



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11810

Hearing Date: July 25, 2022
Decision Issued: August 15, 2022

PROCEDURAL HISTORY

On January 6, 2022, Grievant was issued a Discipline Documentation Form, Written Warning for refusing a supervisor's instruction and insubordination.

On January 26, 2022, Grievant timely filed a grievance to challenge the County's action. The outcome of the Resolution Process was not satisfactory to the Grievant and she requested a hearing. On March 21, 2022, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 25, 2022, a hearing was held by remote conference.

APPEARANCES

Grievant
County Party Designee
County Counsel
Witnesses

ISSUES

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

2. Whether the behavior constituted misconduct?
3. Whether the County's discipline was consistent with law (e.g., free of unlawful discrimination) and policy?

BURDEN OF PROOF

The burden of proof is on the County 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 County employs Grievant as an Executive Assistant to the County Attorney and County Boards. Her position:

Performs advanced administrative work serving as the primary support staff to the County Attorney and Board of Supervisors. Oversees the daily functions of the County Attorney's office; prepares and maintains detailed, complete, official and/or confidential records and files; and other related work as apparent or assigned. Work is performed under the limited supervision of the County Attorney and County Administrator.

In December 2021, COVID-19 was a wide-spread concern for County employees including Grievant.

Grievant, Ms. F, and Ms. M reported to the Administrator.¹

The County scheduled a Board of Supervisors meeting on Tuesday, December 21, 2021 at 7 a.m. in the Meeting Room. Grievant had approved leave to be absent from work from Monday, December 20, 2021 through Friday, December 24, 2021. She remained scheduled to come into the Building at 5 p.m. on December 21, 2021.

¹ The County's HR Regulations provide, "The County Administrator reports directly to the Board of Supervisors. The Administrator directly supervises each of the Department Heads. The Administrator is responsible for overseeing the performance of all County functions."

Grievant, Ms. F, and Ms. M usually set up the room for the Board Meeting. Their responsibilities began with using software to create a meeting agenda. Ms. F often prepared the attachments used during the meeting. Ms. F and Ms. M took a snack cart and mail into the room. They made sure the chairs were properly placed and name plates were displayed. They set up microphones and water for each Board Member. Grievant was responsible for putting down screens and setting up her workstation. She was responsible for taking documents to the meeting to be signed by Board Members. She was responsible for tracking who attended and spoke at the meeting. Grievant was responsible for recording the meeting and preparing minutes of the meeting. Following the meeting, Grievant was responsible for “taking down” the room to restore it to its condition prior to the meeting.

Grievant’s work Unit held a Holiday Lunch on Friday, December 17, 2021. Food Trucks were located outside of the Building. Employees could get their food and eat in a gathering room in the Building or go to their offices to eat alone. Ms. F helped prepare the room for the luncheon. Ms. F got her lunch and sat down at a table in the room with two other employees. Ms. F sat next to Ms. M and they spoke throughout the lunch period. Grievant got her lunch, briefly entered the room, and then went to her office to eat.

Ms. M was sick with COVID-19 on Friday, December 17, 2021. On Saturday, December 18, 2021, Ms. F learned that Ms. M was sick with COVID-19.² On December 20, 2021 beginning at approximately 2 p.m., Ms. M sent Grievant text messages informing Grievant that Ms. F had been exposed to COVID-19 and Ms. F was not allowed to leave her office.

On December 20, 2021, Grievant experienced chills, stomach pain, and diarrhea. She believed she experienced these symptoms because she purchased a bag of lettuce from the Grocery Store on December 17, 2021 and ate some of the lettuce on December 17, 2021 and December 18, 2021. A local TV station reported that the salad bag she had purchased and eaten had been recalled because some of the salads were found to contain Listeria.

Ms. M did not report to work on Monday, December 20, 2021 and Tuesday, December 21, 2021 because she remained ill.

On December 20, 2021 at 10 a.m., the Administrator sent an email to unit managers advising them of a recent COVID-19 exposure at the Friday luncheon. He asked that they limit the number of employees working in the office.

