COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11663

Hearing Date: September 13, 2021
Decision Issued: October 12, 2021

PROCEDURAL HISTORY

On November 19, 2020, Grievant was issued a Group I Written Notice of disciplinary action for failure to follow instructions and unsatisfactory performance.

On December 10, 2020, 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. The Office of Dispute Resolution issued Compliance Ruling 2021-5208 on February 19, 2021. On March 15, 2021, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The hearing was initially scheduled for June 9, 2021 but was continued for just cause. On September 13, 2021, a hearing was held by remote conference.

APPEARANCES

Grievant
Grievant's Counsel
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?

5. Whether the Agency discriminated against Grievant based on gender?

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 as well as any other claims she alleges. 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 Behavioral Health and Developmental Services employs Grievant as a Trades Technician III/Plumber at one of its facilities. She began working for the Agency in April 2017. Grievant received favorable performance evaluations. Grievant had prior active disciplinary action. She received a Group I Written Notice on March 19, 2020.

Grievant reported to the Supervisor who was also a plumber.

Grievant wrote in her due process response:

> Many of my work orders are for stoppages and low water pressure at the resident's personal sinks and toilets in their rooms. I have always been instructed from the time I was hired that these are work orders to consider

first and definitely do not leave a toilet for the on call person overnight or the weekend.[1]

The Agency had a building with a Ground West side and a 1East side. Each side had separate entrances. An employee in Ground West had to exit the Building in order to enter 1East and vice versa.

Beginning on October 19, 2020, a Resident intentionally clogged a toilet on 1East. The Resident had flushed disposable wash cloths which caused pipes to back up. The clog resulted in waste being spilled onto the floor and causing a health risk to residents and staff on the floor. Grievant had reported to 1East on October 19, 2020. She removed the toilet and flushometer, cleared the drain, reset the toilet, made sure the stoppage was cleared without leaks and then called housekeeping. Grievant responded to another clog on October 22, 2020.

On October 23, 2020, Grievant was working at the Facility. She was the only Plumber working that day. Grievant was working on a water cooler or coolers in Ground West of the Building. She finished the work at approximately 11:30 a.m. She left the area.

Grievant took a late lunch at approximately 12:45 p.m.

Grievant caught up on paperwork. She wanted to finish the paperwork since she did not expect to return to the Facility until October 28, 2020. Before returning to Ground West, Grievant stopped at the Carpenter Shop to get bottles of water.

At approximately 1:49 p.m., the Supervisor called Grievant and asked her to assist with a clog on 1East. Grievant said she was at Ground West working on the water cooler. The Supervisor incorrectly assumed that Grievant was next to the water cooler making repairs to the water cooler.[2] Grievant was actually in route to the water cooler. The Supervisor asked Grievant how much time she had left. Grievant said 15 minutes. The Supervisor asked Grievant to finish up and come help him on 1East as soon as she could. The Supervisor called Mr. G and asked him to bring the sewer auger to 1East.

Grievant went to the water cooler. She was working on an electrical power issue and was checking for leaks. At approximately 2:05 p.m., she pressed the button on the water cooler and walked away. She went to the basement of the Maintenance Shop to clean and return tools she used to repair the water cooler. She located the retriever head she intended to take to 1East.

Meanwhile, the Supervisor, Mr. G, Mr. E and Mr. B were at 1East working on the clog. Waste flowed in the room. They removed the toilet and operated the auger.

---

[1] Agency Exhibit p. 89.

[2] The Supervisor did not tell Grievant to respond immediately because he envisioned Grievant next to the water cooler with the water cooler apart. The Supervisor believed this would have justified Grievant's 15 minute delay.

At 2:26 p.m., the Supervisor called Grievant and told her to bring a plumbing wetvac[3] because they were standing in waste. Grievant suggested the Supervisor call housekeeping. The Supervisor reiterated, "I need that wetvac; we are standing in sewage." Grievant said "Ok" and went to get the wetvac.

Grievant arrived at 1East at approximately 2:40 p.m. She brought the wetvac and a retriever head. When Grievant showed the Supervisor the equipment, the Supervisor said they did not need the equipment because they had already gotten the clog unstopped. Grievant assisted with testing the toilets and showers to verify that the clog had been removed and the pipes were working properly.

