



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11377

Hearing Date: September 9, 2019
Decision Issued: October 4, 2019

PROCEDURAL HISTORY

On April 10, 2019, Grievant was issued a Group III Written Notice of disciplinary action with removal for failure to follow policy or instructions, falsifying records, interference with State operations, and other.

On May 10, 2019, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On June 3, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 9, 2019, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's 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 Motor Vehicles employed Grievant as a Program Specialist I at one of its locations. She began working for the Agency in December 2013. Grievant's Supervisor described Grievant's work as "exceptional." No evidence of prior disciplinary action was introduced during the hearing.

The Agency provided Grievant with a Travel Card to use for business travel expenses. On April 17, 2018, Grievant signed an agreement providing:

I will follow the established procedures for the use of the Card. Failure to do so may result in either revocation of my privilege or other disciplinary action, up to and including termination of employment.

Grievant opted to receive her statements electronically.

Grievant used the Card from April 23, 2018 to April 27, 2018 while on a business trip for the Agency. After Grievant returned from her trip, Grievant submitted a Travel Expense Reimbursement Voucher detailing expenses of \$1,164.91. The Voucher included per diem in the amount of \$221.25 for which Grievant did not have to pay the

Bank. The Agency paid her \$1,167.56 to reimburse her for the travelling expenses she incurred on the trip.

Grievant counted her receipts and on June 5, 2018, wrote a check in the amount of \$1,152.56 made payable to the Bank. She placed the check in an envelope and believed it would be mailed to the Bank.¹ A Family Member intercepted the check and removed it from its envelope. The Family Member altered the check by writing the Family Member's name on the check as the payee. The Family Member negotiated the check, deposited the money into the Family Member's account and used the money to benefit the Family Member. Grievant did not know that the Family Member altered the check when it was altered.

On September 18, 2018, Grievant was notified by Ms. B that her statement was 91 to 120 days past due. Grievant did not reply to Ms. B's email.

On October 15, 2018, Ms. F sent Grievant an email notifying Grievant that her Card account was past due as of June 14, 2018 and that "We will take this out of your paycheck if you do not repay by close of business today October 15, 2018." Grievant replied that "the payment of my travel card expenses is not an oversight and that she made payment by check to the Bank on June 5, 2018. Grievant attached a photo of her carbon copy to the check she wrote. The carbon copy was dated June 5, 2018 and showed the Bank name and the amount of the check as \$1,152.56.

On October 22, 2018, Ms. F emailed Grievant and asked for an update. Ms. F said, "we are at a crucial point at how we need to proceed according to policy." Grievant replied that she had contacted the Bank and was awaiting a response.

On November 6, 2018, Ms. F emailed Grievant as a follow-up. On November 13, 2018, Grievant replied that the Bank was still investigating the matter, Ms. F would receive a detailed letter, and that Grievant did not understand what was taking so long. Ms. F wrote Grievant that the investigation was taking far too long and that she would be forced to escalate the matter.

On November 15, 2018, Grievant responded to Ms. F with an apology for the delay and said she had spoken with Barbara and that Grievant had been provided with a reference number of 18195.²

On November 16, 2018, Ms. F asked Grievant to send her a copy of the front and back of the check if payment was made and the check was cashed. Grievant replied that she would check with the Bank to see if that was something she could request online or

¹ Grievant was recovering from surgery and was relying on others to help with tasks such as handling her mail.

² Ms. F called the Bank and provided the number given by Grievant. The Bank did not have any claims under that number. Ms. F was told by Bank staff that the Bank's claim numbers would be nine digit numbers not five digit numbers as provided by Grievant.

in person. Grievant said she would get it to Ms. F as soon as possible. Grievant did not provide a copy of the check to Ms. F.

On November 16, 2018, The Senior Card Account Manager of the Bank sent Grievant an email asking if the check was cashed at the bank and, if so, to send her a copy of the front and back of the check.

On November 26, 2018, Ms. F sent Grievant a follow-up email indicating, "If you do not have them, we will move forward according as outlined in the previous email.

On November 28, 2018, the Supervisor met with Grievant and asked Grievant to "level" with him and tell him what was really going on. Grievant told the Supervisor, "I took care of it" and "I just don't know what is going on." Grievant said that if she paid the bill, it would be "double paying." After that discussion, the Supervisor began to suspect Grievant was not telling him the truth. The Supervisor did not feel comfortable discussing human resource issues with HR staff in front of Grievant.