Ms. F reported to the office on Monday, December 20, 2021 and December 21, 2021. Because she had been exposed to Ms. M who was sick with COVID-19, Ms. F was expected to remain in her office and limit walking throughout the Building.

² Grievant testified that she spoke with her daughter on Saturday December 18, 2021 and told her daughter she felt ill and that a coworker had tested positive for COVID-19. Grievant’s daughter suggested Grievant be tested for COVID-19.

Sometime before 11 a.m. on December 21, 2021, Ms. F notified Grievant that Ms. F would not be able to set up the room for the Board meeting. Ms. F indicated that Ms. M was out of work. Grievant told Ms. F that Grievant did not feel comfortable entering the Building because of the recent positive case of COVID-19.

On December 21, 2021 at 11:01 a.m., Ms. F sent the Administrator an email:

I need to let you know that [Grievant] does not want to come to the meeting or even do the recording from her office. She is uncomfortable because of the COVID situation, she wants to only record the meeting from her laptop at home for her to be able to do the minutes. I do not know what to do, I don't believe I am supposed to be going up and down the hall or setting up the meeting room because I was directly exposed to [Ms. M] for a long period of time on Thursday and longer on Friday. I have not [left] this office at all today or yesterday only to leave for lunch. *** Please advise.

At approximately 11:35 a.m. on December 21, 2021, Grievant and the Administrator spoke by telephone. Prior to their conversation, Grievant had decided she was not going into the Building that night. The Administrator had decided Grievant would have to go into the Building to set up the room. Because Grievant and the Administrator had formed their conclusions before speaking, their telephone conversation was heated and confrontational.

The Administrator was calling from his home because he was in quarantine due to exposure to COVID-19. Grievant was in her vehicle parked in a parking lot of a Grocery Store.

The Administrator told Grievant she needed to come to the Building because Ms. F and Ms. M could not perform Grievant's duties. Grievant expressed concern about her illness from eating contaminated food and being exposed to COVID-19 upon entering the Building. Grievant said the Administrator was being unreasonable. The Administrator said she could enter the Building at 6 p.m. when it was largely empty, perform her duties, and quickly exit the Building. He said Grievant could record the meeting from her home.

Grievant spoke rapidly without pausing. Her tone was elevated.

The Administrator became agitated because he felt like Grievant was not listening to him. His tone was elevated, insistent, and directing. The Administrator did not listen to several portions of Grievant's statements. He was frustrated because Grievant was telling him "no." The Administrator told Grievant that because she was not coming into the Building, he would write her up for insubordination.

At approximately 2 p.m. on December 21, 2021, Grievant called the Assistant County Administrator and asked if he could set up the nameplates for the Board Members and put out the sign-in sheet. He agreed to do so. Grievant asked the Assistant County

Administrator to call her when the meeting began so she could start recording and when the meeting ended so she could stop recording the meeting. Grievant also called Mr. C who worked in the IT Department. Grievant told Mr. C she would come to get her laptop to record the meeting from home.

Grievant drove to the parking lot of the Building. Her laptop was brought to her vehicle and she drove home.

On December 21, 2021 between 3 p.m. and 4 p.m., Grievant scheduled an appointment to obtain a COVID-19 test. The test was scheduled to be taken on December 22, 2021 at 10:30 a.m. at a Pharmacy in a nearby locality.

Grievant recorded the December 21, 2021 Board Meeting from her home. The meeting began at 7 p.m. and ended at 8:50 p.m. With assistance from others, all of Grievant's Board meeting-related duties were completed.

On December 22, 2021 at approximately 9:30 a.m., Grievant called the local Health Department and spoke with Ms. A. Ms. A told Grievant that since Grievant was exposed to COVID-19, Grievant should be tested within five to seven days after exposure and that Grievant should purchase a home COVID-19 testing kit. Grievant purchased a home COVID-19 testing kit at the local Pharmacy.³

Grievant was tested for COVID-19 on Wednesday December 22, 2021 at 10:30 a.m. Grievant did not receive the results of the COVID-19 test until Friday, December 24, 2021. She was negative for COVID-19.

