

Issue: Group II Written Notice (failure to follow policy); Hearing Date: 08/20/19; Decision Issued: 09/09/19; Agency: VSDB; AHO: Carl Wilson Schmidt, Esq.; Case No. 11368; Outcome: Full Relief; **Administrative Review Request received 09/23/19; EDR Ruling No. 2020-4992 issued on 10/29/19; Outcome: AHO's decision affirmed.**



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11368

Hearing Date: August 20, 2019

Decision Issued: September 9, 2019

Substituted Decision Issued: September 18, 2019

PROCEDURAL HISTORY

On April 30, 2019, Grievant was issued a Group II Written Notice of disciplinary action for violating DHRM Policy 2.35, Civility in the Workplace.

On May 7, 2019, Grievant timely filed a grievance to challenge the Agency's action. Grievant requested a hearing. On June 3, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 30, 2019, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency Counsel
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 Virginia School for the Deaf and the Blind employs Grievant as a Student Life Coordinator. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant worked in a large office with an attached storage room. If one entered the office through the double entry doors, he or she would see Grievant's desk on the right and the storage room straight ahead.

Grievant received permission from her supervisor to use the storage room during her breaks to pump breast milk. Grievant placed a chair in the storage room that was approximately eight feet away from the door. She placed the chair facing the back of the storage room and away from the door. Grievant placed a cart with an extension cord outlet next to the chair. When she took a break in the storage room, she would place the pump on the cart, turn on the pump, and sit in the chair with her back to the storage room door.

On April 19, 2019, Grievant took a break from her work duties and entered the storage room. She locked the door. Only a person with a key could unlock the door to enter the storage room from the office. She walked to the chair, sat and began pumping breast milk. She had the office cell phone with her in case someone called asking for assistance. She had her personal cell phone and began a conversation with her sister.

The Manager walked into the office to ask Grievant a question about a student. The Manager did not see Grievant in the office. She walked farther inside the office and close to the storage room door. She heard someone talking from inside the storage room. She stood on one of the two steps into the storage room. She was within a foot of the door and began listening to the person inside the storage room.

The Manager recognized Grievant's voice. Instead of knocking on the door to gain Grievant's attention, the Manager continued listening to Grievant's conversation. The Manager did not know Grievant was speaking to Grievant's sister. Grievant was not yelling or speaking with an unusually elevated voice, but the Manager could clearly hear most of Grievant's conversation.

Grievant spoke about Employee W and a Former Employee who left the Agency on the prior day. Grievant mentioned the Former Employee's departure without notifying people and with only five weeks left of school. Grievant talked about Employee W's doctor appointments stating that Employee W was never here and "how many f—king doctors can you have?" Grievant said Employee W having a possible medical issue but that Grievant did not know more and that Employee W had been out all week. After hearing this, the Manager got a pad of paper and began writing down what Grievant was saying.

Grievant said that Employee W had texted Grievant yesterday and that Employee W was at a doctor appointment in another city and said, "well I guess we've moved the doctors to [another city]." Grievant said, "I don't know how she gets away with it – maybe because she is deaf, a 'yes man'" Grievant said Former Employee had been like a "work mom" to her and that Former Employee said that since Former Employee was not working there, they could be Facebook friends. Grievant said Former Employee was the kind of person that you were friends with at work but once she left, you didn't maintain contact. Grievant said that Employee W had not been here and that Employee W would look good for a few weeks and then school will be over.

Grievant answered a work related call on her work cell phone and then resumed her conversation with her sister on her personal cell phone.

Grievant talked about Employee C and Employee C's daughter's wedding. Grievant said that Employee C did not want her daughter to marry that man. Grievant said that Employee C should just take the time and make Employee W work and that no one had been filling in for Grievant for five years. Grievant mentioned Employee W's text message the prior day which alerted staff that Former Employee had "exited" the Agency. Grievant said that she told Employee W that the word "exited" made it sound like Former Employee was escorted off. Grievant said she told Employee W that Employee W should not have used that word and that Employee W told Grievant, "thanks for your feedback."

Grievant talked about going to Employee B and that someone didn't show up and they had presents or something for someone. Grievant talked about how it would be interesting to see what happens and that Grievant thought Employee W would go out on medical leave.

Grievant mentioned that Employee W had asked Grievant “if she wanted to do the credit card.” Grievant said she did not want to do the credit card work.

While still talking on her cell phone, Grievant got up from her chair and opened the door to exit the storage room. The Manager was standing on the step as Grievant opened the door. The Manager startled Grievant. As the Manager looked at Grievant, Grievant told her sister that she would call her back.

The Manager told Grievant it was amazing how clearly one could hear the conversation through the door – the whole conversation. The Manager told Grievant she had never been so disappointed in Grievant and could not believe how Grievant could be so two-faced and pass on confidential information. The Manager told Grievant again she was so disappointed but also praised Grievant for her work. The Manager said she did not know who Grievant was talking to. ManagerManager

CONCLUSIONS OF POLICY

The Agency alleged Grievant violated DHRM Policy 2.35 governing Civility in the Workplace. This policy states:

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.

Prohibited conduct includes bullying:

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. The behavior may involve a real or perceived power imbalance between the aggressor and the targeted person. The behavior typically is severe or pervasive and persistent, creating a hostile work environment. Behaviors may be discriminatory if they are predicated on the targeted person’s protected class (e.g., using prejudicial stereotyping or references based on the targeted person’s characteristics or affiliation with a group, class, or category to which that person belongs, or targeting people because they are in a protected class).

The Agency has not presented sufficient evidence to show that Grievant violated DHRM Policy 2.35 for several reasons. First, Grievant was talking to her sister and not to another Agency employee. Second, Grievant was engaged in a conversation she intended to be private. Grievant closed the door to the storage room. She was seated with her back to the door so that her voice would not project into the office. It should

have been obvious to the Manager that Grievant intended her conversation to be private. Third, Grievant did not intend to denigrate or marginalize any employees. Grievant was “venting” to her sister. Grievant’s use of a curse word was not made to another employee and not made in a context rendering her words so offensive as to violate DHRM Policy 2.35. Fourth, Grievant’s behavior was not severe, pervasive, or persistent and did not create a hostile work environment for any employee. Grievant did not create a hostile work environment for the Manager. Fifth, Grievant did not harass anyone or engage in any violent behavior. The Group II Written Notice must be reversed.

The Agency argued that Grievant’s conversation could have been overheard by someone such as a parent or other visitor entering the office. Although it was possible that a visitor might enter the office while Grievant was in the storage room, no one other than the Manager entered the office while Grievant was in the storage room. Even if another employee entered the office, Grievant’s comments were not sufficiently severe or pervasive to violate DHRM Policy 2.35. A person entering the office would have heard Grievant’s voice but not the details of her conversation. Only if the person stood next to the door to the storage room would the person have been able to understand Grievant’s words.

The Agency argued that Grievant’s comments adversely impacted the Agency. Upon learning of Grievant’s comments, other employees were offended and changed their perception of Grievant. The Agency’s argument fails because Grievant was not the one who first informed other staff. The Manager “facetimed” Employee W to explain what Grievant said about Employee W. Grievant sent Employee W a text because Grievant knew the Manager intended to tell Employee W what Grievant said on the telephone. If the Manager had not disclosed Grievant’s conversation, no other employees would have known about it.

The Agency argued that Grievant disclosed confidential information. This argument is not persuasive. Other employees voluntarily told Grievant about their medical conditions. Grievant did not obtain the information as part of her work duties or by any unauthorized means. She was free to disclose whatever information she wished.

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 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].

/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.