



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11589 / 11599

Hearing Date: November 19, 2020

Decision Issued: December 15, 2020

PROCEDURAL HISTORY

On May 27, 2020, Grievant was issued a Group II Written Notice of disciplinary action for unsatisfactory performance, failure to follow policy, workplace harassment, and disruptive behavior. On July 16, 2020, Grievant was issued a Group III Written Notice of disciplinary action with removal for unsatisfactory performance, failure to follow policy, violation of DHRM Policy 2.35 and threats or coercion.

On June 25, 2020, Grievant timely filed a grievance to challenge the University's issuance of a Group II Written Notice. On August 14, 2020, Grievant timely filed a grievance to challenge the University's issuance of a Group III Written Notice. On September 10, 2020, the Office of Dispute Resolution consolidated the two written notices into one hearing. On September 14, 2020, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 19, 2020, a hearing was held by remote conference.

APPEARANCES

Grievant
Grievant's Counsel
University Party Designee
University's Counsel
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notices?
2. Whether the behavior constituted misconduct?
3. Whether the University'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:

Old Dominion University employed Grievant as a Manager in one of its units. Grievant received favorable evaluations from the University. No evidence of prior active disciplinary action was introduced during the hearing.

Ms. 1 and Mr. 2 reported to Grievant. Grievant reported to Manager S.

On February 28, 2020, Manager S held a manager's meeting for the department. It was the first meeting with the Business Operations Manager and Grievant's first opportunity to introduce himself to her. Employees in the meeting took turns introducing themselves and explaining what they did for the University. In his opening statement, Grievant said, "I'm a jerk." Grievant's comment made others in the room feel uncomfortable. Manager S perceived Grievant's behavior as a "complete lack of professionalism" and "inappropriate in a business setting."

Ms. 1 resigned from the University. Ms. 1 filed a complaint against Grievant and Mr. 2. The University began an investigation.

Ms. 1 told the Investigator that in 2017 Mr. 2 exposed his penis to her. She claimed she told Mr. 2 to put his penis away and he did so. Ms. 1 said she knew she should have reported the incident to her supervisor, Grievant, and that she did not tell anyone in Human Resources because she feared negative publicity would undermine the University.

The Investigator spoke with Mr. 2 and he denied showing his penis to Ms. 1. Mr. 2 said Ms. 1 had tried to show him pictures of individuals in their underwear. Ms. 1 frequently showed another employee inappropriate videos and photos.

Ms. 1 told the Investigator she attended a supervisor's essentials training with Grievant in 2018. Ms. 1 said that she and Grievant had an argument outside of S Hall and Ms. 1 told Grievant about Mr. 2 exposing himself to her. According to Ms. 1, Grievant responded, "Well, [Ms. 1] all I want to know is was it big?" He also told Ms. 1 that she could not report the violation as "the two years" had passed. Grievant could not recall the incident at first. Grievant then recalled an argument outside of S Hall but denied being told about Mr. 2 exposing himself. Grievant told the Investigator that if Ms. 1 told him something that egregious he would have referred her to Human Resources or Institutional Equity and Diversity.

On April 20, 2020, Manager S called Grievant and told Grievant that he would be placed on administrative leave. Manager S told Grievant to call Mr. 2 and tell Mr. 2 that Mr. 2 was being placed on administrative leave as well.¹

On April 22, 2020, Manager S notified Grievant "effective April 21, 2020 you have been placed on administrative leave with pay in order to protect the integrity of an investigation being conducted by the Office of Institutional Equity and Diversity."²

On April 24, 2020, a Case Manager with the Office of Institutional Equity and Diversity sent Grievant an email notifying him that Ms. 1 had filed a complaint alleging she was held to different standards from other employees regarding "making her find her own replacements for sick days" and not being "afforded opportunities for professional development." The Case Manager added, "Be advised that Executive Order One (2018) prohibits the intimidation of, harassment of, or retaliation against anyone who files a complaint or who takes part in this process."³

¹ Manager S admitted during the hearing that it was a mistake to ask Grievant to call Mr. 2 and tell Mr. 2 he was being placed on leave.

² Agency Exhibit p. 3.

³ Grievant Exhibit C.

The Office of Institutional Equity and Diversity completed its report on April 29, 2020.

On May 11, 2020, Manager S notified Grievant that the University intended to issue Grievant a Group II Written Notice for failure to report an incident of sexual harassment. Grievant was being placed on pre-disciplinary leave pending receipt of his response to the possible disciplinary action and the University's decision.

On May 13, 2020, Grievant, by counsel, submitted a response to the University's notice of pending disciplinary action. Grievant admitted saying "I'm a jerk" was not professional and that Grievant was trying to be funny.

