Issue: Group II Written Notice (insubordination); Hearing Date: 04/17/17; Decision Issued: 05/07/18; Agency: DSS; AHO: Carl Wilson Schmidt, Esq.; Case No. 11168; Outcome: Full Relief.

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11168

Hearing Date: April 17, 2018
Decision Issued: May 7, 2018

PROCEDURAL HISTORY

On October 2, 2017, Grievant was issued a Group II Written Notice of disciplinary action for insubordination.

On October 13, 2017, 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 1, 2018, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On April 17, 2018, a hearing was held at the Agency's office.

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 Social Services employs Grievant as an Executive with its Agency. He began working for the Agency in January 2015. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant reported to Executive C. Because of Grievant's senior leadership position with the Agency, his absence from work could undermine the Agency's ability to operate efficiently.

Executive C informed Grievant that he was willing to approve Grievant's 15 days of military leave and any other military leave requests for which Grievant had leave balances to cover. Executive C told Grievant, however, that he would not approve any request for military leave without pay if the absence was not required or mandatory.

In July 2017, Grievant took military leave even though he did not have sufficient leave to cover his absence and did not communicate with Executive C that he would need military leave without pay.

On August 3, 2017, Col M drafted a memorandum addressed to the Agency regarding "Inactive Duty Training for [Grievant]" and stating that his agency "requests [Grievant] be granted leave in order to complete [Military] Inactive Duty for Training for 11-15 September 2017."

On August 15, 2017, Grievant sent an email containing a chart of military reserve duty dates and types of leave he would be requesting over an eight month period. The first dates were in September 2017. Grievant was requesting to use eight hours of annual leave and 32 hours of leave without pay.

On August 18, 2017, Grievant was informed that his request was denied because the leave was not mandatory.

On August 22, 2017 at 10:02 a.m., Grievant sent Executive C an email stating:

> After a review of DSS policy, DHRM Policy, and Code of Virginia § 44-93, I am entitled to take military leave with or without pay as long as I give advance notice of the duty when possible. My 15 August 2017 email to you below constitutes that advance notice and I will provide HR with evidence of completion upon my return. Because my unit reports directly to the [Military Organization] we often support short-notice, strategic level exercises and simulations. I will keep you apprised of any changes to the training schedule.
>
> VERY Respectfully,
> [Grievant's name]

Executive C considered Grievant's email to mean that Grievant was entitled to take military leave as long as Grievant gave notice of the duty when possible and that Grievant would keep Executive C apprised of any changes to the training schedule. Executive C understood Grievant's email to mean that Grievant would be going on military leave although the leave had been denied. In other words, Grievant was disregarding Executive C's instruction that Grievant's leave request was denied. Grievant closed his email by saying:

> VERY respectfully,

Executive C recognized that sending an email containing a word in all caps was the equivalent of yelling that word at the email recipient.

On August 22, 2017 at 2:01 p.m., Executive C sent Grievant an email stating:

> Your interpretation of policy is incorrect.
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> As we have discussed repeatedly, I will approve your 15 days of military leave and any annual leave you request for active duty assignments. I will not approve leave without pay for active duty assignments unless they are required.

> I am astonished that you have not sought me out for any discussion on this issue since your return from your most recent active duty for which you made no mention of leave without pay prior to leaving for your active duty assignment.
>
> WE have discussed the criticality of your position and the need for you to be available to the Department to fulfill your primary role …..[1]

Grievant notified his military unit of the Agency's denial of his request for leave. Col M sent the Agency a memorandum indicating Grievant's military training was a requirement for Grievant and not merely voluntary. The Agency allowed Grievant to take the military leave without pay because the leave met the requirements of DHRM Policy 4.51.

CONCLUSIONS OF POLICY

State Agencies may not take disciplinary action against employees for engaging in protected activities. To permit such disciplinary action would have the effect of retaliating against the employee.

Only the following activities are protected activities under the grievance procedure: "participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before Congress or the General Assembly, reporting an incidence of fraud, abuse, or gross mismanagement, or exercising any right **otherwise protected** by law."[2] (Emphasis added).

Virginia Code § 2.2-3000(A) states:

> It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints. To that end, employees shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management. To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes that may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In EDR Ruling 2008-1964, 2008-1970, the EDR director concluded:

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[1] Agency Exhibit 6.

[2] See Grievance Procedures Manual Section 4.1(b)(4) and Virginia Code § 2.2-3004 (A).

> Under Virginia Code § 2.2-3000, "[i]t shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints. To that end, employees shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management." Thus, bringing a concern about an annual performance evaluation to a reviewer would appear to be an act "otherwise protected by law."
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> In Ruling 2017-4457, EEDR concluded:
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> As EDR has held, however, this protection is not without exception. For instance, an employee might still be disciplined for raising workplace concerns with management if the manner in which such concerns are expressed is unlawful (for instance, a threat of violence to life or property) or otherwise unreasonable under the circumstances. The limited exceptions to the general protection of employees who raise workplace concerns can only be determined on a case-by-case basis.

Grievant's communication with Executive C was an attempt to resolve an employee problem or complaint. He was entitled to discuss his concern freely and without retaliation. The issuance of disciplinary action to Grievant served to retaliate against him for attempting to resolve his employee problem or complaint.

The Agency argued that Grievant's comments were insubordinate. Insubordination involves a defiance of authority and a refusal to obey lawful and reasonable orders/instructions. Grievant was not attempting to defy authority that he knew or should have known that the Agency possessed. Grievant attempted to persuade the Agency that it did not have the authority to deny his military leave request. He informed the Agency of his legal arguments including 20 CFR 1002.87 which provides:

> **Is the employee required to get permission from his or her employer before leaving to perform service in the uniformed services?**
> No. The employee is not required to ask for or get his or her employer's permission to leave to perform service in the uniformed services. The employee is only required to give the employer notice of pending service.

It is neither obvious nor certain that Grievant's interpretation of the law is incorrect. He was entitled to question the Agency's authority without it being deemed insubordination. In addition, Grievant did not take optional military leave. At the time he took military leave, Col M already had notified the Agency that the training was required.

Executive C was offended by Grievant's email in which he capitalized "VERY" instead of writing "Very Respectfully." Although Executive C reasonably understood Grievant's capitalization to be the equivalent of yelling, the fact remains that emails are silent and Grievant did not actually yell at Executive C. Capitalizing "VERY" was not

prohibited by Agency policy or otherwise disruptive behavior. Grievant's capitalization of "VERY" was not sufficiently material as to justify the issuance of disciplinary action given the protection afforded to him by Virginia Code § 2.2-3000(A).

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is **rescinded**.

APPEAL RIGHTS

You may request an administrative review by EEDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EEDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Equal Employment and 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 EEDR 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 EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

/s/ Carl Wilson Schmidt

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Carl Wilson Schmidt, Esq.
Hearing Officer