



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11881

Hearing Date: November 18, 2022
Decision Issued: December 8, 2022

PROCEDURAL HISTORY

On August 18, 2022, Grievant was issued a Group III Written Notice of disciplinary action with removal for lack of civility in the workplace.

On August 25, 2022, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On September 12, 2022, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 18, 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 Department of Behavioral Health and Developmental Services employed Grievant as a Lead at one of its facilities. He began working for the Agency on February 10, 2021. No evidence of prior active disciplinary action was introduced during the hearing.

On October 26, 2021, Grievant received a written counseling because, "it was reported that you were in the medication room all morning talking to the medication nurse." Grievant was advised, "You are expected to remain on your unit your entire shift, except during breaks and when responding to codes, engaging with patients in a therapeutic manner."¹

Grievant's work shift was from 7 a.m. to 3 p.m. Ms. C initially worked on Grievant's shift but changed her work shift to begin at 11 p.m. and end at 7 a.m. She changed her shift to avoid encountering Grievant.

On May 9, 2022, Grievant came to work at 6:45 a.m. prior to his scheduled shift beginning. Ms. C was upstairs in the Unit Office alone. Grievant entered the office and "snuck up" on Ms. C. He pressed his body against Ms. C's body and began rubbing Ms. C's right shoulder. He then slid his hand down her back to her lower back. He said, "Good

¹ Agency Exhibit p. 2.

morning Ms. [C]" in what Ms. C considered to be a "provocative way." Ms. C shoved Grievant away and told him never to touch her again.

Ms. C walked out of the office and down the stairs. She encountered Mr. H. Mr. H could see that Ms. C was upset. Mr. H asked Ms. C, "What's wrong?" Ms. C told Mr. H that Grievant pressed up against her and put his hands on her while they were in the Unit Office. Mr. H said he was going up there and talk to Grievant right now. Mr. H walked up the stairs and observed Grievant looking out the window. Grievant had seen Ms. C speaking with Mr. H. Grievant asked Mr. H what was wrong with Ms. C and why was Ms. C upset with Grievant. Mr. H told Grievant what Ms. C had said about Grievant and told Grievant "you can't do that, that ain't cool, you can't be doing that." Grievant said he was going to call Ms. C and attempted to do so. Ms. C did not answer Grievant's calls.

May 9, 2022 was not the first time Grievant had behaved inappropriately towards Ms. C. In order to avoid encountering Grievant, Ms. C began placing her bag in the women's restroom and not the Unit Office so that she could leave the Facility without having to return to the Unit Office and possibly encounter Grievant.

On July 2, 2022, Ms. C sent Agency managers an email asking not to have Grievant as her supervisor and be transferred to another division.

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."²

DHRM Policy 2.35 governs Civility in the Workplace. This policy provides:

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

² See, Virginia Department of Corrections Operating Procedure 135.1.

action, up to and including termination, under Policy 1.60, Standards of Conduct.

This policy defines Hostile Work Environment as:

A form of sexual harassment when a victim is subjected to unwelcome and severe or pervasive repeated sexual comments, innuendos, touching, or other conduct of a sexual nature that creates an intimidating or offensive place for the employees to work.

The Policy Guide for DHRM Policy 2.35 lists prohibited conduct 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;

On May 9, 2022, Grievant snuck up behind Ms. C, pressed his body against her body, rubbed her shoulder, and moved his hand down her back. His behavior was not welcomed or expected by Ms. C. They did not have any relationship beyond being co-workers. Ms. C was offended and upset by Grievant's behavior. She did not want to work with Grievant because of his inappropriate behavior.

The Agency has presented sufficient evidence to show that Grievant violated DHRM Policy 2.35. He invaded Ms. C's personal space when he snuck up behind her and pressed his body against her body. His behavior was inappropriate, rude, and unprofessional. He caused Ms. C significant distress. Grievant's touching was unwelcome and created a hostile work environment for Ms. C. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, the Agency's decision to remove Grievant must be upheld.

Grievant denied touching Ms. C on May 9, 2022 or touching anyone else inappropriately. He claimed, "These allegations are all lies." Grievant argued that the allegations were not believable because they were not documented. Grievant argued that the allegations against him should not be believed because they only arose after it was announced that he was being promoted to supervisor.

The Agency's assertion of events is persuasive for several reasons. First, Ms. C's testimony was credible. Disciplinary action can be supported by testimony alone. Second, immediately after the incident, Ms. C spoke with Mr. H who observed she was upset. Ms. C recounted the incident to Mr. H. Mr. H's testimony was credible and he had a good relationship with Grievant. Third, Grievant displayed similar behavior towards Ms. B. Grievant approached Ms. B while she was sitting in front of a computer and began rubbing her shoulders. She told him to stop and not to touch her like that. Fourth, Mr. H switched

shifts with Ms. C so that Ms. C would no longer have to work on Grievant's shift. Fifth, Ms. C did not apply for the position Grievant received. She was not motivated to get revenge against Grievant by falsely accusing him of inappropriate behavior. Sixth, Grievant did not testify. The Hearing Officer could not determine the credulity of his assertion that the allegations against him were lies.

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"³ 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 III Written Notice of disciplinary action with removal 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.

³ Va. Code § 2.2-3005.

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.