



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11394 / 11395 / 11396 / 11397 / 11398

Hearing Date: October 11, 2019

Decision Issued: October 31, 2019

PROCEDURAL HISTORY

On June 10, 2019, Grievant was issued a Group III Written Notice of disciplinary action with removal for neglect of duty. On June 10, 2019, Grievant was issued a Group III Written Notice with removal for violation of the Civility in the Workplace policy. On June 10, 2019, Grievant was issued a Group III Written Notice of disciplinary action for violation of DPOR Code of Ethics. On June 10, 2019, Grievant was issued a Group II Written Notice with removal for failure to follow a VITA Policy for Procuring and Managing IT Contingent Workers. On June 10, 2019, Grievant was issued a Group II Written Notice for violation of a VITA Policy for Procuring and Managing IT Contingent Workers.

Grievant timely filed grievances to challenge the Agency's actions. The matter advanced to hearing. On July 15, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 11, 2019, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Counsel
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notices?
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 Professions and Occupations employed Grievant as an IT Director. No evidence of prior active disciplinary action was introduced during the hearing.

The Agency hired Grievant in October 2017. She began supervising the Unit which consisted of approximately six employees.¹ Four of the employees were in the Unit when she began working in her position and she hired two additional employees. The existing employees included Employee 4 and Employee 3. Employee 4 was interim unit director prior to Grievant's selection for the position. Grievant also selected a Contingent Worker who served as a Database Administrator but was not an Agency employee.

The Former Agency Head told Grievant in October 2017 to "clean up" the Unit. The Former Agency Head felt a great deal of frustration with several Unit employees.

¹ Employees are numbered consistent with the number used by the Agency as part of its investigation.

For example, when he asked Employee 4 to reconfigure his laptop to better accommodate his needs, Employee 4 said “no, this is the way I do it” even though Employee 4 reported to the Former Agency Head. On another occasion, the Former Agency Head had a problem with his laptop software and took it to Employee 4 and asked Employee 4 to repair the laptop. When the Former Agency Head went to retrieve his laptop, Employee 4 could not find it. Employee 4 had given the laptop to another employee to use. The Former Agency Head described the attitude of several Unit employees as “passive-aggressive.” The Former Agency Head told Grievant when she was hired that she had a tough job but he expected she would be able to fix it. He did not tell Grievant she could violate the Standards of Conduct to correct the Unit.

The Former Agency Head spoke often about the problem of bullying and that employees should not have a fear of coming to work.

At Grievant’s direction, the Contingent Worker participated in an employee panel interviewing candidates for a position with the Unit. He served as a subject matter expert. He advised the panel whether candidates had correctly answered questions about databases and understood the relationship between an application and a database.

Grievant formed a close working relationship with the Contingent Worker. When Grievant was not at work, the Contingent Worker acted like he was in charge of the Unit. It is not clear whether Grievant was aware of how the Contingent Worker behaved when she was away from the office.

Grievant treated her subordinates differently. Grievant’s actions “morphed” the Unit into old employees and new employees.

Grievant told Employee 4 that Employee 3 did not know what she was doing and was not qualified for her job. Employee 3 learned of the comment and was upset by the comment. Employee 3 began looking for other jobs because she did not want to work under Grievant. Grievant sometimes used a demeaning tone when she spoke about Employee 3 in front of another employees.

Grievant would “take digs” at Employee 4. When Employee 4 tried to express an opinion, Grievant would “shut him down.” When they were discussing projects, Employee 4 would sometimes ask if he could do anything and Grievant quickly said “No”.

Grievant denied Employee 3’s request to renew a “soft token” so that Employee 3 could telecommute. Grievant denied Employee 3’s request for approximately seven months without explaining her reasoning to Employee 3. Grievant allowed other employees to obtain soft tokens and telecommute within a short period of time.

