



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11882

Hearing Date: January 25, 2023
Decision Issued: February 14, 2023

PROCEDURAL HISTORY

On June 2, 2022, Grievant was issued a Group I Written Notice of disciplinary action for creating an environment where open communication and collaboration did not exist.

On June 14, 2022, 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 September 12, 2022, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 25, 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 a Business Manager at one of its locations. Regional Administrator P described Grievant as the "hardest working person I have ever met." Grievant regularly worked between 10 and 14 hours per day.

In January 2020, several employees met with Regional Administrator M and complained about Grievant. The employees included Ms. S, Mr. B, Mr. W, and Ms. W. These employees were not within Regional Administrator M's chain of command.

Superintendent B called the Regional Administrator M to discuss Grievant's telephone conversation with an employee working for Superintendent B. Superintendent B observed his employee crying while talking on the phone with Grievant. Superintendent B initially believed the employee was being told of a death in her family because of how upset the employee was during the telephone conversation. He later learned the employee was speaking to Grievant and Grievant was berating the employee.

Regional Administrator M held another meeting with the employees in the spring of 2022. The employees remained upset with Grievant.

The Agency conducted a “dialogue” where employees met with a senior manager and expressed their concerns. Following this process, the Agency investigated the allegations and concluded that it should take disciplinary action against Grievant.

Grievant supervised a Team of employees. Grievant supervised Ms. B who supervised Mr. B, Mr. W, and Ms. W.

Mr. B. Mr. B observed Grievant display a “hateful tone” towards an Information Technology employee who was providing assistance to the Unit. Mr. B believed that Grievant was a good person but felt she had “no business being anyone’s boss.” Mr. B described Grievant’s management style as “bully and intimidation.” Mr. B believed Grievant was “beyond micro-management, to the point of ultra-micro-management.”

Mr. W. Vendor invoices were supposed to be paid on a timely basis upon receipt of the invoice. If a vendor sent an invoice to a Team member it could delay payment. Team members were not supposed to receive invoices from vendors. They had no control over whether vendors would send them invoices. If Mr. W received a vendor invoice, Grievant would become upset and explain to him in a coarse and abrasive way that he was not to receive invoices. This happened on several occasions.

In May 2021, Mr. W met with Grievant. She closed the door to her office and “chewed him out” for a mistake he made. She raised her voice during their conversation.

Mr. W went out of his way to avoid talking to Grievant.

Ms. W. Ms. W reported to Ms. B. Ms. W worked with Grievant and believed Grievant did not cultivate a team environment. Ms. W would attempt to avoid Grievant when she could. If Grievant entered the room, Ms. W would leave the room. Ms. W had spoken with staff of other institutions and said they should speak with Grievant. Several staff told Ms. W they did not want to speak with Grievant.

Ms. B. Ms. B reported to Grievant. Ms. B observed Grievant raise her voice to inmates. Ms. B felt that Grievant sometimes spoke to her with a belittling tone. She would sometimes “hide” in her office to avoid encountering Grievant.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three groups, according to the severity of the behavior. Group I offenses “include types of behavior less severe in nature, but [which] require correction in the interest of maintaining a productive and well-managed work force.” Group II offenses “include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal.”

Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”¹

“[I]nadequate or unsatisfactory job performance” is a Group I offense.² In order to prove inadequate or unsatisfactory job performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

Grievant engaged in abrasive behavior towards her subordinates. Several of Grievant’s subordinates experienced Grievant being intimidating and offensive to them. DHRM Policy 4.57 requires employees to maintain civility in the workplace when interacting with other employees. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice for unsatisfactory performance.

Grievant disputed the Agency’s evidence regarding her interactions with other employees. The Agency, however, presented several credible witnesses and showed that Grievant’s interactions with her subordinates was not satisfactory. The number of witnesses and the consistency in their experiences with Grievant is sufficient to show that Grievant did not always display civility in the workplace.

Grievant argued that the Team met without her on a monthly basis for “gripe sessions” about Grievant and simply reinforced their negative views of Grievant. The evidence did not support this conclusion.

Grievant first learned of the Team’s complaints in April 2022. She was provided only with general conclusory statements when she was given the Written Notice. She asked for specific examples, but few were given. Grievant objected to the Agency’s failure to provide her with the details of employee complaints about her. She was not given detailed examples until a week before the hearing.³ The Agency should have provided Grievant with specific examples of the employee complaints about her at the time the Agency took disciplinary action. Its failure to do so, however, does not affect the outcome of this case. Grievant had the Agency’s examples prior to the hearing and was able to present her defenses to those allegations.

Grievant argued that the Agency did not take progressive disciplinary action. The evidence showed that Grievant was not counseled by her supervisor regarding her behavior even though Agency managers were aware of it in January 2020. Grievant was not aware that her behavior was perceived so negatively by her subordinates. For example, Grievant received an October 2021 performance evaluation with an overall rating of “Exceeds Contributor”. The evaluation stated that Grievant “effectively works

¹ See, Virginia Department of Corrections Operating Procedure 135.1.

² Virginia Department of Corrections Operating Procedure 135.1(V)(C)(2)(e).

³ Grievant received heavily redacted notes during the Step Process. She did not address her concerns with OEDR by seeking a compliance ruling.

with all staff.”⁴ Once Grievant became aware of the Agency’s concern about her performance, she changed her behavior and her interactions with other employees improved. It is clear that Grievant is a capable and motivated employee who wishes to perform her job duties including her supervisory duties at a high level. The Agency could have given Grievant a written counseling memorandum and corrected Grievant’s behavior without the need for disciplinary action. This is especially true in light of Regional Administrator P’s described Grievant as the “hardest working person I have ever met.” Although progressive disciplinary action is encouraged, nothing in policy requires an agency to engage in progressive disciplinary action. In this case, the Agency issued a Group I Written Notice and its action was consistent with the Standards of Conduct.

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”⁵ 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

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group I Written Notice of disciplinary action 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

⁴ Agency Exhibit p. 62.

⁵ *Va. Code § 2.2-3005*.

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].

/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.