

DECISION OF HEARING OFFICER

IN RE: [REDACTED] v. VIRGINIA DEPARTMENT OF
TRANSPORTATION

CASE NO. 11500

HEARING DATE: JULY 14, 2020

DECISION ISSUED: AUGUST 12, 2020

PROCEDURAL HISTORY

The date of alleged offense was September 9, 2019. The alleged offense was not discovered until October 15, 2019. The letter of intent to investigate was issued November 1, 2019¹. Agency met with Grievant and accepted her written response on November 4, 2019². A Written Notice was issued November 19, 2019³. The first step resolution was December 23, 2019⁴. The second step resolution was January 27, 2020⁵. The third step resolution was February 12, 2020⁶.

Grievant filed for appeal on December 17, 2019⁷ and was qualified on February 21, 2020⁸. The original Hearing Officer assigned to this case passed away and a substitute Hearing Officer assigned on April 20, 2020. A pre-hearing telephone conference was conducted on April 28, 2020. Due to Covid-19 issues, the case was heard by telephone conference on July 13, 2020.

It should be noted due to technical difficulties the rebuttal testimony of HR2 and the initial closing argument of the Agency were not recorded. After re-establishing the connection with Grievant's attorney, the Agency repeated it's closing statement and Grievant's attorney gave his closing statement.

APPEARANCES

Agency Advocate
Agency representative as Witness
1 additional Agency Witness
Grievant's Advocate
Grievant as Witness

¹ Agency Exhibit 4, Pages 7, 8, 9

² Agency Exhibit 4, Page 10

³ Agency Exhibit 3

⁴ Agency Exhibit 10, Pages 6, 7

⁵ Agency Exhibit 10, Pages 8, 9

⁶ Agency Exhibit 10, Pages 10

⁷ Agency Exhibit 10, Pages 1-5

⁸ Agency Exhibit 10, Pages 11, 12

ISSUES

1. Whether Grievant had notice E's case was not to be processed as a worker's compensation case.
2. Whether Agency proved its case for discipline by a preponderance of evidence.
3. Whether following proper steps to process a worker's compensation matter had relevance to this case.
4. Whether Grievant had sufficient knowledge that Grievant had acted against an Agency policy.
5. Whether pre-hearing policy procedures were properly followed leading up to a Group I Written Notice.
6. Whether mitigating circumstances were considered.

BURDEN OF PROOF

In disciplinary actions, the burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary actions against the Grievant were warranted and appropriate under the circumstances. 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. Grievant has the burden of proving any affirmative defenses raised by Grievant. GPM §5.8.

APPLICABLE POLICY

This hearing is held in compliance with Virginia Code § 2.2-3000 et seq the Rules for Conducting Grievances effective July 1, 2012 and the Grievance Procedure Manual (GPM) effective July 1, 2020.

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "includes acts of minor misconduct that require formal disciplinary action." Group II offenses "include acts of misconduct of a more serious and/or repeat nature that requires formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination." More than one (1) active Group II offense may be combined to warrant termination.⁹

This case involves O.P. 1.60 Standards of Conduct¹⁰ as well as company policies 11 and 13¹¹.

⁹ OP 135.1

¹⁰ Agency Exhibit 8

¹¹ Agency Exhibit 3, Page 3

FINDING OF FACTS

After reviewing the evidence presented and hearing from each witness during the telephone conference, the Hearing Officer makes the following findings of fact:

Grievant is a long-time employee of Virginia Department of Transportation. Grievant's record has been good.¹² More recently Grievant had health problems in her family and taken a FMLA leave. In March of 2019 Grievant received a counseling memo regarding her work performance.

The witnesses or pertinent parties will be described as: Grievant, or noted as Human Resource Benefits Specialist HR1; Co-worker as HR2; Supervisor as HR3; Employee as E, Employee's supervisor as ES1; and Co-Supervisor as ES2.

E previously had a worker's compensation claim and was currently applying for medical leave not related to the previous worker's compensation claim. Grievant and HR2 were co-workers. After E filed his claim, HR3 bifurcated the duties of Grievant and HR2 as related to regions. HR2 had processed E's claim before Grievant had the regional cases turned over to her. HR2 provided Grievant with written notes of those cases being given to Grievant.¹³ There were no notes regarding E. HR2 stated she orally advised Grievant that E's claim was a medical leave issue¹⁴. HR2 stated Grievant said Grievant would send out for information and see what Grievant got back in relation to E's case. HR2 stated she thought this statement odd but apparently did not question it.