Grievant was issued a Group II Written Notice dated May 27, 2020 for unprofessional behavior since July 2019. When Manager S presented Grievant with the Group II Written Notice, Manager S told Grievant that what happened in the past was in the past and that Grievant should focus on being professional in the future.

Mr. 2 was also issued a Group II Written Notice on May 27, 2020.

Grievant reported to work on May 28, 2020 as instructed. Mr. 2 was also working that day.

When Grievant and Mr. 2 were placed on administrative leave, Grievant began contacting Mr. 2 at Mr. 2's home. Mr. 2 repeatedly told Grievant he did not want to talk about the situation. This continued when they returned to work.

Mr. 2 returned to work on May 28, 2020. Upon Mr. 2's return to the office, Grievant did not want to speak with Mr. 2. When Mr. 2 entered an area where Grievant was located, Grievant left the area and went to Grievant's office. Later on, Grievant sent Mr. 2 a text message regarding what they were going to do. They set a meeting for June 3, 2020. On June 3, 2020, Grievant asked Mr. 2 about the situation and said that he was going to get a lawyer to deal with his grievance. Mr. 2 told Grievant he did not want to talk about it.

On several occasions when Grievant and Mr. 2 met during the day, Grievant "would bring it up all over again." Mr. 2 would have to repeat that he did not want to talk about it.

Mr. 2 began to avoid going to his office in order reduce the risk that he would encounter Grievant. Mr. 2 shifted more of his work outside of his office in order to avoid seeing Grievant. Grievant did not realize Mr. 2 was trying to avoid him.

On June 24, 2020, Grievant and Mr. 2 met with several other employees to discuss work tasks. After the meeting ended, Grievant wanted to talk to Mr. 2 about Grievant's situation and getting a lawyer for his grievance. Mr. 2 said, "[Grievant's first

name], I do not want to talk about any of this.” Grievant said, “I will ask you one thing – will you have my back or not?” Mr. 2 replied, “I will not talk about this.”

Mr. 2 was concerned about his employment status because if Mr. 2 did not have Grievant’s “back”, it would be worse for him at work. Mr. 2 experienced anxiety when coming to work and worried about what could happen to him. He was concerned about being around Grievant. Because of his concerns, Mr. 2 sent text and email messages to University managers.⁴

On June 24, 2020, Mr. 2 contacted Manager S alleging while Grievant and Mr. 2 were on administrative leave from April 11, 2020 to May 11, 2020, Grievant contacted Mr. 2 numerous times to discuss why they were on administrative leave. Mr. 2 told Grievant he did not want to discuss the matter but Grievant continued to contact Mr. 2.

Manager S called Mr. 2 and spoke about Mr. 2’s concerns. Mr. 2 told Manager S that it was difficult to be in the office with Grievant and that Grievant kept asking Mr. 2 if Mr. 2 would have Grievant’s back. Manager S considered Grievant’s actions to be hostile. Manager S spoke with Grievant about his contact with Mr. 2. Grievant was mostly silent but said that that was the last time he would talk about it with Mr. 2.

On July 6, 2020, Manager S notified Grievant that the University intended to issue a Group III Written Notice with removal for disregarding ODU Discrimination Policy 1005 and DHRM Policy 2.35. Manager S notified Grievant he was removed from employment effective July 16, 2020.

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.”⁵ 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.”

Group II Written Notice

The University alleged Ms. 1 told Grievant that Mr. 2 exposed himself to her. This assertion has not been established. This assertion rests on the credibility of Ms. 1. Grievant and Mr. 2 denied Ms. 1’s allegations against them.

⁴ The University did not provide copies of these text and email messages as exhibits.

⁵ The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

Ms. 1 had a motive to make false statements against Grievant because she believed he had treated her differently from how he treated other employees. Their relationship was also clouded because Grievant loaned Ms. 1 \$2,000 and she still owed him \$600 as of April 15, 2020 and at the time of the hearing. Ms. 1's motivation may have been to seek retribution against Grievant because she believed he mistreated her and was seeking repayment of money she had not paid.⁶

One way to establish credibility is to present evidence of consistent statements made over time. For example, an individual's credibility is enhanced if the individual presented a written statement to an investigator and then testified consistently with that statement. In this case, the University presented the Investigator's report of Ms. 1's statements and Ms. 1's testimony. The University had the opportunity to obtain written statements from Ms. 1 as part of her allegation and as part of the University's investigation. If the University obtained such statements, it did not present them as evidence. The University's investigation report consisted of a summary of the statements made by Ms. 1 to the Investigator. During her testimony, Ms. 1 added statements about Grievant seeking to hire her nephews for an improper task. She claimed to have told the University about Grievant's request. Ms. 1's assertion seemed fanciful and undermined her credibility. The Investigator's report did not address this assertion. If Ms. 1 had made a similar statement to the Investigator, her assertion may have been substantiated and her credibility enhanced.

