



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11941

Hearing Date: May 17, 2023

Decision Issued: June 9, 2023

PROCEDURAL HISTORY

On January 17, 2023, Grievant was issued a Group III Written Notice of disciplinary action with removal for unsatisfactory performance and disruptive behavior.

On February 16, 2023, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On March 13, 2023, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 17, 2023, a hearing was held by remote conference.

APPEARANCES

Grievant
University Party Designee
University Representative
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notice?
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:

Old Dominion University employed Grievant as an Administrative and Office Specialist III.

On April 27, 2022, Grievant received a Counseling Memorandum regarding her disruptive behavior. Grievant was counseled regarding her argumentative, disrespectful, and unprofessional behavior towards the Supervisor. She was advised to act in a professional manner in the future and comply with DHRM Policy 2.35, Civility in the Workplace.

On October 19, 2022, Grievant received a Notice of Improvement Needed/Substandard Performance which was to remain in effect until December 19, 2022.

On October 25, 2022, Grievant received an annual performance evaluation with an overall rating of "Contributor." Grievant received below contributor ratings for several core responsibilities within the annual evaluation. Grievant disagreed with those ratings.

Grievant met with the Supervisor on November 14, 2022 to discuss Grievant's work performance. The Supervisor had to remind Grievant several times to allow him to talk and not interrupt him and for Grievant not to raise her voice.

The University issued Grievant a Group I Written Notice dated December 8, 2022 regarding Grievant's unsatisfactory performance. The Group I Written Notice advised Grievant, "Your display of your unprofessional behavior towards me during meetings is unacceptable and my expectation going forward will be for you to conduct yourself in a professional manner at all times while performing the duties of your position. *** Further occurrences will result in further disciplinary action up to and including termination."

The Supervisor presented the Group I Written Notice to Grievant on December 8, 2022. Grievant responded by being loud, disruptive, and not allowing the Supervisor to speak. Grievant mocked the Supervisor by saying, "you never trained me." The Supervisor decided to leave the meeting and as he left Grievant said, "there you go again closing your door and walking away from me."

On December 19, 2022, the Supervisor met with Grievant to discuss completion of the Notice of Improvement Needed/Substandard Performance. The Supervisor told Grievant she should complete her work duties.

An employee sent the Supervisor an email about a work-related injury. The email came into the "intake portal" for the division so everyone in the unit received an incident report. The Supervisor sent an email informing the employee to notify the human resource department since his department did not address workers' compensation. On December 21, 2022, Grievant sent an email with "reply all" to the Supervisor and many other employees. Her email asked how many tasks she was to be given and questioned the Supervisor's leadership and decision-making. Grievant should have replied only to the Supervisor and not the entire unit. The Supervisor counseled Grievant about her behavior. On December 22, 2022, the Supervisor sent Grievant an email stating, "your comment was out of place, and I will not allow you to question my abilities in that way again." The Supervisor added, "your Needs Improvement Plan was completed as we discussed."

The Supervisor asked Grievant to be prepared to discuss her work progress in a meeting scheduled for January 6, 2023. On January 6, 2023, Grievant appeared at the meeting but had not prepared any documents and was not able to respond to the Supervisor's questions about her work.

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

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

acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.”

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

Behaviors that undermine team cohesion, staff morale, individual self-worth, productivity, and safety are not acceptable.

The policy provides:

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.

The Supervisor repeatedly informed Grievant of her obligation to remain civil and professional in the workplace. Grievant displayed a pattern of being rude, discourteous, and unprofessional during her interaction with the Supervisor. Grievant’s behavior created significant stress for the Supervisor. The University has presented sufficient evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, the University’s decision to remove Grievant must be upheld.

Grievant argued she was not disruptive during the December 8, 2022 meeting with the Supervisor and on other occasions. Grievant did not testify or otherwise present any evidence to support her assertion.

Grievant argued that the University did not follow the performance planning policy because she received a Notice of Improvement needed/Substandard Performance untimely and it should not have affected her annual performance evaluations. Grievant’s annual performance evaluation is not an issue before the Hearing Officer. Grievant’s argument does not affect the outcome of this case.

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

² Va. Code § 2.2-3005.

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 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

Carl Wilson Schmidt, Esq.
Hearing Officer