CONCLUSIONS OF POLICY

Under the County's grievance procedure, "there are four disciplinary steps, outlined below. County management may combine or skip steps depending on the facts of each situation and the nature of the offense. Factors that will be considered in applying discipline include whether the offense is repeated despite coaching, counseling or training; the employee's work record; and the impact the offense has on County operations, other employees, and customers." The steps are:

- Step 1: Counseling and verbal warning
- Step 2: Written warning
- Step 3: Suspension and final written warning
- Step 4: Termination of employment

³ Grievant testified that she bought and took the rapid test on December 21, 2021. Whether Grievant took the rapid test on December 21, 2021 or December 22, 2021 is not significant. What is significant is that she took the rapid test after speaking with the Administrator.

“The following are examples of offenses typically addressed through the use of written warnings and suspension. ***

7.3.10 Delay or failure to carry out assigned work or instructions in a reasonable period of time, including failure to cooperate with corrective action pursuant to the disciplinary policy.

7.3.13 Failure to attend scheduled meetings or training sessions.

The following are examples of offenses so significant, disruptive, or dangerous that they may result in immediate suspension or dismissal. ***

7.4.3 Insubordination or refusal to follow management directions.”

On December 21, 2021, the Administrator instructed Grievant to go to the Building to set up the room for the Board of Supervisor’s meeting scheduled that evening. The Administrator’s request was reasonable and within the scope of his authority. Grievant could have performed her duties within approximately 20 to 30 minutes and then left the Building. Grievant reported to the Administrator and was obligated by that reporting relationship to comply with the Administrator’s instruction. Grievant refused to do so. The County has presented sufficient evidence to support the issuance of a Written Warning for refusal to follow management directions.

Grievant argued that her illness from eating salad justified her refusal to enter the Building. Grievant argued that it was unreasonable to expect Grievant to enter the Building given that Ms. M had tested positive for COVID-19 and had been in the office on Friday, December 17, 2021.

Grievant’s arguments are not persuasive. On December 21, 2021, Grievant spent approximately 1.5 hours shopping at department stores in a Shopping Mall. If Grievant was able to drive to the mall and spend over an hour shopping, she should have been able to enter the Building and spend less than an hour setting up the Meeting Room. Grievant went shopping on December 21, 2021 and was around other people for over an hour. She could have contracted or exposed others to COVID-19 while shopping. Grievant scheduled COVID-19 testing on December 21, 2021 after speaking with the Administrator. If Grievant had a high level of concern about having COVID-19, she would have scheduled a COVID-19 test shortly after learning Ms. M had tested positive for COVID-19 and she would not have gone shopping where she would be around other people. If Grievant had gone into the Building on December 21, 2021, she would have been around few, if any, people and she would have been able to control how close she was to others who might have been present in the Building. The significance of Grievant’s concern about contracting COVID-19 is undermined because Grievant took steps towards testing only after speaking with the Administrator on December 21, 2021.

Grievant argued that she did her job duties even though she was on approved vacation leave on December 21, 2021. Grievant’s leave approval, however, did not

include avoiding the December 21, 2021 meeting. She was expected to perform her job duties for the Board Meeting.

Grievant argued that she got her job done by contacting others who were willing to assist under unusual circumstances. The County did not suffer any material consequences because of Grievant's refusal to go to the Building. It is clear that Grievant ensured that her customary work duties were completed satisfactorily. Although the County's need to take disciplinary action under the unusual circumstances of a pandemic could be questioned, the County acted within its authority and discretion to do so. The County has met its burden of showing that Grievant failed to follow a management directive that was appropriately given. Grievant has not presented evidence showing the disciplinary action should be mitigated.

DECISION

For the reasons stated herein, the County's issuance to the Grievant of a Written Warning of disciplinary action is **upheld**.

APPEAL RIGHTS

The County's Grievance Procedure provides:

15.6.7 The decision of the hearing officer, acting within the scope of its or his authority, shall be final, subject to existing policies, procedures, and law.

The parties should review the County's Grievance Procedure to determine other appeal rights.

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer