



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11933

Hearing Date: May 10, 2023
Decision Issued: July 13, 2023

PROCEDURAL HISTORY

On December 12, 2022, Grievant was issued a Group II Written Notice of disciplinary action for lacking civility in the workplace as required by DHRM Policy 2.35.

On January 12, 2023, 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 March 6, 2023, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 10, 2023, a hearing was held by remote conference.

APPEARANCES

Grievant
Agency Party Designee
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 employs Grievant as a Financial Management Analyst. No evidence of prior active disciplinary action was introduced during the hearing.

Mr. 1 began working for the Agency on November 10, 2016 and was promoted to a leadership position on January 25, 2018. Mr. 1 reported to the Supervisor. Grievant reported to Mr. G who reported to the Supervisor.

Grievant believed Mr. 1 spoke to Grievant in a condescending manner. Grievant believed Mr. 1 asked him to make transactions without supporting documentation. Grievant alleged Mr. 1 asked him to create "bogus invoices" so that a vendor would not have to repay the Agency. Grievant believed that Mr. 1's action was "illegal and borderline fraud."

The Agency had a transaction involving a bond fund from fiscal year 2016 before Mr. 1 joined the Agency. Grievant alleged that Mr. 1 was responsible for the transaction and asked Grievant to "cook the books" to address the transaction. The matter was investigated by the Agency and resolved.

Grievant sent Mr. 1 and other staff an email on April 11, 2019 asking for corrective actions regarding an account. The matter was discussed and a solution implemented by Agency managers. Grievant raised the issue again on June 20, 2022 in an email to Mr. 1 even though Grievant knew a review had been completed and adjustments were made to the account.

On July 28, 2021, Grievant sent an email to Mr. 1 and approximately five other Agency staff stating:

I am not sure you are in the position to speak to me about 'Complying with applicable laws, regulations, policies and procedures' but we can discuss at the meeting.¹

Grievant filed a complaint against Mr. 1 with the Virginia Board of Accountancy on December 21, 2021.

Grievant sent an email on July 19, 2022 making comments about Mr. 1. He sent the email to approximately 14 recipients. Several of those employees did not need to be included in the email. Grievant wrote:

Ever since my employment with the agency beginning on June 25, 2018, [Mr. 1] has attempted to displace his responsibility of assuring capital project invoice processing prompt pay is met on my shoulders. As a result of this undue and/or intense pressure with the falsehood that the A&E prompt pay issue is my fault I created an analysis of 39 invoices *** What is most disturbing is that a fellow CPA would lead the group down this path that weakens internal controls and goes backwards in the processing and management of capital projects invoices without addressing the real issue which is people not systems.²

On July 20, 2022, the Supervisor sent Grievant an email:

Please cease and desist with any communication regarding this matter outside of your chain of command ([Mr. G] and me). Please continue to work through [Mr. G] on how to best resolve these issues. We will take this discussion off-line.³

On July 28, 2022, Grievant sent another email to the employees listed in his July 19, 2022 email contrary to the Supervisor's instruction.

¹ Agency Exhibit p. 18.

² Agency Exhibit 10.

³ Agency Exhibit p. 15.

In July 2022, Mr. 1 filed a complaint with the Agency's Human Resource Division against Grievant alleging workplace harassment because Grievant engaged in a campaign seeking public scrutiny of his professional competency and impugning his reputation as a certified public accountant. The Agency conducted an investigation. The Agency substantiated Mr. 1's allegations by finding that Grievant continuously targeted Mr. 1 by making insulting and disparaging remarks in agency emails to unnecessarily broad recipient groups.

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."⁴ 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 prohibits:

Behaviors that undermine team cohesion, staff morale, individual self-worth, productivity, and safety are not acceptable.

This policy defines bullying as:

Disrespectful, intimidating, aggressive and unwanted behavior toward a person that is intended to force the person to do what one wants, or to denigrate or marginalize the targeted person.

This policy provides:

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.

Grievant demonstrated a pattern of sending emails with disrespectful and denigrating comments about Mr. 1. On July 28, 2021, Grievant sent an email to Mr. 1 and several other Agency staff stating Grievant was "not sure you are in the position to speak to me about 'Complying with applicable laws, regulations, policies and procedures.'" This email suggested Mr. 1 was not someone who complied with laws, regulations, and policies. On July 19, 2022, Grievant sent an email stating that "[Mr. 1] has attempted to displace his responsibility of assuring capital project invoice processing prompt pay is met

⁴ The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

on my shoulders” and “the falsehood that the A&E prompt pay issue is my fault” and “What is most disturbing is that a fellow CPA would lead the group down this path”. On July 20, 2022, the Supervisor instructed Grievant to cease and desist sending emails outside of his chain of command. On July 28, 2022, Grievant disregarded the Supervisor’s instruction. Grievant’s emails were disrespectful and demeaning to Mr. 1 and sent unnecessarily to other Agency employees. Grievant’s objective included undermining Mr. 1 in the eyes of other employees. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

Grievant argued that Mr. 1 took credit for Grievant’s work and had been uncivil to him. Grievant argued that the Supervisor was bullying him. Grievant asserted that he filed a complaint but that the Agency did not investigate it. The Hearing Officer can assume for the sake of argument that Grievant’s allegations are true. They do not affect the outcome of this case. These factors would not excuse Grievant’s lack of civility towards Mr. 1.

Grievant argued that he had the right to report his concerns to outside agencies without fear of retaliation from the Agency. Grievant’s assertion is correct. Grievant had the right to report his concerns about Mr. 1 to, for example, the Virginia Board of Accountancy as well as the State Fraud Waste and Abuse Hotline without being disciplined by the Agency for doing so. The Agency’s Written Notice is based on the Agency’s investigation which found that Grievant filed numerous, repetitive complaints with entities including the State Fraud Waste and Abuse Hotline and the Virginia Board of Accountancy. The Agency’s disciplinary action was based, in part, on an improper purpose and was retaliatory. Whether retaliation affects the outcome of this case is determined by the “but-for” test.⁵ The but-for test requires the Grievant prove that the adverse action would not have occurred but for the protected activity. The Hearing Officer believes that if the Agency had been unaware of Grievant’s complaints to external entities, the Agency would have taken disciplinary action consisting of a Group II Written Notice for lacking civility in the workplace. In other words, there remain sufficient facts to support the Agency’s disciplinary action if the Hearing Officer disregards Grievant’s protected activities.

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”⁶ 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

⁵ See, *Univ. Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2534 (2013).

⁶ Va. Code § 2.2-3005.

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 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.

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]

^[1] Agencies must request and receive prior approval from EDR before filing a notice of appeal.

[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