



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11417

Hearing Date: November 20, 2019

Decision Issued: December 10, 2019

PROCEDURAL HISTORY

On July 17, 2019, Grievant was issued a Group II Written Notice of disciplinary action with a five workday suspension for violation of the Civility in the Workplace policy.

On July 26, 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 she requested a hearing. On September 10, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 20, 2019, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Representative
Agency 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 Social Services employs Grievant as a Budget Manager. Grievant began reporting to the Manager in June 2016. No evidence of prior active disciplinary action was introduced during the hearing. Part of Grievant's job duties included making sure salary increases were "in line."

Grievant was reviewing a spreadsheet showing salary increases for approximately 193 employees. One of those employees received an additional salary increase. Grievant had questions regarding the appropriateness of this additional salary increase. She was aware of a directive that employees should not receive additional salaries until after the fiscal year.

On or about June 24, 2019, the Manager was in her office seated behind her desk. When the Manager was looking forward while seated at her desk the door to her office would be in front of her and slightly to her right. The Manager's door was open.

Grievant came to the Manager's office. Grievant asked about the salary increase for Ms. D. Grievant asked if Ms. D's salary was correct. The Manager said, "Yes it is correct." The Manager asked Grievant to sit and to close the office door. Grievant continued to stand. The Manager got up from her seat and closed the office door. Grievant asked "Why did Ms. D get a raise?" Grievant asked, "What did she do to get a

raise?; I didn't get a raise!" Grievant asked, "Does anyone know what I am doing around here?"

The Manager said, "In the essence of transparency; I will share with you and all of the salaries are 'foiable' and right now you don't have the authority to question why she got a salary increase." The Manager asked Grievant to stop raising her voice.

The Manager said, "I am sharing with you, but as Associate Director, I am not obligated to explain why someone got a raise."

Grievant continued to talk loudly. While the Manager was seated, Grievant put her hand in the Manager's face. Grievant's hand was within 18 inches of the Manager's face. Grievant's used her hand as if the hand was a mouth talking. Grievant said, "You are still talking!" Grievant said, "You went behind my back and processed the work. Who did this!" The Manager said, "Please stop."

The Manager stood up as Grievant was holding onto the office door. The Manager said, "Please let's talk about this civilly." Grievant opened the door and said to the Manager, "you went behind my back; you wait and see what I do."

The Manager said, "Please stop. Do you want to go to the division director to talk about it." Grievant said, "No". The Manager said, "What about HR?" Grievant said, "HR won't do." Grievant said, "Wait until you see what I do; you reap what you sow."

The Manager felt threatened when Grievant had her hand in the Manager's face. The Manager had to stand up in response. The Manager felt threatened by Grievant's statements suggesting consequences. The Manager thought about a recent shooting where an employee returned to his work place and killed people. The Manager reported Grievant's threat to agency managers.

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."

DHRM Policy 2.35 governs Civility in the Workplace. The policy states:

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

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.

Section A(1) provides:

The Commonwealth strictly forbids ... bullying behaviors, and threatening or violent behaviors of employees ... in the workplace. Behaviors that undermine team cohesion, staff morale, individual self-worth, productivity, and safety are not acceptable.

On June 24, 2019, Grievant engaged in threatening behavior directed at the Manager. Grievant undermined the Manager's feeling of safety in the workplace. Grievant spoke loudly to the Manager. Grievant entered the Manager's personal space by placing her hand close to the Manager's face and pretending her hand was talking. Grievant then specified uncertain consequences to the Manager such as wait and see what I do and you reap what you sow. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for violation of Policy 2.35. Upon the issuance of a Group II Written Notice, an agency may suspend an employee for up to ten workdays. Accordingly, Grievant's five workday suspension must be upheld.

Grievant denied making the threatening statements. She denied raising her voice. Grievant did not identify any motivation or explanation of why the Manager would create false allegations against Grievant. The Manager's testimony was credible. The Agency has presented sufficient evidence to support the disciplinary action.

Grievant asserted the Manager did not actually feel threatened because the Manager was willing to meet with Grievant privately after the incident. It is not necessary for the Agency to show that Grievant intended to carry out her threat or that her threat was ongoing. The Agency established that on June 24, 2019, Grievant threatened the Manager.

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

² Va. Code § 2.2-3005.

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 II Written Notice of disciplinary action with a five workday suspension 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