COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11457

Hearing Date: February 13, 2020
Decision Issued: February 14, 2020

PROCEDURAL HISTORY

On September 23, 2019, Grievant was issued a Group I Written Notice of disciplinary action for obscene or abusive language and disruptive behavior:

> On August 26, 2019, you placed a note in a claimant's file, which was inappropriate and reflects unprofessional behavior and interaction with a claimant. On August 27, 2019, I spoke with the claimant and third party and verified the nature of your conversation. You were counseled previously regarding your unprofessional behavior.

On October 10, 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 he requested a hearing. On December 9, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 13, 2019, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
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 Virginia Department of Aging and Rehabilitative Services employs Grievant as a Claims Adjudicator 3 / Health Care Compliance Analyst. No evidence of prior active disciplinary action as introduced during the hearing.

Grievant made notes in the Agency's Virginia Case Processing System (VCSP) to record his work for each of his assigned cases. Documents in the VCSP are official State records and the Agency's record of its processing of a disability determination case. The Agency's record could be used in other proceeds including those involving the U.S. Social Security Administration. Claimants had access to VCSP documents about them.

Grievant received training regarding how to record and what information to record in the VCSP. He also received training regarding proper telephone communication with claimants.

Grievant had a telephone conversation with a Claimant and his Wife. On August 26, 2019, Grievant entered a note into the VCSP.

> Called the claimant and informed he need detailed work [history]. He then put his wife on the phone who was being a smart ass. I informed we need detailed [history] from 2004 to present and disconnected the call afterwords. The claimant husband calls back and asked where I was located as he wanted to meet me. I informed the claimant I have already spoke to his nasty rude wife and that can provide him the information that I provided. Claimant said he wanted to come up to the office and speak with me. I told him like I tell all claimants who will not be meeting with me as I don't meet claimants face-to-face as we live in a crazy world.[1]

The Unit Supervisor spoke with the claimant and his wife to verify their conversation with Grievant.

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."

"[U]nsatisfactory work performance" is a Group I offense.[3] In order to prove unsatisfactory work 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.

On August 26, 2019, Grievant made an entry into the VCSP with derogatory descriptions of a claimant's wife. He referred to her as a "smart ass" and "nasty". Under the Agency's culture, neither reference was appropriate. Grievant could have used other less offensive terms to describe the Wife's behavior. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.

Grievant argued that the Agency failed to engage in progressive counseling. In particular, he claims the Agency failed to counsel him regarding putting notes into the

---

[1] Agency Exhibit 2.

[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. Disruptive behavior can also be described as unsatisfactory job performance.

Agency's computer system prior to taking disciplinary action. Although progressive counseling is encouraged by the Standards of Conduct, it is not required. The Standards of Conduct provides:

> Counseling is typically the first level of corrective action but is not a required precursor to the issuance of Written Notices.

In other words, the Agency was authorized to take disciplinary action against Grievant despite not having first counseled him regarding the use of derogatory statements about claimants and their families.

Grievant argued that the Agency issued the Written Notice approximately 27 days after the event instead of as soon as possible. The evidence showed that the Agency issued Grievant a due process notice and provided him with the opportunity to respond. Agency managers considered Grievant's response and the facts of the case and then concluded to issue a Group I Written Notice. The amount of time the Agency took to issue disciplinary action was not excessive or contrary to policy.

The Agency presented evidence regarding prior counseling and an expired disciplinary action. Grievant presented argument in response. None of these matters have any material impact on or relevancy to the Group I Written Notice issued September 23, 2019.

Grievant argued that Agency managers displayed a lack of civility towards him. He asserted that other employees acted inappropriately by sending emails that were "humiliating, demeaning, revolting, defaming, negative, and insinuates derogatory (comes off racially profiling.)" Although Grievant may have concerns regarding the actions of other Agency employees, none of the example provided by Grievant related to the Group I Written Notice issued to him. None of them showed the inconsistent application of disciplinary action. The Hearing Officer does not believe the Agency issued Grievant disciplinary action based on any improper purpose such as based on race or any protected status. It appears that the Agency took disciplinary action because of Grievant's behavior.

Grievant asserted that he received a job offer and asked the Regional Director to have the Agency match the pay offer. Grievant argued that the Regional Manager told Grievant that he would never be a supervisor and that he would not "even give" Grievant a five percent increase. The Regional Director had this conversation with Grievant in private and spoke with monotone voice. The Regional Director described the discussion as giving Grievant feedback on his work performance. Although this conversation may have made Grievant feel unsupported by the Agency, it does not show the Agency took disciplinary action for any improper purpose or otherwise contrary to policy.

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 the disciplinary action.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action 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

[4] Va. Code § 2.2-3005.

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.