



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11427

Hearing Date: January 24, 2020
Decision Issued: March 10, 2020

PROCEDURAL HISTORY

On August 19, 2019, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow a supervisor's instructions. On August 19, 2019, Grievant received a second Group II Written Notice of disciplinary action for unauthorized use of State property or records. On August 19, 2019, Grievant was issued a Group III Written Notice of disciplinary action for violating DHRM Policy 2.5 governing Civility in the Workplace.

On September 5, 2019, Grievant timely filed a grievance to challenge the Agency's actions. The matters advanced to hearing. On September 23, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 24, 2020, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Representative
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 Corrections employed Grievant as a Personnel Assistant at one of its facilities.

Grievant's schedule included a one-half hour lunch break. She could begin her lunch break anytime between 11:30 a.m. and 1:30 p.m. Grievant was allowed to make personal telephone calls during her lunch break.

Most of Grievant's duties involved processing payroll documents and completing human resource paperwork. Approximately ten percent of her time was to be devoted to making telephone calls.

Grievant had tax records returned because the employee was no longer at the address reflected in the Agency's records. Grievant was supposed to determine if a new address existed and if so, resend the document. If she could not find a new address, then

Grievant was supposed to file the form in the employee's file. Grievant had not filed numerous employee tax documents that were returned to the Agency in 2016.

The HRO found numerous documents unfiled by Grievant. The documents were dated from 2018 and 2017. The documents included tax forms and direct deposit forms.

The HRO testified that on December 18, 2018, she met with Grievant and told Grievant she had to file documents within two weeks of receipt.

In April 2019, Grievant went on leave. The HRO reviewed the items in Grievant's office and determined that Grievant had not filed all of the required documents. The HRO observed several payroll checks that were received on March 29, 2019. Grievant had not contacted the employees to ask them to come to the office to pick up their checks. The HRO contacted the employees and arranged for them to receive their checks.

In October 2018, the HRO observed that Grievant was on the phone "all the time". She met with the Warden who told her to review telephone call logs. The HRO told Grievant she should only be making a minimum of personal calls since the phone was supposed to be for business use.

In February 2019, Grievant attended a staff meeting during which the HRO told staff that the telephones should be used for State business only and employees could occasionally make outside calls.

In January 2019, Grievant and the Lieutenant began a romantic relationship.¹ The relationship ended in the beginning of April 2019.

On April 16, 2019, Grievant sent the Lieutenant an email from her personal email account:

People treat animals better than u have treated me at least they will feed them. You are unbelievable and pathetic and I don't want you. You can take that pasta salad and you know what you can do with it. I hate I loved you and I should have listened to the people that said you were crazy and not worth my time. Karma!

In April 2019, the Lieutenant told the HRO "that woman is crazy." He was referring to Grievant. He told the HRO that Grievant was stalking him.

On May 13, 2019, the Lieutenant sent the HRO² an email:

¹ The relationship was properly disclosed to the Agency.

² The HRO asked the Lieutenant to send her this email.

This statement is in regards to harassing statements and unprofessional demeanor that has been displayed by [Grievant]. Since the demise of a relationship with [Grievant] she has made numerous degrading statements towards me and [Ms. T]. These messages were sent through text, Facebook messenger, face book news feed, work email and personal email. The messages sent to my personal phone were very direct and vulgar in nature. *** [Grievant] also has used her personal email account to send me an inappropriate email through my DOC email address. Also during this duration, she has been to my residence to confront me due to rumors she heard in regards to [Ms. T] and myself. Fortunately, I wasn't home. She stated to me that she was HR and she was going to get me one way or another. [Grievant] also made inappropriate statements and sent very degrading messages regarding [Ms. T]. She stated again that she³ [is] HR, I know where she⁴ lives, I'll get you both. Supporting documents have been attached to this report.⁵

The Lieutenant testified that "emotions were high" but he did not feel threatened by Grievant's statements.

In July 2019, the Lieutenant ended his relationship with Ms. T and resumed his relationship with Grievant.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three groups, according to the severity of the behavior. Group I offenses "include types of behavior less severe in nature, but [which] require correction in the interest of maintaining a productive and well-managed work force."⁶ Group II offenses "include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal."⁷ Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."⁸

Group II – Failure to Follow Instruction

³ "she" refers to Grievant.

⁴ "she" refers to Ms. T.

⁵ Agency Exhibit 12.

⁶ Virginia Department of Corrections Operating Procedure 135.1(VI)(B).

⁷ Virginia Department of Corrections Operating Procedure 135.1(VI)(C).

⁸ Virginia Department of Corrections Operating Procedure 135.1(VI)(D).

“[I]nadequate or unsatisfactory job performance” is a Group I offense.⁹ In order to prove inadequate or unsatisfactory job performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

Grievant’s work duties included filing documents in employees’ folders. The Agency inspected Grievant’s work area and discovered she had not filed numerous employee documents including documents created in 2017, 2018, and 2019. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice for unsatisfactory work performance.

