

DECISION OF HEARING OFFICER

IN RE: CASE NO. 11972
HEARING DATE: 7-20-23
DECISION ISSUED: 8-18-23

PROCEDURAL HISTORY

Two (2) Written Notices were both issued March 30, 2023.¹ Hearing Officer appointment was made on May 9, 2023. The Pre-hearing Conference was scheduled for May 24, 2023. The case was set for July 20, 2023, at the Agency location.

APPEARANCES

Agency Advocate
Agency representative as witness
Three (3) additional agency witnesses
Grievance advocate
Grievant as witness
One (1) additional grievant witness

ISSUES

- 1) Whether Grievant failed to report to Grievant's superior the matter(s) of harassment which occurred in July 2022.²
- 2) Whether Department of Human Resource Management's Operating Procedure 1.60³ and Agency Policy 99⁴ in reference to Policy 2.35⁵ and internal policies were violated.
- 3) Whether a Group III discipline was appropriate.
- 4) Whether Grievant failed to report two incidences of mismarked grave sites to Grievant's superior.⁶
- 5) Whether Department of Human Resource Management's Operational Procedure 1.60 and Agency Policy 11 and 99 in reference to Policy 2.35 and Internal Policy⁷ were violated.
- 6) Whether a Group II discipline was appropriate.
- 7) Whether mitigating circumstances were considered.

¹ Agency Exhibit 9 and 10

² Agency Exhibit 10

³ Agency Exhibit 11

⁴ Grievant Exhibit 6

⁵ Agency Exhibit 12

⁶ Agency Exhibit 9

⁷ Agency Exhibit 14

BURDEN OF PROOF

In disciplinary actions, the burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary actions against the Grievant were warranted and appropriate under the circumstances. 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. Grievant has the burden of proving any affirmative defenses raised by Grievant. GPM §5.8.

APPLICABLE POLICY

This hearing is held in compliance with Virginia Code § 2.2-3000 et seq the Rules for Conducting Grievances effective July 1, 2012, and the Grievance Procedure Manual (GPM) effective July 1, 2017

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “includes acts of minor misconduct that require formal disciplinary action.” Group II offenses “include acts of misconduct of a more serious and/or repeat nature that requires formal disciplinary action.” Group III offenses “include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.” More than one (1) active Group II offense may be combined to warrant termination.

FINDING OF FACTS

After reviewing the evidence presented and observing the demeanor of each witness the Hearing Officer makes the following findings of facts:

Grievant had been employed by the Agency as the Superintendent of the facility for three (3) years. Grievant has an excellent record.⁸

On January 23, 2023, an employee (herein after “E1”) of Agency sent a memo⁹ to Human Resources personnel with information about twenty-three (23) alleged incidences that created a hostile environment for E1. After consultation with Executive Management, it was decided to hire an independent investigative company to research the allegations made. The investigator at the hearing stated she interviewed all nine of the Agency’s employees. After all interviews were completed, she concluded several of the allegations were likely to have occurred.¹⁰

Grievant is the Supervisor of this agency’s operation. Grievant reports to his Superintendent who is in charge of all five similar operations in Virginia. One of the allegations E1 stated was that., “E2 called me a dumb ass motherfucker at the start of my job. Whilst completing work on a fork- truck, I then went to Grievant about the situation. He replied with, “I have worked with E2 many years, and he would never say something

⁸ Grievant Exhibit 1

⁹ Agency Exhibit 1

¹⁰ Agency Exhibit 3

like that, that doesn't sound like him. Are you sure you want to continue with this accusation?"¹¹ However, Grievant stated he would follow up on the accusation by talking with E2. Grievant was charged with a Written Notice for failure to report this incident to his superior. Grievant stated he did report the incident to Agency Management. Agency Management stated he did not report the incident. However, Agency Management later stated Grievant may have reported the matter to him. Agency Management did admit the Written Notice focused on this one particular incident and the failure to report this incident to Agency Management. This was the basis for the disciplinary action. Grievant stated he did report the incident in a timely fashion and Agency Management accepted his handling of the incident. Grievant admitted he did not think E1's allegations were likely but nonetheless did confront the other party involved.

