



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11831

Hearing Date: July 19, 2022
Decision Issued: August 8, 2022

PROCEDURAL HISTORY

On April 11, 2022, Grievant was issued a Group III Written Notice of disciplinary action with removal for violating DHRM Policy 2.35, Civility in the Workplace.

On April 29, 2022, Grievant timely filed a grievance to challenge the University's action. The matter advanced to hearing. On May 16, 2022, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 19, 2022, a hearing was held by remote conference.

APPEARANCES

Grievant
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:

Norfolk State University employed Grievant as a Housekeeping Floor Tech. He had been employed by the University for approximately 15 years. No evidence of prior active disciplinary action was introduced during the hearing.

Mr. M began working for the University in September 2021. He worked the day shift. Grievant did not believe Mr. M was performing his duties adequately. When Grievant reported to work to begin his night shift, he would complain to Mr. M. Mr. M felt Grievant was creating a hostile work environment for Mr. M. In October 2021, Mr. M was working in the janitorial closet. Grievant reached over Mr. M and brushed Mr. M's arm. Grievant did not say "excuse me" or otherwise apologize for touching Mr. M. Mr. M perceived Grievant's behavior as an assault.

On March 21, 2022, Mr. M was leaving work when Grievant came behind Mr. M and began yelling at Mr. M and telling Mr. M that Mr. M had not done something properly. Mr. M left and reported Grievant's behavior to a supervisor. Mr. M was upset by Grievant's behavior. Mr. M was shaking as he spoke about Grievant to Supervisor 1 and Supervisor 2.

The Manager wanted a police officer to be present when Grievant was interviewed about the conflict between Grievant and Mr. M. The Manager called the Police Department and asked for assistance. The Police Lieutenant walked to the Building and

was met by Mr. M. The Police Lieutenant asked Mr. M why the Police Lieutenant “was here.” Mr. M answered because he was having a problem with Grievant. The Police Lieutenant asked Mr. M to describe the problem. Mr. M said that he worked the day shift and Grievant worked the night shift. Mr. M said that each time Grievant comes to work, Grievant says something rude to Mr. M. Mr. M said that Grievant brushed up against him and he felt threatened.

The Police Lieutenant, EEO Manager, Manager, Supervisor 1, and Supervisor 2 met with Grievant to discuss his interaction with Mr. M. They were seated in chairs in a conference room.

The Police Lieutenant explained to Grievant that he was there to speak to Grievant. The Police Lieutenant began explaining Mr. M’s statement about his encounter with Grievant. Once the Police Lieutenant told Grievant about Mr. M’s claims, the Police Lieutenant asked Grievant to explain his version of the incident.

Grievant spoke loudly to the Police Lieutenant. Grievant explained that Mr. M kept messing up and leaving bags in the wrong closet. Grievant “raised up” in an aggressive manner while speaking to the Police Lieutenant. Grievant rolled his chair up to the Police Lieutenant and moved his body and face forward “in an aggressive manner”. While looking sternly at the Police Lieutenant, Grievant said, “Are you under investigation for messing with women on this job!” Grievant insinuated that the Police Lieutenant was being investigated about his interaction with women and did not have the right to question Grievant. The Police Lieutenant replied, “Are you trying to intimidate me? You can’t intimidate me. You need to check your tone and don’t raise your voice to me.” Grievant rolled his chair back and sat back in his chair.

Grievant’s tone throughout the meeting was, “unapproachable, aggressive, condescending, and uncooperative.” Grievant gestured with his arms and hands and moved his body abruptly.

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 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 provides:

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

- The Commonwealth strictly forbids harassment (including sexual harassment), bullying behaviors, and threatening or violent behaviors of employees, applicants for employment, customers, clients, contract workers, volunteers, and other third parties in the workplace.
- Behaviors that undermine team cohesion, staff morale, individual self-worth, productivity, and safety are not acceptable.
- 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 Policy Guide for DHRM Policy 2.35 prohibits behavior including:

- Invading personal space;
- Demonstrating behavior that is rude, inappropriate, discourteous, unprofessional, unethical, or dishonest;
- Behaving in a manner that displays a lack of regard for others and significantly distresses, disturbs, and/or offends others;
- Raising one's voice inappropriately or shouting at another person;

On March 21, 2022, Grievant met with the Police Lieutenant. Grievant raised his voice inappropriately towards the Police Lieutenant. He was rude and unprofessional. He attempted to invade the personal space of the Police Lieutenant and to intimidate the Police Lieutenant. The Police Lieutenant did nothing to provoke Grievant's behavior. Grievant's actions were contrary to DHRM Policy 2.35. The University has presented sufficient evidence to support the issuance of a Group III Written Notice for lacking civility in the workplace. 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 asserted that the allegations against him were "false and untrue." He claimed the Police Lieutenant presented a "distorted view and recollection" of events. The evidence showed that the Police Lieutenant's testimony was credible and consistent with the testimony of others in the room on March 21, 2022.

Grievant argued the University had poor leadership and communication and lacked transparency and accountability. Even if the Hearing Officer assumes for the sake of argument that Grievant's assertions are true, they would not have justified Grievant's behavior on March 21, 2022.

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 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 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.

² Va. Code § 2.2-3005.

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.