



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11939

Hearing Date: June 7, 2023
Decision Issued: June 27, 2023

PROCEDURAL HISTORY

On November 15, 2022, Grievant was issued a Group I Written Notice of disciplinary action for failure to follow instructions.

Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On March 13, 2023, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 7, 2023, 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 Department of Corrections employs Grievant as an Adult Education Instructor at one of its locations. She began working for the Agency on September 25, 2008. The Supervisor described Grievant as "an excellent teacher." No evidence of prior active disciplinary action was introduced during the hearing.

Before Grievant began working for the Agency, she worked for another employer who provided retirement benefits under the Virginia Retirement System. Grievant was entitled to retirement benefits based on her years of service with the prior employer and the Agency.

The Agency wanted to compare the compensation of its employees with the compensation of teachers in other school systems. The Agency decided to obtain data from its teachers by sending them a survey. The Agency intended to use the data from its teachers to determine whether its teachers were over or under paid as compared to teachers in other organizations.

The Agency has a Research Department. The Research Department did not draft the survey. The ITC worked in a division responsible for implementing technology for inmates to use in the classroom. The SAC also worked with the ITC. They were not in

Grievant's chain of command and not part of the Research Department. The ITC and SAC put together a three question survey for teachers.

On September 9, 2022, the SAC instructed Grievant and over 90 other teachers to complete a Correctional Education Personnel Survey by September 16, 2022. The Survey asked:

How many years of service do you have with VRS (Virginia Retirement System) as an educator?

How many years of service do you have with DOC (Department of Corrections) as an educator and/or academic personnel?

What is your highest level of degree obtained?

The reasons for conducting the survey were not shared with Grievant or other employees asked to participate in the survey. Grievant initially believed that the survey could be related to budget cuts, moving teachers, or restructuring the Agency. She did not want to participate in the survey.

On September 19, 2022, the ITC sent Grievant and other staff an email reminder to complete the survey.

On September 21, 2022, the ITC sent Grievant and other staff an email reminder to complete the survey.

On September 27, 2022, the ITC sent Grievant an email to Grievant reminding her to complete the survey. He asked that she complete the survey by September 28, 2022.

On October 3, 2022, the ITC sent Grievant's Supervisor an email asking him to follow up with Grievant to have the survey completed.

On October 5, 2022, Grievant informed the ITC he could obtain answers to the survey from the Agency's human resource department and the Virginia Department of Education for accuracy.

On October 23, 2022, the Supervisor sent Grievant an email with the survey attached and told her to complete the survey by close of business October 24, 2022. He told her that her failure to do so would be considered insubordination and result in disciplinary action.

On October 23, 2022, the Supervisor met with Grievant and instructed her to complete the survey.

On October 25, 2022, Grievant declined to complete the survey.

Grievant did not complete the survey.

CONCLUSIONS OF POLICY

Grievant was authorized to reject the Supervisor's instruction to complete the survey because it required her to disclose confidential personnel information. She was entitled to determine to whom she would disclose such information. The decision is based on two reasons.

First, DHRM Policy 6.10 governs Personnel Records Management. This policy provides:

Personnel File - The "official" or master personnel file that includes documents with original authorization signatures relating to an individual's employment with the Commonwealth.

Personnel Records - All records maintained on employees.

Employees' personnel records are to be maintained in a secure location.

Personnel records are confidential in nature and, therefore, access to the information in them is to be limited. (See Policy 6.05, Personnel Records Disclosure.)

Based on this policy, the Hearing Officer concludes that Grievant's length of service with the VRS was confidential personnel information. It was not information available to the public.

A State agency cannot compel an employee to produce confidential personnel information without that employee's agreement. Grievant had the right to determine who would receive her confidential personnel information. She was entitled to disregard the Supervisor's instruction.

Second, Operating Procedure 020.1 governs Research Conducted in DOC Units. It sets forth Research Standards addressing confidentiality and anonymity. The privacy of participants must be maintained in accordance with the policy. Information given to researchers "must be kept as confidential or as anonymous depending on the study design." The Agency did not give Grievant any assurance that the information she provided would be kept confidential or reported as anonymous.

The Agency argued that Grievant failed to follow a supervisor's instruction thereby justifying issuance of disciplinary action. The evidence showed that it was improper for the Agency to instruct Grievant to provide confidential personnel information without her consent. Grievant was not obligated to follow an instruction improperly given.

The Agency argued that Operating Procedure 020.1 did not apply to Grievant. Nothing in the policy expressly excludes the survey given to Grievant.

Either reason is sufficient to justify Grievant's refusal to comply with the instruction.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action is **rescinded**.

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].

Carl Wilson Schmidt, Esq.
Hearing Officer