The Agency alleged Grievant should receive a Group II Written Notice for failure to follow a supervisor’s instruction. The Agency did not establish the nature of the instruction Grievant was supposed to have violated. The HRO testified she held a meeting with Grievant, Grievant’s immediate Supervisor, and other employees. The HRO testified she instructed Grievant to complete future document filings within two weeks. Grievant’s Supervisor testified the instruction was for Grievant to file within two weeks any existing documents that had not been filed. In other words, the HRO testimony’s related to an instruction about future filings while the Supervisor’s instruction related to prior filings. The HRO did not send Grievant an email or memorandum documenting her instruction. A Group II Written Notice is not supported by the evidence because it is unclear what instruction was given.

Group II – Misuse of State Property

The Agency alleged Grievant had unauthorized use or misuse of State property because Grievant made personal calls using her State owns telephones. The Agency claimed Grievant was to keep personal calls to a minimum and that “[h]ours of calls do not meet the definition of minimum.” The Agency claimed Grievant “used your state telephone as if it was a personal home telephone.”

The Agency’s evidence is not sufficient to establish disciplinary action. The Agency presented Grievant’s telephone log from February 1, 2019 through April 17, 2019. Grievant’s duties included making and receiving telephone calls. Not all of Grievant’s telephone calls were personal. The Agency presented evidence that the HRO reviewed Grievant’s outgoing and incoming telephone calls to determine which calls were personal in nature. The Agency, however, failed to provide any summary assessments of the number and duration of personal calls. For example, the Agency failed to calculate the total time each day devoted to personal telephone calls. The Agency failed to compare the total personal with the total business telephone calls each day. The Agency failed to identify which days Grievant made “hours of calls.” The Agency failed to account for personal calls made during Grievant’s lunch or other breaks. On February 1, 2019, for example, Grievant had 30 calls. Ten of the calls were incoming. The Agency asserted that 12 of the calls were personal. The personal incoming and outgoing telephone calls

⁹ Virginia Department of Corrections Operating Procedure 135.1(V)(B)(4).

amounted to 24 minutes and 14 seconds. This amount of time does not exceed the amount of time allowed for lunch and other breaks. This amount of time is clearly not “hours of calls” or an example of using the Agency’s phone “as if it was a personal home telephone.” The Agency’s Group II Written Notice with a five workday suspension must be reversed.

Group III – Civility in the Workplace

DHRM Policy 2.35 governs Civility in the Workplace. 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) provides:

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.

Bullying is defined to include:

Disrespectful, intimidating, aggressive and unwanted behavior toward a person that is intended to force the person to do what one wants, or to denigrate or marginalize the targeted person. The behavior may involve a real or perceived power imbalance between the aggressor and the targeted person. The behavior typically is severe or pervasive and persistent, creating a hostile work environment.

Group III offenses include, “[v]iolation of DHRM Policy 2.35 Civility in the Workplace ... depending on the nature of the violation.”¹⁰ Grievant told the Lieutenant “she was HR and she was going to get me one way or another.” Grievant told the Lieutenant, “that she¹¹ [is] HR, I know where she¹² lives, I’ll get you both.” Grievant expressed that she held a position of power over the Lieutenant (she was HR) and threatened, “I’ll get you both.” Grievant’s threat was sufficiently severe to establish a hostile work environment for the Lieutenant. In response to Grievant’s statements, the Lieutenant reported his concerns to the HRO. The Agency has presented sufficient

¹⁰ Operating Procedure 135.1(V)(E)(2)(s).

¹¹ “she” refers to Grievant.

¹² “she” refers to Ms. T.

evidence to support the issuance of a Group III Written Notice for violation of DHRM Policy 2.35. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, the Agency's decision to remove Grievant is upheld.

The Lieutenant may not have felt threatened by Grievant's comments, but he clearly was concerned about what actions Grievant might take against him. His concern motivated him to report Grievant's behavior to the HRO.

Grievant asserted she did not actually intend to threaten or harm the Lieutenant and that the comments were made in the context of a personal relationship. Although the Hearing Officer does not believe Grievant intended to carry out her threat against the Lieutenant, it is not necessary for the Agency to show that Grievant actually used her position of power to affect the Lieutenant.

Additional Defense

Grievant argued that the Agency failed to provide her with due process because the Agency failed to provide her with a due process meeting prior to her removal. Any defect in the Agency's procedural due process is cured by the hearing process. Grievant could have submitted any evidence or arguments during the grievance hearing that she could have submitted to the Agency prior to her removal.

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"¹³ 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.

¹³ *Va. Code § 2.2-3005.*

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action for failure to follow instructions is **reduced** to a Group I Written Notice.

The Agency's issuance to the Grievant of a Group II Written Notice with a five workday suspension for failure to follow instructions is **rescinded**. The Agency is directed to provide the Grievant with **back pay** during the period of suspension. The Agency is directed to provide **back benefits** including health insurance and credit for leave and seniority that the employee did not otherwise accrue during the period of suspension.

The Agency's issuance to the Grievant of a Group III Written Notice with removal for violating DHRM Policy 2.35 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