When Grievant met with employees, she would sometimes abruptly stop them from speaking by raising her hand with her palm out in a “stop” gesture. She would stop

the employees from speaking while they were in the middle of expressing their ideas. Several employees found this frustrating and believed it occurred too often. When Employee 3 told Grievant her gesture was rude, Grievant replied that she did it to Employee 4 all the time. Employee 2 also found Grievant's "stop" gesture to be rude. Grievant used this gesture regularly from October 2017 to June 2019, according to Employee 2.

Employee 4's step-father passed and Employee 4 was upset. Employee 3 and Grievant were walking towards the break room and Employee 3 said she was worried about Employee 4. Employee 3 told Grievant Employee 4's wife had health issues and his step-father had died. Grievant replied that Employee 4 was upset because Grievant got the Unit Director position and Employee 4 was making himself sick. Employee 3 was offended by Grievant's comment.

When Grievant first joined the Unit, she had a meeting that included Employee 4, Employee 3 and several other employees. Grievant said to Employee 4 "so you are the one who wanted my job". The other employees overheard Grievant's comment. Employee 2 heard Grievant several times "joking" that Employee 4 made himself sick since he did not get Grievant's job.

Employee 3 needed to be absent from work. Employee 3 told Grievant she was going to court to assist her niece. Employee 3 did not expect Grievant to tell anyone else why Employee 3 was absent from work. Grievant later told Ms. S that Employee 3 had left for the day and had a court custody matter going on with Employee 3's sister and niece. Employee 2 also overheard Grievant's comment about Employee 3. Employee 3 was surprised that Grievant had disclosed what Employee 3 considered to be a private matter.

Employee 4, Employee 3, and Employee 2 met with Mr. Q to vent their frustrations with Grievant. Some of the employees were tearful when describing how Grievant had treated them. Mr. Q would hear comments about "I can't do anything right" or everyone is "walking on eggshells" around Grievant.

On one occasion, Grievant suggested Employee 4 might be just a "glorified help desk clerk." Employee 4 was offended by Grievant's comment.

Grievant told Employee 4 that Employee 3 could not do her job. Employee 4 said that Employee 3 could do her job and had been doing it for over a year.

Employee 4 developed an ulcer and had to be hospitalized. During a meeting in November 2018, one employee asked Employee 4 how he was feeling. Employee 4 said he was feeling better and had had an ulcer. Grievant heard Employee 4's comment and then said aloud, "I probably gave him that ulcer." Grievant was trying to be funny but offended Employee 4 in front of other employees.

Employee 4 did not authorize Grievant to tell other employees about his health status.

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.”² 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.”

Failure to follow policy is a Group II offense.³

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.”

Group III Written Notice – Neglect of Duty

The Agency did not establish that Grievant neglected her duties as a Director. She performed her duties on a daily basis but did not do so adequately. Her failure to adequately perform her duties is not a neglect of duty.

Group III Written Notice – Civility in the Workplace

DHRM Policy 2.35 governs Civility in the Workplace. This policy provides:

It is the policy of the Commonwealth to foster a culture that demonstrates the principles of civility, diversity, inclusion, and equity. In keeping with this commitment, workplace harassment (including sexual harassment), bullying (including cyber-bullying), and workplace violence of any kind are prohibited in state government agencies. ***

The purpose of this policy is to ensure that agencies provide a welcoming, safe, and civil workplace for their employees, customers, clients, contract workers, volunteers, and other third parties and to increase awareness of

² The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

³ See, Attachment A, DHRM Policy 1.60.

all employees' responsibility to conduct themselves in a manner that cultivates mutual respect, inclusion, and a healthy work environment

Section A(1) provides:

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.

Section C(1) states:

Any employee who engages in conduct prohibited under this policy or who encourages or ignores such conduct by others shall be subject to corrective action, up to and including termination, under Policy 1.60, Standards of Conduct.