Grievant stated she did not recall the above conversation¹⁵. Grievant stated a leave slip and doctor's note related to E came across her desk. Grievant stated she then had an oral conversation with HR2 and asked what the paperwork was about. Grievant stated HR2 told her to call E's supervisor. Grievant emailed E's companion supervisor¹⁶, ES2, and received a note back from E's supervisor, ES1, stating he believed E was on worker's compensation leave.¹⁷ Grievant then proceeded to work E's case as a worker's compensation matter.

E eventually received paperwork from the worker's compensation commission. E called the Human Resource office asking why worker's compensation was involved when he did not have a worker's compensation case. The matter was investigated, and it was found that Grievant had duplicated E's compensation. The Human Resource office was able to stop payment of funds for a worker's compensation case.

¹² Agency Exhibit 11, also Grievant Exhibit 3

¹³ Grievant Exhibit 1, Pages 2-5

¹⁴ HR2 testimony beginning at 2:36:20

¹⁵ Grievant testimony beginning at 3:24:47

¹⁶ Agency Exhibit 6, Pages 8, 9

¹⁷ Agency Exhibit 6, Pages 8, 9

OPINION

Both Grievant and HR2 stated there was an oral conversation regarding E. Unfortunately, there were no witnesses to the oral conversations between Grievant and HR2.

Obviously, there is a contradiction in the statements of these two parties.

HR3 stated she believed Grievant should have called E and reviewed his file before attempting to start a worker's compensation case. Grievant admitted she did not call E as Grievant stated claimants are hard to contact and often don't have the correct information. Grievant stated it was her policy to call the supervisor. Grievant admitted she did not review E's file before starting the worker's compensation claim but stated when she did, there was nothing inconsistent with a worker's compensation claim in the file.

Again, the facts don't match but the Agency believed that E would have given Grievant sufficient information to not process a worker's compensation case. The Agency further believed the information in E's file was an important first step to review.

In disciplinary actions, the burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary actions against the Grievant were warranted and appropriate under the circumstances.¹⁸

Further, a Hearing Officer is not to disrupt an Agency's decision unless it is clearly incorrect.

A Hearing Officer is not a "super-personnel officer". Therefore, the Hearing Officer should give the appropriate level of deference to actions by the Agency management that are found to be consistent with law and policy.¹⁹

Given these policies the Agency's opinion that Grievant should have known to not reprocess E's case has sufficient weight to be believed and is within the bounds of Agency's discretion to discipline for failure to follow instructions and unsatisfactory performance.

There was much testimony regarding Grievant having faithfully followed the procedures to work up a worker's compensation case. While it could be true that she may have met this standard, it is irrelevant. The crux of the matter was whether Grievant should have processed the case at all.

Grievant also believed there was no written policy to guide her as to this situation, therefore she had breeched no policy requirement. Group actions are described in OP

¹⁸ GPM §5.8

¹⁹ Rules for Conducting Grievance Hearings 2017, VI.A., page 15

Stds. of Conduct 1.60 with examples of infractions, but the text further describes these as only examples.²⁰

Examples of offenses, by group, are presented in Attachment A. These examples are not all-inclusive but are intended as examples of conduct for which specific disciplinary actions may be warranted. Accordingly, any offense not specifically enumerated, that in the judgment of agency heads or their designees undermines the effectiveness of agencies' activities, may be considered unacceptable and treated in a manner consistent with the provisions under this section. Indeed, "duplicating work" is not specifically listed, but stands to reason it is neither a prudent nor economically sound behavior that would benefit the state. Since the Agency believed Grievant had been told E's case was finished, Grievant did not follow instruction and did not perform in concert with the information given to her.

The prehearing policy procedures for employee discipline were properly followed as outlined in Procedural History *supra*.

Grievant gave testimony of her satisfactory and long employment at Virginia Department of Transportation²¹. Grievant's annual evaluation was given to her 2 days after the event causing the discipline was discovered. However, the evaluation was for the entire previous year²². Grievant spoke of her need for an FML leave and why she believed she was being punished because of the leave. Grievant felt her previous counseling discipline should not be considered as a negative factor. Grievant stated she did not believe the Agency had given proper weight to mitigating circumstances.

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..."²³ 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. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.²⁴

²⁰ Agency Exhibit 8, Stds. Of Conduct Policy 1.60, Pages 7 (B:2); 8(B:2a); 22(Attachment A)

²¹ Grievant's testimony beginning 3:17:06

²² Agency Exhibit 11

²³ Va. Code § 2.2-3005.

²⁴ Va. Code § 2.2-3005.

It appears from the language of the Written Notice that both mitigating and aggravating matters were considered and given proper weight. The original Group II discipline was reduced to a Group I as duplicate funds were not distributed.

DECISION

For all of the above reasons and after due consideration the Group I 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.²⁵

²⁵ 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 EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].



Sondra K. Alan, Hearing Officer