At the end of November or the beginning of December 2018, Grievant learned that the Family Member altered the check. Grievant was upset and embarrassed by the Family Member's action.

On December 5, 2018, the Supervisor sent Grievant an email, "Please get with your bank and provide the cancelled check today."

On December 5, 2018, Grievant sent the DMV Controller an email indicating that it was "ok for you to set up a payroll deduction for the amount we discussed."

On December 5, 2018, the DMV Controller met with Grievant. Grievant told the DMV Controller that her payment did not post to her account but cleared her checking account. Grievant said she had filed a fraud claim with the Bank.

On December 7, 2018, Grievant met with the Supervisor. Grievant told the Supervisor that someone who worked at the Bank intercepted her check. Grievant said there was bank video of the person who cashed the check and that the person was of Middle Eastern descent.

On December 7, 2018, the Supervisor sent Grievant an email reminding Grievant she was obligated to pay her Card balance in full each month. He asked her for an explanation regarding why she had not complied with policy governing payment of the Card balance. He asked her for any mitigating circumstances she wanted the Agency to consider. The Agency considered this its first due process allegation against Grievant.

On December 12, 2018, Grievant submitted to the Supervisor a "document as my response to your letter of allegation dated December 7, 2018." Grievant wrote that following surgery on May 31, 2018, she asked family members to handle tasks for her

including taking her outgoing mail to her mailbox. She said the check was posted to her account on June 30, 2018 and \$1,152.56 was deducted from her account. Grievant wrote:

Between the dates of 11/29/2018 and 12/3/2018, I discovered, through my bank, that my check [number] for \$1,152.56 was cashed by an individual, not [the Bank]; in fact, the check itself had been altered to make it payable to an individual. I initiated a fraud claim through my bank and must now complete a myriad of claim procedures and criminal complaint procedures to initiate a criminal charge against this individual.³

On December 14, 2018, the Agency deducted \$291.89 from Grievant's paycheck. On December 31, 2018, the Agency deducted \$291.89 from Grievant's paycheck. On January 16, 2019, the Agency deducted \$291.89 from Grievant's paycheck. On February 1, 2019, the Agency deducted \$291.89 from Grievant's paycheck for a total of \$1,167.56.

On January 3, 2019, the Supervisor reminded Grievant that she had not provided a copy of her cancelled check despite being asked for it by numerous people. He said "this matter can be resolved in a matter of minutes if the requested documentation (cancelled check and statement) are provided." He asked Grievant to provide a copy of the check and her bank statement by January 7, 2019.

On January 15, 2019, Mr. A, a human resource division employee, met with Grievant regarding her ongoing refusal to provide documents. Grievant told Mr. A that an African American had cashed the check and that they were reviewing the video to find out the identity of that person. Mr. A sent Grievant an email after the meeting:

I spoke with [name] about your concern with jeopardizing any ongoing investigation. He's free at 2:00 tomorrow afternoon to contact [County] and get their blessing on your sharing information that shows you attempted to comply with policy (e.g. bank statement and check). Please bring your copy of the complaint and the investigator's business card with you to [name] office at 2:00 tomorrow. I can't imagine [County] law enforcement would want to prevent you from sharing information that helps you establish that you followed policy but, assuming there are concerns, hopefully [name] will be able to fully address them.⁴

On January 16, 2019, Grievant sent Mr. A an email stating:

It was my plan to contact the investigator to inquire about sharing documents I had given as evidence when I filed the report; it was not necessary to have [name] contact them on my behalf. However, per the

³ Agency Exhibit 9.

⁴ Agency Exhibit 10.

advice of an attorney, I do not want to compromise the criminal investigation.

On February 8, 2019, the Assistant Commissioner sent Grievant an email:

What we need now is the opportunity to evaluate your explanation of the problem you encountered when you attempted to pay off the travel card balance. Please provide the name of your attorney so we can have our representative from the Office of the Attorney General reach out to him or her. Also, please provide the name of the [County] detective you referenced as working on the case as a result of the criminal complaint you filed. Without the benefit of this information, the potential for serious disciplinary action remains. Please provide these no later than close of business Monday, February 11, 2019.

On February 11, 2019, the Assistant Commissioner contacted the County Police Department and learned that Grievant had not filed a criminal complaint and that there was no criminal investigation by the County.

