COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11448

Hearing Date: June 3, 2020
Decision Issued: June 23, 2020

PROCEDURAL HISTORY

On September 12, 2019, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow instructions.

On September 29, 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 November 19, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 3, 2020, a hearing was held by audio conference.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's Counsel
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 employs Grievant as an Ombudsman Services Manager. She has been employed by the Agency for approximately 22 years. No evidence of prior active disciplinary action was introduced during the hearing.

The Supervisor began supervising Grievant in March 2019 as the result of an Agency reorganization.

On March 19, 2019, Grievant sent an email to staff with a copy to the Supervisor regarding signing a logbook. The Supervisor sent Grievant an email stating, in part:

> In the future, let's discuss these before you send them out. *** I need to be part of the conversation before something changing a current practice or procedure is formally put to paper and sent out.[1]

The Agency wanted to hire an Ombudsman position that would report directly to Grievant. Grievant was the "hiring manager." The Agency expected there to be two rounds of interviews before a candidate was selected.

[1] Agency Exhibit p. 5.

Grievant had been involved in hiring employees on several prior occasions. Without knowing the Supervisor wanted to be closely involved in the hiring process, Grievant followed the practice that she had followed previously. An HR employee, Ms. C, screened the 13 applicants for the position and told Grievant she could send Grievant "either 5 or 13 applicants."[2] Grievant selected five candidates for the first interview. She scheduled the interviews for August 19, 2019. The Supervisor sent Grievant an email on August 14, 2019 indicating:

> I don't know what needs to be done to halt this process but you'll need to call the 5 back to cancel the interviews on the 19th. Additionally, please let [name] know we will be submitting replacement questions. Thereafter, we will decide who we will interview, who will be on the interview panel, when the interviews will be conducted, and where. These types of things must be approved by me before you move forward on them. We can discuss further tomorrow, if need be.[3]

On August 20, 2019, Grievant sent the Supervisor an email with the names of 13 candidates to be interviewed by a panel of three employees. Grievant was not on the first panel.

Grievant attempted to speak with the Supervisor "as to the direction for the interviews schedule[d] for August, 2019 and thirteen (13) applicant's notification." Because she could not reach the Supervisor by telephone, she sent him an email asking him to call her. The Supervisor responded, "Let's just interview all at 30 minutes each. Make sure everyone can interview on the 27th and then please let HR know."[4]

Eleven questions were listed for the Regional Ombudsman position. Grievant took five of the eleven questions to be used in the first round of interviews. She added a sixth question, "Do you have any questions for the panel?"

Grievant used five remaining questions for the second round of questions. She added, "Do you have any questions for the panel?" She omitted the question, "What do you hope to accomplish your first 90 days in this position?"

CONCLUSIONS OF POLICY

In order to establish that an employee should receive a Group II Written Notice for failure to follow instructions, an agency should show that a clear and detailed instruction describing a task to be performed and that an employee failed to comply with that instruction.

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[2] Grievant Exhibit 112.

[3] Agency Exhibit p. 12.

[4] Agency Exhibit p. 15.

In this case, some of the Supervisor's instructions amounted to instructing Grievant to communicate better with the Supervisor. Such an instruction would be aspirational in nature and not provide Grievant with adequate guidance as to how she was expected to comply with the instruction. Grievant had numerous tasks to perform as part of her position. She could not be expected to "read the mind" of the Supervisor to know how she was to perform each task and when she must incorporate the Supervisor into that task. Only if the Supervisor expressly stated that Grievant was to incorporate him into one of her assigned tasks, would Grievant be expected to do so.

For example, the Agency asserted the Supervisor instructed Grievant "on the need to communicate issues affecting the Administrative Compliance Unit before they are acted upon." Such an instruction did not provide Grievant with sufficient details to determine what issues the Supervisor was concerned about. The Supervisor left it to Grievant to guess what the Supervisor considered significant enough to be issues affecting the Administrative Compliance Unit.

The Agency did not establish that Grievant failed to comply with several instructions. For example, the Supervisor "instructed [Grievant] that when she meets with other units regarding the offender grievance process or procedure, any potential outcomes or directives affecting this unit need to be vetted by myself and, potentially, the Unit Head before they are decided upon." The Agency did not present sufficient evidence to show that Grievant failed to comply with this instruction after it was given.

The Supervisor asserted, "[Grievant] acted unilaterally in her selection, notification, and scheduling of staff interviews for the Regional Ombudsman Position, and thereafter, in her drafting and submitting of interview questions not approved by the appointment authority, she again failed to follow my instructions …." Grievant was the hiring manager and was relying on her prior experience to complete selecting of a new employee. If the Supervisor wished to be involved in that process, he should have informed Grievant at the time Grievant was advised the Agency would be hiring a new employee. There is no evidence that the Supervisor told Grievant he was to be consulted regarding the hiring prior to Grievant following her customary practice. Once the Supervisor informed Grievant he wanted to be involved, she cancelled the initial interviews and rescheduled the first and second round interviews as the Supervisor directed.

The Supervisor asserted, "after the interviews were conducted, I learned that [Grievant] had altered the replacement questions I provided to Human Resources (HR) for the Regional Ombudsman interview. Specifically, I provided eleven questions to HR and to [Grievant] to be asked during the first interview. Following the interview, [Grievant] provided me with the interview packets including the questions asked to each applicant. Noticeably absent from the questions asked, were six of the more probing questions designed to cull the pool to a more manageable number of finalists for second interview."

There is no evidence Grievant altered the eleven questions provided to HR. Grievant did not change or alter the wording of any of the eleven questions.

The Agency did not establish that Grievant was instructed to ask all 11 questions during the first round of interviews. The first round interviews were to last 30 minutes. There is no written evidence of such an instruction and the Supervisor did not testify during the hearing. Grievant expected to use the 11 questions in both the first and second rounds. Thus, the Hearing Officer cannot conclude Grievant rejected the Supervisor's instruction.

Grievant failed to include one of the questions in the two rounds of interviews but the Agency's disciplinary notice does not appear to identify the omission of a question as a basis for disciplinary action. Grievant added a question about whether the candidate had any questions for the panel. This appears to be a question providing a courtesy to applicants and not as a question relating to a candidate's merits. The Agency's disciplinary notice does not identify the additional question as a basis for disciplinary action.

Insufficient evidence was presented to show that Grievant failed to follow a supervisor's instruction. The disciplinary action must be reversed.

The Agency asserted but did not establish that Grievant violated Operating Procedure 102.2(IV)(J)(13)(I).

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is **rescinded**.

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]

[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.