The University asserted that Ms. 1 told Ms. C about her interaction with Grievant. Ms. C could not identify when Ms. 1 told her about speaking with Grievant. The University was unable to establish whether the conversation between Ms. 1 and Ms. C occurred a few months ago or a few years ago. Ms. 1's claim that she told Ms. C about her interaction with Grievant was not supported by Ms. C's testimony. Ms. 1 also claimed to have told a former employee, Mr. B, about her interaction with Grievant. The University's Investigator could not recall hearing Mr. B's name from Grievant.

Insufficient evidence exists for the Hearing Officer to conclude Ms. 1 is telling the truth and Grievant and Mr. 2 are untruthful. Since the burden of proof is on the University, the issue must be resolved in favor of Grievant.

The University also alleged that Grievant referred to himself as "the jerk" in a meeting and on another occasion displayed inappropriate "body language". Grievant admitted to these mistakes. This evidence is sufficient to support the issuance of a Group I Written Notice.

The University alleged in the Group II Written Notice that Grievant failed to host an employee development and team building retreat. This allegation was unsubstantiated. The evidence showed that Grievant held a golf and dinner event and

⁶ The University's Investigator believed Ms. 1 was credible because Ms. 1 had no reason to lie. When asked whether Ms. 1 discussed her debt to Grievant, the Investigator said that "sounds familiar." The Hearing Officer will not give deference to the Investigator's opinion that Ms. 1's allegations were credible.

gave each of his supervisory staff \$50 because they had complained the University had not provided them with bonuses.

The University alleged in the Written Notice that Grievant engaged in disproportionate treatment and retaliation with respect to Ms. 1. No credible evidence was presented showing Grievant engaged in such behavior.

The University has presented evidence only sufficient to support the issuance of a Group I Written Notice. The Group II Written Notice must be reduced to a Group I Written Notice.

Group III Written Notice

The University issued Grievant a Group III Written Notice with removal for violating DHRM Policy 2.35 governing 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 action, up to and including termination, under Policy 1.60, Standards of Conduct.

The DHRM Policy 2.35 Policy Guide identifies prohibited conduct/behavior to include:

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;

Grievant supervised Mr. 2 and, thus, was in a position to influence Mr. 2. Grievant was entitled to question his co-workers in order to explore the existence of evidence to support his defenses. This opportunity, however, was not unlimited. Once Mr. 2 indicated he did not want to talk with Grievant about Grievant's case, Grievant was obligated to stop questioning Mr. 2. Instead, Grievant continued to question Mr. 2 and did so despite repeated requests by Mr. 2 that Grievant stop asking him questions. Grievant continued to pursue Mr. 2 to the point that Mr. 2 altered his work behavior in

order to avoid coming into contact with Grievant. Mr. 2 felt significant distress to the point where he was compelled to report Grievant to University managers. The University has presented sufficient evidence to support the issuance of disciplinary action for violation of DHRM Policy 2.35. The University elected to issue a Group III Written Notice which is authorized by DHRM Policy 2.35. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

Grievant denied excessively questioning Mr. 2. For example, on one occasion when Grievant called Mr. 2, it was at the request of another employee who was worried about Mr. 2 and wanted to see how Mr. 2 was doing. The conversation was short and not about whether Mr. 2 would help Grievant. Nevertheless, Mr. 2's testimony regarding his interaction with Grievant was credible and sufficient to support the University's decision to issue disciplinary action.

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 rules established by the Department of Human Resource Management"⁷ 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.

Although the Hearing Officer does not agree with the University's decision to remove Grievant from employment, there is no basis to reduce the Group III Written Notice. The University should have done a better job of instructing Grievant not to speak with Mr. 2 or anyone else about the University's investigations and Grievant's pending disciplinary action. Once Grievant was informed by Manager S to stop talking to Mr. 2, Grievant did so. On the other hand, Grievant should have stopped talking to Mr. 2 about his grievance when Mr. 2 first asked that such conversation stop. The University was entitled to hold Grievant to a higher standard because he was a supervisor. The University's failure to properly instruct Grievant does not make its disciplinary action exceed the limits of reasonableness. The University could have adequately corrected Grievant's behavior without his removal but the civility policy gave it discretion to remove Grievant. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

⁷ *Va. Code § 2.2-3005.*

DECISION

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

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].

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

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer