



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11497

Hearing Date: August 3, 2020

Decision Issued: August 4, 2020

PROCEDURAL HISTORY

On December 3, 2019, Grievant was issued a Group I Written Notice of disciplinary action for displaying a lack of civility in the workplace.

On December 27, 2019, 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 she requested a hearing. On February 18, 2020, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 3, 2020, a hearing was held by video conference.

APPEARANCES

Grievant
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 a Support Enforcement Specialist. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant did not like working for the Supervisor. Grievant and the Specialist attended a team meeting on August 23, 2019. At the conclusion of the meeting, Grievant and the Specialist began walking towards their desks. Grievant told the Specialist that the Supervisor was a "dumb dummy" who had no business holding the position she held. Grievant balled her left hand with her middle finger extended and balled her right hand with her middle finger extended.¹ She leaned back and then directed her two middle fingers towards the Supervisor's location. The Specialist understood Grievant to be insulting the Supervisor.² The Supervisor was not aware of Grievant's behavior.

¹ Displaying a middle finger is an obscene gesture.

² The agency presented other allegations against Grievant. Those allegations either did not rise to the level justifying disciplinary action or constituted protected speech as an attempt to resolve a dispute with the manager.

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.”³ 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. Bullying includes, “[d]isrespectful ... behavior toward a person that is intended ... to denigrate or marginalize the targeted person.” On August 23, 2019, Grievant referred to the Supervisor as a “dumb dummy” and directed her middle fingers towards the Supervisor as an insult to the Supervisor. Grievant’s actions were contrary to DHRM Policy 2.35. The Agency’s issuance of a Group I Written Notice must be upheld.

Grievant denied calling the Supervisor names and making insulting gestures in front of the Specialist. The testimony of the Specialist was credible. Grievant did not provide a plausible motive for the Specialist to be untruthful. The Agency has presented sufficient evidence to show Grievant called the Supervisor names and made insulting gestures towards her.

Grievant argued the Agency took disciplinary action against her in retaliation for her complaining of bullying by other employees in the Agency. The evidence showed that the Agency took disciplinary action because of Grievant’s inappropriate behavior on August 23, 2019.

Grievant argued that she had complained to Agency managers about the Supervisor’s bullying and Agency managers took no action. It is unclear what complaints Grievant made (prior to her initiation of the grievance) and how the Agency responded. It appears that the Agency transferred Grievant to another position and that any ongoing bullying is no longer an issue.

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”⁴ 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

³ The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

⁴ Va. Code § 2.2-3005.

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. 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 I 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