As to the Group II incident, there were two separate events where grave markers, and a gravestone were misplaced. Grievant admits he did not immediately advise his supervisor of each incident as it occurred. The Agency felt the incidents were serious because great grief could be caused to family members and be a disgrace to the facility if the wrongly named person was in the burial plot.

The first incident involved temporary markers being switched on two close-by grave sites. Grievant's witness stated it was less than five (5) minutes until the correction was made.

The second incident involved actually digging the space for a permanent gravestone on a plot site and installing the gravestone on the wrong grave. When the employees' Superior noticed the error, the gravestone was dug up and ground and turf replaced. It was stated it was too late in the day to redig and reset the stone on the correct plot. The stone was returned to the storage shed and placed the following day.

OPINION

There were hours of irrelevant testimony in this case. The Written Notices were difficult to understand as much extraneous information was included. The Agency representative stated the first paragraph of both Written Notices was "information only". The duty to report received much attention. Department of Human Resource Management Operational Procedure 1.60 is a policy that sets standards for disciplinary processes. It is general in its information about the conduct expected of employees and suggested corrective measures. Policy 2.35 describes civility in the workplace and the expectations of agencies which includes an Agency's responsibility to establish an internal complaint procedure. No agency procedure policy was introduced in evidence. There was no evidence other than the testimony of the agency's representative stating he spoke often with his staff about matters at their facility. However, there was specific policy for reporting gravesite issues.¹²

Of the many allegations made by E1, the Agency chose one (1) incident to fashion its first Written Notice. While many other incidents may have occurred, some of which Grievant should or could have been aware of, they were not listed in the Written Notices. The purpose of the Group III notice was to discipline Grievant for failure to report the incident to Agency Management. Agency Management stated he had not been

¹¹ Agency Exhibit 1

¹² Agency Exhibit 14

advised of the incident involving the name calling. However, Agency Management on two occasions in testimony indicated that may he had received information. The G stated he did report the incident and management offered no further action. The weight of this evidence would have to be that Grievant did report the incident. Therefore, the Group III action termination is not valid. Further, no written policy was produced by the Agency that required Grievant to report such incidents to his superiors.

The Group II issue is, in part, an overreaction by management in that the first matter reported was easily corrected and noted and discussed with employees. The second incident was of far greater concern. Indeed, family members could have seen their loved ones grave had been dug out and turf replaced. Conceivably the matter could have reached public attention. Grievant admitted he did not report either of these incidents. The Grievant attempted to counsel his staff but did not offer discipline. Agency Management state discipline for such a grievous error need disciplinary action. Grievant was clearly wrong in not reporting and requesting guidance on how to handle the very serious situation. Grievant was bound by reporting protocol policy Gravesite Discrepancy Resolution Report.¹³

MITIGATION

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 the rules established by the Department of Human Resource Management...” 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 recorded 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:

- (1) whether an employee had notice of the rule, how the Agency interprets the rule, and/or the possible consequences of not complying with the rule.
- (2) whether the disciplinary is consistent with the Agency’s treatment of other similarly situated employees or
- (3) whether the penalty otherwise exceeds the limits of reasonableness under all the relevant circumstances.

Grievant’s good record was in evidence¹⁴ and considered. The Agency believes the manner in which matters were handled was not in keeping with good management practices.

DECISION

For the above reasons, the Group III discipline is **RECIDED** and the Group II discipline is **UPHELD**. Grievance shall be reinstated to his position with back pay except for a 10-day suspension without pay.

¹³ Agency Exhibit 14

¹⁴ Grievant Exhibit 1

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]

[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].

Sondra K. Alan
Hearing Officer

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