



# ***COMMONWEALTH of VIRGINIA***

## ***Department of Human Resource Management***

### **OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

#### **DECISION OF HEARING OFFICER**

In re:

**Case Number: 11402**

Hearing Date: October 15, 2019  
Decision Issued: November 4, 2019

#### **PROCEDURAL HISTORY**

On May 24, 2019, Grievant was issued a Group III Written Notice of disciplinary action with removal for unsatisfactory performance, failure to follow the Workplace Civility policy, disruptive behavior, and insubordination.

On June 27, 2019, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On July 16, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 15, 2019, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
Grievant's Representatives  
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 Virginia Community College System employed Grievant as a Fiscal Technician at one of its locations.

Grievant has bipolar type II disorder. In July 2018, Grievant told the Manager she had a disability. He advised Grievant to discuss her disability with the Human Resource department.

Grievant sometimes had difficulty interacting with students, parents, and co-workers. She would become angry and display her anger through outbursts directed at others. She would sometimes abruptly hang up the telephone on customers to whom she was expected to render quality customer service. Some students would wait in another employee's service line to avoid interacting with Grievant. Some employees sometimes preferred not to work with Grievant.

Grievant had prior active disciplinary action. On September 21, 2018, Grievant received a Group I Written Notice for failure to provide courteous customer service to students and customers and for insubordination.

On January 17, 2019, Grievant was providing services to students seeking assistance with financial matters. A student called Grievant seeking assistance.

Grievant became upset based on her interaction with the student. Grievant abruptly hung up the telephone.

The Supervisor asked Grievant if Grievant hung up on the student. Grievant said “yes”. The Supervisor said “why didn’t you let me talk to the student”. Grievant had been previously instructed to let the Supervisor speak with students Grievant considered to be difficult callers.

Grievant called the local Police Department. Grievant was redirected to the Campus Police Department.

Grievant said in a screaming voice to office staff “that when someone comes to the office with a gun and shoots us we will all deserve it!” Several staff in the office as well as students heard Grievant’s statement. Ms. M heard Grievant’s statement and became upset.

Ms. M later called the Manager and said she questioned whether she wanted to come to work after hearing Grievant’s outburst.

At approximately 5 p.m. on January 17, 2019, Ms. M sent the Manager an email:

After careful consideration and speaking with my husband about what ensued today at the office between [Grievant] and a student or parent, I want to express my concerns. In [Grievant’s] screaming voice she told [Ms. S] “that when someone comes to the office with a gun and shoots us all we will deserve it!” That was heard by everyone in the office as well as students at the counters. The statement made me extremely uncomfortable not only for my safety but that of everyone else in the office. [Grievant] has her issues which she needs to deal with but when I hear something like this, it makes me very apprehensive and very concerned.<sup>1</sup>

On February 19, 2019, the Manager sent Grievant an email stating:

As a follow up to our call, both the EEO (discrimination complaints) and ADA (Disability Accommodations) fall under our Office of Fair Practices [web link]. The contact person for EEO is [name] and the ADA contact is [name].

Grievant did not seek an ADA accommodation for her disability.

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<sup>1</sup> Agency Exhibit 6.

On March 14, 2019, Grievant received a Development Plan<sup>2</sup> due to her overall rating of Below Contributor on her 2018 Annual Evaluation. She was advised:

You must immediately correct your verbal and written communications with customers, other employees, and your supervisor. Yelling, displaying aggressive behavior, being disrespectful, appearing/becoming combative or argumentative is not acceptable behavior and will not be tolerated.

You are responsible for the consistent, efficient, and professional interaction with all students, co-workers and your supervisor, as it relates to student financial account information. All verbal and written communication should be handled in a calm, professional, friendly, and efficient manner, with the understanding that this position deals with a diverse community, which means each customer situation is considered “unique”.

Your customer service interactions need to be viewed as a positive experience for the customer. This includes being pleasant with others on the job, displaying a cooperative attitude, exhibiting patience. Exhibiting patience means, maintaining your composure through difficult interactions, displaying a calming presence to the customer; showing empathy to their situation and a strong willingness to work with them to reach a positive resolution. When the customer interaction is complete, the customer should have been treated in a respectful manner and received all of the information they were seeking, or have the tools and knowledge of how to resolve the issue.

In addition, you need to be open to constructive criticism and feedback from your supervisor when performance concerns are being addressed.<sup>3</sup>

Grievant continued to have poor communication with her Supervisor and the Agency elected to issue disciplinary action instead of waiting for Grievant to complete the Development Plan.

### **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

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<sup>2</sup> The Agency failed to issue the Development Plan within a reasonable period following the issuance of Grievant’s annual evaluation. The Agency’s failure to comply with policy does not affect the outcome of this case.

<sup>3</sup> Agency Exhibit 5.

disciplinary action.”<sup>4</sup> 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:

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

Section A(1) states:

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.

Workplace violence is defined as:

Any physical assault, threatening behavior, or verbal abuse occurring in the workplace by employees or third parties. Threatening behaviors create a reasonable fear of injury to another person or damage to property or subject another individual to extreme emotional distress.

On January 17, 2019, Grievant screamed so that her co-workers could hear “that when someone comes to the office with a gun and shoots us we will all deserve it!” Grievant scared at least one co-worker into believing her workplace was no longer safe. Ms. M became apprehensive about coming to work. Grievant’s statement was contrary to the Civility in the Workplace policy and rises to the level of a Group III offense. The Agency has presented sufficient evidence to support the issuance of a Group III Written

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<sup>4</sup> The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

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 the Agency established a Development Plan and should have permitted Grievant to complete the Development Plan without taking disciplinary action. Grievant did not present any policy requiring the Agency to complete the Development Plan prior to taking disciplinary action. The Agency was free to disregard the Development Plan and implement disciplinary action.

Grievant argued she was experiencing a mental health crisis that resulted in the behavior giving rise to disciplinary action. Grievant did not testify during the hearing. Grievant was notified she could contact the Agency's ADA coordinator prior to the issuance of the disciplinary action. Grievant took no action to seek a reasonable accommodation that might have assured the Agency that she would be capable of meeting the Agency's customer service expectations.

Grievant argued the Agency removed her for excessive absences that were excused by FMLA leave. Although the Agency's Written Notice refers to insubordination (that related to attendance), it also referred to poor customer service and the Agency's due process notice refers to violation of DHRM Policy 2.35 and the Agency's Code of Ethics. The Agency adequately informed Grievant of the allegations against her.

*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 ...."<sup>5</sup> 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.

## 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**.

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<sup>5</sup> Va. Code § 2.2-3005.

## 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 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto: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.<sup>[1]</sup>

[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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>[1]</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.