Grievant violated DHRM Policy 2.35 by undermining team cohesion, staff morale, and employee self-worth. Grievant treated old employees differently from how she treated new employees she hired. Grievant undermined staff morale by discussing Employee 4's private medical matters and Employee 3's private court proceedings. Grievant inappropriately confronted Employee 4 in front of other employees as the one who wanted her job. Grievant mocked the seriousness of Employee 4's medical condition by saying as a joke that she probably caused his ulcer. Grievant undermined Employee 3's self-worth by telling other employees that Employee 3 could not do her job. Grievant frequently undermined the self-worth of employees by using a "stop" gesture to cut them off in the middle of their statements.

Violation of DHRM Policy 2.35 can be a Group I, Group II, or Group III offense depending on the circumstances of the case. In this case, 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, Grievant's removal must be upheld.

Grievant argued she was instructed by the Former Agency Head to clean up the Unit and she was acting consistently with that directive. Although Grievant's objective may have been to clean up the Unit as directed, her method of doing so was not appropriate. The Former Agency Head did not authorize Grievant to violate the Civility in the Workplace policy.

Group III Written Notice – Violation of Code of Ethics

The Agency's Code of Conduct requires Agency employees to:

Treat all persons in an evenhanded, respectful and courteous manner.

This requirement is not materially different from the expectations required under DHRM Policy 2.35. The facts giving rise to this Written Notice are not materially different from the facts giving rise to the Group III Written Notice for violation of the Civility in the Workplace policy. Violation of a policy such as a Code of Ethics is typically a Group II offense, not a Group III offense. The Agency, in essence, has issued two written notices for the same facts and same performance expectations. Accordingly, this Group III Written Notice for violation of the Code of Ethics is reversed because it is redundant.

Group II Written Notice – Violation of VITA Policy

The Agency alleged that Grievant permitted the Contingent Worker to serve in a managerial capacity through his monitoring and reporting of employee attendance and activity when Grievant was not in the office. The Agency has established that the Contingent Worker acted as a supervisor by monitoring employees when Grievant was not in the office. What the Agency has not established is that he did so at Grievant's direction. It is not clear that Grievant was aware of the Contingent Worker's behavior when she was not at work or that she consented to it. The Agency has not presented sufficient evidence to support this Written Notice because the Agency did not establish that the Contingent Worker's actions were at Grievant's direction. The Written Notice must be reversed.

Group II Written Notice – Violation of VITA Policy

VITA Policy for Procuring and Managing IT Contingent Workers provides guidelines for procuring information technology staff and consulting service through the IT Contingent Labor Contract. Section XIV(H) provides:

Authorized Users should insure that Contingent Workers do not:

Participate in any way in processes related to hiring or termination of an employee or Contingent Worker.

Grievant instructed the Contract Worker to serve as a subject matter expert and assist a hiring panel who was interviewing candidates for an open position with the Unit. Grievant's instruction was contrary to policy thereby justifying the Agency's decision to issue a Group II Written Notice.

Grievant argued she was not aware of that VITA policy provision. Although this may be true, Grievant was obligated to be aware of the policy as part of her duties when selecting the Contingent Worker.

Mitigation

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 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 further the disciplinary actions.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group III Written Notice of disciplinary action for neglect of duty is **rescinded**. The Agency’s issuance to the Grievant of a Group III Written Notice of disciplinary action with removal for violating the Civility in the Workplace policy is **upheld**. The Agency’s issuance to the Grievant of a Group III Written Notice of disciplinary action for violating the Agency’s Code of Ethics is **rescinded**. The Agency’s issuance to the Grievant of a Group II Written Notice for violation of a VITA Policy by permitting a Contingent Worker to serve in a managerial capacity is **rescinded**. The Agency’s issuance to the Grievant of a Group II Written Notice of disciplinary action for violation of a VITA Policy by permitting a Contingent Worker to assist with job hiring is **upheld**. The Agency’s decision to remove Grievant from employment 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

⁴ Va. Code § 2.2-3005.

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.