COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11498

Hearing Date: May 20, 2020
Decision Issued: August 21, 2020

PROCEDURAL HISTORY

On November 22, 2019, Grievant was issued a Group III Written Notice of disciplinary action with demotion and ten percent disciplinary pay reduction for failure to follow policy.

On December 12, 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 he requested a hearing. On February 24, 2020, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 20, 2020, a hearing was held by audio conference.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's 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 Department of General Services employed Grievant as a Quality Assurance Senior Scientist until his demotion on November 25, 2019 to Scientist I with a ten percent disciplinary pay reduction. He was promoted to QA Senior Scientist in December 2014. Grievant wrote, "I am an Asian male who has worked for the [Lab] for almost 7.5 years." No evidence of prior active disciplinary action was introduced during the hearing.

Grievant worked in the Lab. A purpose of the Lab was to identify infants with rare but serious disorders. Grievant described the Lab's mission as "saving Virginia's babies, one test at a time." The Lab screened samples for 31 disorders. If a test was positive, the Lab considered the baby "critical". If a test was negative, the Lab considered the baby "well." If a doctor was not timely informed of a positive test result, the critical baby could suffer intellectual disability, coma, seizures, or death.

The Senior Scientist was a white female employed by the Agency for approximately 18 years. She was supposed to review the sample cards to make sure they matched the demographics. Doing so would enable her to accurately assign test results to specific infants. The results would be reported to a Virginia Department of Health Nurse so that newborns could receive or avoid immediate care and testing.

On Tuesday, October 15, 2019, specimens from several infants were tested at the Lab. The Senior Scientist failed to property review sample cards to make sure they matched the demographics. As a result, the Senior Scientist "signed off" on a report showing two babies with critical test results as well babies and two well babies as critical babies.

Grievant was responsible for preparing a Critical Incident Report on a daily basis to make sure that the test results for babies were accurately reported to the VDH. He was to ensure that samples were documented on the critical fax report. If a sample was not properly documented, Grievant was to notify the Newborn Screening Manager of the discrepancy. If Grievant could not complete the Report, he could ask another scientist to perform the task.

Grievant did not prepare a Report on Wednesday, October 16, 2019. Grievant attended a leadership meeting on October 16, 2019 scheduled from 3 p.m. to 4 p.m. Grievant did not prepare a Report on Thursday, October 17, 2019. Grievant's Time Detail Report for Thursday, October 17, 2019 showed he worked 6.5 hours and used sick leave for 1.5 hours. Grievant had a doctor's appointment that day.

Grievant ran the Report on Friday, October 18, 2019. He noted a discrepancy in the information reported by the Senior Scientist to the VDH. In other words, Grievant recognized that a reporting error had been made by the Agency. Grievant intended to follow up with the Senior Scientist after discovering the error. He did not investigate the discrepancies. He did not report the discrepancies to anyone else.

On October 24, 2019, a VDH Nurse notified the Agency of the error. The Agency began an investigation.

As a result of the error, two well babies were subjected to unnecessary re-test procedures. This included being injected with needles and having blood drawn. Doctors for two critical babies were not timely informed of the need for immediate re-testing.

The Agency took disciplinary action against two white females, one white male, and Grievant. Only Grievant received a Group III Written Notice. The Senior Scientist received a Group II Written Notice

The Manager and Lab Director testified credibly that they did not consider race or gender when they considered the appropriate level of disciplinary action for employees involved in this matter.

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."[1] 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."

The Agency's policy governing newborn testing was referred to as a Job Aid. Grievant drafted the Job Aid in February 2017. It was approved by Agency managers.

Failure to follow policy is a Group II offense. The Job Aid made Grievant responsible for reviewing the Critical Result Report and comparing it to the Critical Telephone and Fax Log to identify discrepancies. If he found discrepancies, he was to investigate those discrepancies and report the discrepancies to other Agency staff and ultimately to the VDH Nurse.

On October 15, 2019, three employees including the Senior Scientist made errors in testing specimens from newborns. Grievant did not timely review the results of their work. Grievant reviewed the reports on October 18, 2019 and identified discrepancies, but failed to report his discovery to other staff. VDH staff were not timely informed of the errors. The errors were identified separately by the VDH Nurse who notified the Agency six days later on October 24, 2019. The Agency has presented sufficient evidence to show Grievant committed a Group II offense by failing to follow the Agency's Job Aid to timely review, investigate, and report testing errors.

In certain extreme circumstances, an offense listed as a Group II Notice may constitute a Group III offense. Agencies may consider any unique impact that a particular offense has on the agency. The impact on the Agency was significant because it placed healthy infants at risk of additional unnecessary testing and critical infants at risk of delayed testing and treatment. The Agency has presented sufficient evidence to support its decision to elevate the Group II offense to a Group III offense.

Upon the issuance of a Group III Written Notice, an agency may demote, transfer, and impose a disciplinary pay reduction in lieu of removal. Accordingly, the Agency's decision to demote, transfer, and reduce Grievant's pay must be upheld.

Grievant argued that the Lab was understaffed. The evidence showed that the Lab had a steady and heavy workload. Understaffing, however, was not the result of Grievant's mistake. Grievant identified the reporting error. He simply failed to report that error. His mistake was not affected by understaffing.

Grievant admitted he made a mistake. He objects to the level of discipline imposed by the Agency. The Agency has established that Grievant's mistake had a unique impact on the Agency justifying the issuance of a Group III Written Notice. The

[1] The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

Agency selected the level of disciplinary action in accordance with the Standards of Conduct.

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 …."[2] 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.

Grievant argued the Agency inconsistently applied disciplinary action. Grievant and the Senior Scientists were peers and engaged in the same behavior, according to Grievant. The Agency gave the Senior Scientist a Group II Written Notice while Grievant received a Group III Written Notice. The evidence showed, however, that Grievant's role in applying the Job Aid was materially different from the Senior Scientist's role. Grievant's role was to catch the errors made by the Senior Scientists. Grievant was the fail-safe in the Agency's process to prevent the Agency from causing life-threatening errors. The Senior Scientist made an error. The Agency anticipated that employees might make an error so it created a check on their behavior. Grievant caught the error but failed to report it, thus, making the Agency's process insignificant. The Agency has demonstrated a sufficient reason for it to treat Grievant and the Senior Scientist differently even though they were peer employees. The Hearing Officer does not believe the Agency improperly singled-out Grievant for disciplinary action.

Grievant asserted that the Agency discriminated against him based on his race. Agency managers denied this assertion. Their denials were credible. The Hearing Officer does not believe the Agency's disciplinary action reflected consideration of race. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

This case is unfortunate. Grievant is clearly a highly skilled and capable employee who is dedicated to serving and improving his Agency. The Agency's decision to take disciplinary action was in accordance with the Standards of Conduct.

[2] Va. Code § 2.2-3005.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with demotion, transfer, and disciplinary pay reduction 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

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Carl Wilson Schmidt, Esq.
Hearing Officer