III Written Notice, the Agency has presented sufficient evidence to support the Agency’s decision to remove Grievant.

Grievant questioned the quality of the Investigator’s questioning and denied Grievant was untruthful. With respect to the statements about slapping the Supervisor and using a derogatory phrase to describe O Facility residents, Grievant’s statements of denial made to the Investigator were clear. Grievant did not tell the Investigator all of what she said to Ms. J.

Mitigation

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 ….”[2] 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.

DECISION

[2] Va. Code § 2.2-3005.

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action is **upheld**. The Agency's issuance 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]

[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