



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11494

Hearing Date: May 4, 2020
Decision Issued: May 28, 2020

PROCEDURAL HISTORY

On October 30, 2019, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory performance.

On November 27, 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 February 10, 2020, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 4, 2020, a hearing was held by audio conference.

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 Department of Juvenile Justice employs Grievant as a Juvenile Probation Supervisor at one of its offices. He has been employed by the Agency for over 23 years. Grievant consistently received favorable annual performance evaluations. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant reported to the Manager. The Manager and Grievant had different office locations. Grievant's work duties included, "Notifies [Manager] of all complaints from the public, law enforcement, court, clerks, CA, etc."¹ Ms. 1 and Mr. 2 reported to Grievant.

An Educational Institution placed Intern M and Intern S with the Agency in 2015. Mr. 2 interacted with both interns.

On April 16, 2019, Ms. 1 contacted Grievant and alleged she had been sexually assaulted by Mr. 2. The Agency began an investigation of the allegation and related matters.

¹ Agency Exhibit 9.

Ms. 1 told the Investigator that Intern M and Intern S complained about Mr. 2 in 2015. Ms. 1 said that Mr. 2 touched Intern M on her thigh and said “Us redheads taste different.” Ms. 1 told investigators that Intern S had spoken with Grievant about being uncomfortable with some of the things Mr. 2 shared with Intern S. Ms. 1 said that Intern S complained to Grievant that it was draining to be with Mr. 2 because he spoke about his personal life. Ms. 1 said that Intern S did not complain to Grievant about sexual harassment from Mr. 2.

Grievant told the Investigator that Intern S may have told him that the supervisors at the Educational Institution called her in and asked if Mr. 2 had ever done anything inappropriate with Intern S. Intern S told the supervisors, “No he [Mr. 2] had not.” Grievant told the Investigator he learned through Intern S that Intern S learned from the Educational Institution that Mr. 2 had said some inappropriate things to Intern M.

Grievant told the Investigator he reached out to Ms. D at the Educational Institution and asked if there was an issue with Mr. 2 regarding Intern M. Ms. D told Grievant that, “No, we looked into it and there is nothing to it; everything is taken care of.”

On May 1, 2015, Grievant met with Intern S. Grievant took notes:

[Intern S] was led to believe that [Intern M] had complained about [Mr. 2] being inappropriate. [Intern M] had never approached this supervisor about any concerns. [Intern S] reported that she believed [Intern M] had reported that [Mr. 2] once said, “Is it true that red heads taste different?” She also thought [Intern M] said something about [Mr. 2] touching her leg. [Intern S] reports that she told [the Educational Institution] that if [Mr. 2] ever touched her leg, it was in a nonsexual manner. She feels that [Educational Institution] now expects her to talk to [Mr. 2] about the situation.²

Grievant did not report Intern S’s allegations to the Manager until October 2017 in response to the Manager’s questions about Mr. 2’s behavior towards interns.

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.”³ 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.”

² Agency Exhibit 9.

³ The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

“[U]nsatisfactory work performance” is a Group I offense.⁴ 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.

The Agency’s Staff Code of Conduct requires:

Individuals subject to this Procedure who observe or suspect inappropriate behavior, including but not limited to violations of the Commonwealth’s Standards of Conduct for Employees, shall report the behavior to their immediate supervisor, a higher level administrator in DJJ, the DJJ Investigative Unit, or the State Hotline. When notice is provided to a supervisor, he or she shall take immediate steps to investigate and, if founded, address and correct the inappropriate behavior.

In May 2015, Grievant had reason to suspect that Mr. 2 made an inappropriate statement to Intern M and inappropriately touched Intern M’s leg. He did not report his interaction with Intern S and the Educational Institution to the Manager until October 2017. Grievant failed to timely report suspected inappropriate behavior thereby justifying the issuance of a Group I Written Notice for unsatisfactory performance.

The Agency presented other evidence of its concerns about Grievant’s work performance. That evidence was not sufficiently material or persuasive to support the issuance of disciplinary action. Nevertheless, the Agency has established a basis for disciplinary action because Grievant failed to inform the Manager of the content of his conversation with Intern S.

Grievant argued that he told the Manager in May 2015 of his contact with Intern S. Grievant did not testify and did not otherwise present any evidence to contradict the Manager’s credible testimony.

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”⁵ 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

⁴ See Attachment A, DHRM Policy 1.60.

⁵ *Va. Code § 2.2-3005.*

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 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