



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11872

Hearing Date: December 19, 2022
Decision Issued: January 9, 2023

PROCEDURAL HISTORY

On September 14, 2021, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow an instruction and safety rule violation.

On October 18, 2021, 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 August 15, 2022, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 19, 2022, a hearing was held by remote conference.

APPEARANCES

Grievant
Agency Party Designee
Agency 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 for Aging and Rehabilitative Services employs Grievant as a VR Counselor at one of its locations. She began working in her position in January 2020. No evidence of prior active disciplinary action was introduced during the hearing.

In the spring of 2020, Grievant's Mother died from COVID19. Grievant developed a fear of and a caution with COVID19. She began checking her temperature every morning and bought an oximeter. She exercised caution when near others especially at her workplace. She scheduled client meetings in a large conference room and sat at least 15 feet away from her guests. Grievant wore a mask and regularly disinfected her work space.

On July 1, 2021, the Agency implemented a Safe Workplaces Plan. This policy provided:

Employees, who test positive for Covid-19 or come close into close contact with anyone known or suspected to infected, must notify their supervisor.¹

¹ Agency Exhibit D2.

On July 9, 2021, the DARS Chief Deputy Commissioner sent all DARS staff including Grievant an email with the Safe Workplaces Plan attached.

On Thursday, August 19, 2021, Grievant had brought her older son home from an out-of-town Emergency Department. Grievant sent the Supervisor an email stating that she would not be reporting to work because of an unexpected event. Grievant needed to monitor her older son's health and medication use throughout the day.

Grievant reported to work on Friday, August 20, 2021. She did not experience any symptoms of COVID19 and did not have any close contact with other employees during the day. She met with a client. They both wore masks and stayed at least six feet apart. She spent the rest of the day working in her office with the door closed.

On Saturday, August 21, 2021, Grievant awoke and checked her temperature which was normal but her body felt a "little off." She did not believe she had COVID19, but asked her husband to schedule a test for her. The first test available was on Sunday August 22, 2021. Grievant took a COVID19 test that day. Grievant called her doctor who decided to prescribe medication for Grievant in case Grievant tested positive for COVID19.

Grievant's younger son also experienced symptoms of COVID19 but did not believe he was sick. He took a COVID19 test on Sunday, August 22, 2021.

Grievant was not scheduled to work on Mondays including August 23, 2021. She asked her husband for the test results. Grievant tested positive for COVID19. Grievant's youngest son also tested positive for COVID19. Grievant reviewed the Virginia Department of Health website to determine how long she had to isolate. She made sure her result was reported to the Virginia Department of Health. She had not had close contact with Agency employees so she did not do contact tracing. She did not believe Center for Disease Control guidelines required that her work place be disinfected. She wanted to isolate herself for ten days to ensure that she did not infect other people including her co-workers. Grievant feared the Supervisor would make an example of her for not being vaccinated.² Grievant knew she would have to speak with the Supervisor before she returned to work so the Supervisor could count out and confirm the 10 days of isolation.

On Monday, August 23, 2021 at 2:23 p.m., Grievant sent the Supervisor an email stating, "I have a medical issue that is going to require me to be out for all of this coming week. *** I plan on being back in the office next Tues. the 31st."³ The Supervisor replied, "I understand. Leave for the remainder of the week is approved."

² Grievant's health was contraindicated for COVID19 vaccines.

³ Grievant Exhibit page 3.

On Tuesday, August 24, 2021, Grievant remained concerned about the health of her two sons. Her youngest son was experiencing a high fever and his throat was so swollen he had difficulty getting fluids into his body. Just before midnight, Grievant took her youngest son to a local Hospital Emergency Department. She and her youngest son were at the Emergency Department overnight and into the following day. Grievant's health had declined. Grievant remained pre-occupied with taking care of her sons during the following days.

On Friday, August 27, 2021, Grievant opened her email and noticed an unread message from the Supervisor. Grievant noticed an email sent by the Supervisor on Tuesday August 24, 2021 at 9:16 a.m. The Supervisor wrote, "I forgot to remind you too that medical leave of three days or more requires a doctor's note upon return."⁴

On Friday, August 27, 2021, Grievant sent the Supervisor an email:

Thank you. I'm just now seeing this. I did not go to the doctor. I am isolating from having a positive Covid test. The 10 days will be over before I return to work on Tuesday, the 31st.

The Agency first learned that Grievant tested positive for COVID19 on Friday, August 27, 2021.

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 supervisor's instructions is a Group II offense. Violation of a safety rule or rules where no threat of bodily harm exists is a Group II offense. Unsatisfactory work performance is a Group I offense.

On July 9, 2021, Grievant was notified of the Agency's Safe Workplaces Plan requiring:

Employees, who test positive for Covid-19 or come close into close contact with anyone known or suspected to infected, must notify their supervisor.

⁴ Grievant Exhibit page 5.

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

Grievant learned she tested positive for COVID19 on Monday, August 23, 2021. She notified her supervisor of the test results on August 27, 2021. Grievant complied with the Agency's policy because she reported her positive COVID19 test, but she could have done so sooner. For example, she could have notified the Supervisor on August 23, 2021 when she told the Supervisor that she had a medical issue and would not be reporting to work as scheduled. Grievant's behavior is best described as a Group I offense for unsatisfactory performance.

The Agency asserted that Grievant should receive a Group II Written Notice because Grievant did not immediately report her positive test. The Agency argued that immediate reporting was an essential part of the policy in order to enable it to take action to protect other employees. The discipline does not rise to a Group II for several reasons. First, the policy did not contain the word "immediately" with respect to notifying a supervisor. Grievant complied with the policy as written even though she did not immediately report her positive test. Second, Grievant knew she had to report her positive test in order to allow the Supervisor to confirm the ten day isolation period. She did not believe she had to immediately report her positive test because she did not come into contact with any other employees on her last day of work. Grievant believed there was no risk that she could have spread COVID19 to any employees and, thus, there would not be any action necessary by the Agency to protect other employees. The Agency is bound by its policy wording that did not include immediacy. Third, it is not clear that the delay placed any employee's or customer's safety at risk. Fourth, Grievant's decision-making process was materially affected by her concern for the safety of her two children. Her priority was taking care of them while recovering from COVID19. She was exhausted and not focusing on the Agency.

Grievant argued that the Agency could have issued a written counseling instead of taking disciplinary action. Although agencies are encouraged to engage in progressive disciplinary action, the Standards of Conduct does not require them to do so.

Grievant argued that the Agency's Safe Workplaces Plan was unenforceable because it did not comply with State regulations or requirements of the Center for Disease Control. Grievant did not show that State or other regulations prohibited the Agency's reporting requirement. The Agency had the authority to instruct Grievant to report positive COVID19 test results regardless of whether the instruction met all of the requirements of State or CDC regulation.

Grievant argued that the Agency failed to properly train her regarding the standard. The evidence showed that Grievant received actual notice of the Agency's Safe Workplaces Plan. This level of notice is sufficient to support the Agency's issuance of disciplinary action.

Grievant argued the Agency failed to provide her with sufficient time to respond to the Agency's allegations prior to issuing the Written Notice. To the extent the Agency may have denied Grievant's procedural due process, the hearing process cured any defects.

Grievant had ample time and opportunity to present at the hearing any documents, testimony, and defenses to the Agency's disciplinary action.

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"⁶ 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 further the disciplinary action.

DECISION

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

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.

⁶ Va. Code § 2.2-3005.

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].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

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