On March 5, 2019, the Supervisor sent Grievant a second Due Process letter setting forth the Agency's allegations against her. The Supervisor indicated that:

At this point, DMV is losing confidence in the accuracy of your story. If you have information we have requested (copy of the cancelled check, a bank statement, the name of the attorney and the name of the investigator), please provide it to us immediately. Without valid information corroborating your representations about the forgery and criminal investigation, DMV can no longer accept your story as true.⁵

On March 7, 2019, Grievant sent the Supervisor an email and attached a copy of her bank statement showing the check had cleared her account.

On April 8, 2019, Grievant admitted that there was no investigator handling a criminal complaint and that there was no criminal complaint.

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."⁶ Group II offenses "include acts of misconduct of a more serious

⁵ Agency Exhibit 12.

⁶ The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

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 1.60 lists numerous examples of offenses. 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 of this section.”

The Agency’s Employee Code of Conduct requires employees to “[a]ct with honesty and integrity at all times.”⁷

Grievant did not timely pay off the Card balance because a Family Member altered her check to the Bank. The Agency sought an explanation from Grievant and she failed to fully disclose the reason why her account balance had not been paid. Grievant was instructed several times to provide a copy of the check she wrote to verify her claim that she had written a check to the Bank. Grievant failed to comply with those instructions. Grievant made repeated untruthful statements to avoid disclosing to the Agency that a Family Member had altered and cashed her check to the Bank. Grievant did not open a fraud claim with the Bank. Grievant falsely claimed a bank employee of Middle Eastern descent cashed her check. She falsely claimed that an unknown person cashed her check and that they were looking at the video to determine who that person was. At the time Grievant made these statements, she knew her Family Member was the one who altered and cashed the check. Grievant falsely stated that she had initiated a fraud claim. Grievant falsely claimed she contacted a County Police Department to initiate a criminal investigation.

Repeatedly making untruthful statements to an agency’s employees is a Group III offense. Untruthfulness is similar to and consistent with falsifying records which is a Group III offense. Grievant intentionally and repeatedly mislead Agency employees in response to their questions about the overdue travel card account. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, the Agency’s decision to remove Grievant must be upheld.

Grievant argued that the consequences to her should have been limited to deducting from her paychecks the balance owed to the Agency. She argued that her untruthfulness should not form a basis for disciplinary action because her motive was to avoid disclosing that her Family Member had committed a crime. Grievant wanted to avoid disclosing embarrassing information about her Family Member. Grievant’s arguments are understandable. Once the money was deducted from Grievant’s paychecks, the financial damage to the Agency was eliminated. In addition, it is not

⁷ Agency Exhibit 19.

surprising that an employee would want to protect a Family Member and not disclose negative information about a Family Member. The Agency considered Grievant's motivation and concluded that because she was a person holding a position of trust within the Agency that it had to expect truthfulness at all times regardless of any motive to be untruthful. The Agency notified Grievant of its zero tolerance for untruthfulness. It is within the Agency's discretion as to whether to disregard Grievant's motive for being untruthful. The Agency did not abuse its discretion. The Agency cannot reverse the Agency's decision unless it exceeds the limits of reasonableness. This is not the case.

Grievant argued that she was not notified when the Agency began its investigation. There is no DHRM policy requiring the Agency to notify Grievant of its investigation prior to beginning the investigation.

Grievant argued that the Agency took disciplinary action against her because of her race and in retaliation because she was involved in inviting a controversial speaker to an event held at one of the Agency's facilities and attended by Agency employees. The Agency planned a celebration in February 2019 to honor the life of a historically significant local person. A speaker made comments about an elected official that caused some of the DMV audience to walk out of the meeting. Grievant felt that the meeting was attended by an excessive number of security employees and she believed it was because of her race and the topic being discussed. The Supervisor testified that he and Agency managers did not take disciplinary action against Grievant because of her race or gender. The most reliable evidence was the Supervisor's credible testimony that the Agency did not take disciplinary action against Grievant because of her race or gender. The Supervisor added that he and everyone else loved working with Grievant. It appears that the Agency took disciplinary action against Grievant because its managers believed she was untruthful.

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"⁸ 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 that the Agency inconsistently applied disciplinary action. Grievant presented evidence relating to two other employees who were investigated

⁸ Va. Code § 2.2-3005.

regarding their use of a Travel Credit Card. The Written Notices for these employees showed that they were not similarly situated with Grievant. These other employees received disciplinary action that included the reason of carrying balances on their travel credit cards. Grievant was disciplined at the level of a Group III Written Notice with removal for lying. The other employees were not disciplined for being untruthful. In light of the standard set forth in the Rules, 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 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]

^[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