



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11827

Hearing Date: September 19, 2022
Decision Issued: October 7, 2022

PROCEDURAL HISTORY

On February 15, 2022, Grievant was issued a Group II Written Notice of disciplinary action with a ten workday suspension for lack of civility in the workplace.

On February 21, 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 he requested a hearing. On May 2, 2022, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 19, 2022, a hearing was held by remote conference.

APPEARANCES

Grievant
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 Virginia Department of Transportation employed Grievant as a Transportation Operator II at one of its residencies. He began working for the Agency on November 10, 2020. No evidence of prior active disciplinary action was introduced during the hearing. On March 8, 2022, Grievant resigned his employment with the Agency.

Grievant started an apprenticeship program on November 10, 2020. He was not eligible to transfer to another residency until he completed the 14 month program which was scheduled to end on January 10, 2022. Grievant wanted to transfer to another residency closer to his home. He believed he could transfer in 12 months and became frustrated when he was not told he could transfer. He complained to Human Resource staff about the Agency's failure to transfer him.

The Agency conducted an investigation of alleged unprofessional and disruptive behavior by managers in the residency where Grievant worked. On November 15, 2021, Grievant was interviewed about his concerns with Agency supervisors and managers. He was informed his participation was "not voluntary" and "[a]gency policy strictly prohibits retaliation for participation in workplace investigations."¹ Grievant discussed the management styles of the TOM II and Maintenance Operations Manager.

¹ Agency Exhibit p. 79.

On January 11, 2022, Grievant contacted the HR Consultant and complained that the apprenticeship program and transfer was taking too long.

On January 20, 2022, Grievant was approved by a TOM I Supervisor for a lateral transfer from Operator Apprentice Maintenance to Operator Maintenance.

The Maintenance Operations Manager planned to go to the residency to meet with staff. He planned to meet with Grievant in a later meeting to discuss Grievant's attendance.

On January 20, 2022, the Maintenance Operations Manager arrived at the "shop area" of the residency. He noticed that the TV was on and staff were sitting "all over the place." He took a chair and placed it in the middle of the room. He asked everyone to turn around and look at him. Grievant did not turn around. Grievant sat with his arms folded. The Maintenance Operations Manager spoke to staff. He then held a "safety meeting" with staff.

After the other staff left the room, Grievant remained with the Maintenance Operations Manager and they went into the TOM II's office. Grievant and the Operations Manager were seated. The TOM II also was in the office. The Maintenance Operations Manager said they were going to discuss Grievant's attendance plan. The Maintenance Operations Manager said they were going to discuss the plan last week but Grievant was out sick. The Maintenance Operations Manager said that Grievant had reached out to Human Resources staff and to the HR Manager regarding his apprenticeship program coming to an end. He told Grievant that Grievant needed to be patient and let the area headquarters attempt to resolve his questions or concerns. If Grievant was not happy with area headquarters staff, he could contact Human Resource staff, but Grievant should try to let his chain of command fix his concerns first. Grievant said he was not sure exactly how the apprenticeship program ending worked. The Maintenance Operations Manager said that when Grievant did those things it made it seem that Grievant was not getting the response or treatment Grievant thought he deserved and if that was the case Grievant should take the next steps in communicating but Grievant needed to follow the process. Grievant said, "That wasn't my intent." Grievant loudly repeated his statement, "That wasn't my intent!"

While the Maintenance Operations Manager was talking to Grievant, Grievant started speaking loudly and said, "F—k you. You are putting words in my mouth!" Grievant said, "I've been over a lot of people; I taught in the 5th largest school district in the country and you're sitting her tell me this bull s—t!" The Maintenance Operations Manager said, "See [Grievant's first name] this is what I am talking about, your approach." Grievant moved his chair two or three feet closer to the Maintenance Operations Manager and leaned forward. Grievant pointed his finger at the Maintenance Operations Manager. The Maintenance Operations Manager believed Grievant might hit him. The Maintenance Operations Manager began to think of how he might protect himself. The TOM II also believed that Grievant might hit the Maintenance Operations Manager. The Maintenance

Operations Manager told Grievant to “Go home!” Grievant replied, “F—k you, [Maintenance Operations Manager’s first name]!” The Maintenance Operations Manager told Grievant, “Go home and don’t come back!” Grievant began walking out of the office. He said to the Maintenance Operations Manager, “F—k you, f—k you, prick!”

Grievant was so loud that another employee heard him and came to check on the Maintenance Operations Manager.

Grievant left the building and went to his vehicle in the parking lot. The Maintenance Operations Manager watched Grievant while Grievant was at his vehicle. The Maintenance Operations Manager feared that Grievant might return to the building with a weapon or otherwise attempt to harm the Maintenance Operations Manager. After gaining his composure, the Maintenance Operations Manager called Ms. M in Human Resources and explained what had happened.

The Maintenance Operations Manager did not yell at Grievant or take any action that could be construed as readying to fight during the incident.

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.”² 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. Under this policy:

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.

Workplace violence is defined as:

Any physical assault, threatening behavior, or verbal abuse occurring in the workplace by employees or third parties. Threatening behaviors create a reasonable fear of injury to another person or damage to property or subject another individual to extreme emotional distress.

DHRM Policy 2.35 provides:

² The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

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 to DHRM Policy 2.35 describes prohibited conduct to include:

- 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;
- Swearing or using obscene language or gestures toward another person;

On January 20, 2022, Grievant told the Maintenance Operations Manager "f—k you" and called him a "prick". Grievant moved his chair forward to intimidate and invade the personal space of the Maintenance Operations Manager. Grievant's behavior was discourteous, offensive, and caused distress and fear. Grievant engaged in workplace violence. Grievant's behavior was sufficient to support the issuance of a Group III Written Notice, but the Agency only issued a Group II Written Notice. Upon the issuance of a Group II Written Notice, an agency may suspend an employee for up to ten work days. Accordingly, the Agency's issuance to Grievant of a Group II Written Notice with a ten workday suspension must be upheld.

Grievant argued that he did not make any threats against his supervisors. DHRM Policy 2.35 prohibits threats and other behavior. Grievant engaged in behavior other than making specific threats and his behavior was workplace violence.

Grievant argued that if the Maintenance Operations Manager was actually fearful of Grievant, the Maintenance Operations Manager would have called the police. It is not necessary for the Agency to show that an employee called the police in order to establish a violation of DHRM Policy 2.35. The Maintenance Operations Manager feared for his safety because of Grievant's behavior.

Grievant argued that the Agency retaliated against him and created a hostile work environment. It was inappropriate for the Maintenance Operations Manager to tell Grievant not to contact HR staff because the Maintenance Operations Manager did not know all of Grievant's communications with HR staff. Those communications likely included complaints about the TOM II and Maintenance Operations Manager. Employees with complaints about supervisors are not obligated to inform those supervisors before speaking with HR staff. In this case, however, the Agency did not take disciplinary action against Grievant because he complained to HR staff about the Maintenance Operations

Manager. The Maintenance Operations Manager's improper instruction was not a sufficient basis to provoke, justify, or excuse Grievant's workplace violence.³

Grievant alleged the Agency created a hostile work environment for employee. Grievant did not testify and did not present sufficient evidence to support this allegation.

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"⁴ 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 II Written Notice of disciplinary action with a ten workday suspension 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

³ In addition, the Agency did not deny Grievant's request to transfer to another residency because of his participation in the investigation.

⁴ *Va. Code § 2.2-3005.*

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.