The Supervisor reviewed video to determine the times Grievant was at certain locations. The video was deleted and not available for Grievant to review as part of her defense. Grievant asked the Hearing Officer to draw an adverse inference due to the Agency's failure to maintain the video. The Hearing Officer will not do so because Grievant's descriptions of the time events occurred were not materially different from the Agency's assertions.

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."[4] 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.[5] 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 October 23, 2020 clog was a high priority event because waste was flowing onto the floor of a resident living unit. When Grievant learned of the clog, she should have redirected her attention to assisting with the clog. Instead, she focused her attention on verifying repairs to the water coolers even though these duties were of a lesser priority. Grievant informed the Supervisor she expected to be at 1East in approximately 15 minutes but had to be called again approximately 36 minutes later. Because of her delay,

[3] A wetvac is used to vacuum liquids.

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

[5] See Attachment A, DHRM Policy 1.60.

other employees took the lead in resolving the clog when she should have taken the lead. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.

Grievant argued that the matter was not an emergency and that the Supervisor did not inform her that the clog was an emergency. Although the matter was not an emergency, it was a high priority event. Grievant should have recognized the clog was a high priority event and focused her attention on going to 1East to provide assistance.

Grievant argued that she did not tell the Supervisor she would be at 1East in 15 minutes but rather said it would be a "good half hour." The evidence supports the Agency's assertion that Grievant said she would be there in 15 minutes. The Supervisor wrote down what Grievant said. Grievant wrote in her Charge of Discrimination, "He asked me how long it would take for me to finish, and I gauged that it would be maybe 15 minutes or so."[6] The Supervisor's testimony was credible.

Grievant argued she complied with the Supervisor's instructions. The Hearing Officer agrees that the Agency did not establish that Grievant failed to follow the Supervisor's instructions. The Agency's discipline, however, was for unsatisfactory performance which the Agency has established because she did not prioritize responding to the clog ahead of checking the water cooler.

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 …."[7] 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.

Due Process Concerns

[6] Agency Exhibit p. 34.

[7] Va. Code § 2.2-3005.

Grievant objected to the Agency's action of issuing a Written Notice for the reason of failure to follow instructions and then modifying that Written Notice to include an allegation of unsatisfactory performance. Grievant argues the Agency essentially issued two written notices without proper due process. The Hearing Officer interprets the Agency's action to be the issuance of one Written Notice for failure to follow instructions and then modifying that notice to refer to unsatisfactory performance. Nothing in policy prohibits an Agency from modifying disciplinary action once issued and doing so is good practice if it fully informs the employee of the nature of the reasons for the Agency's disciplinary action. In any event, unsatisfactory performance would be a "lesser included offense" within an allegation of failure to follow instructions. In other words, if an employee failed to follow instructions, that employee's behavior would be unsatisfactory performance as well.

Retaliation

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;[8] (2) suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity; in other words, management took an adverse employment action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse employment action, retaliation is not established unless the Grievant's evidence shows by a preponderance of the evidence that the Agency's stated reason was a mere pretext or excuse for retaliation. Ultimately, to support a finding of retaliation, the Hearing Officer must find that the protected activity was a "but-for"[9] cause of the alleged adverse action by the employer.[10]

Grievant established that she engaged in protected activity such as filing grievances and charges of discrimination. She suffered an adverse employment action because she received disciplinary action. Grievant did not establish a causal link between her protected activity and the adverse employment action. The Hearing Officer does not believe the Agency took disciplinary action as a form of retaliation. The Agency took disciplinary action because the Supervisor believed Grievant did not timely respond to the clog on 1East.

Discrimination

[8] See Va. Code § 2.2-3004(A)(v) and (vi). The following activities are protected activities under the grievance procedure: participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

[9] This requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer.

[10] *See,* Univ. Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2534 (2013).

Grievant alleged the Agency discriminated against her based on her gender because "I am never a party of anything. I'm never shown how and when …." She asserted two male employees were allowed to work in a basement to clean things up but she was excluded. She claimed she was issued a preventive maintenance order to perform the unpleasant task of going under a building. She was told to go down into a pit to do water meter readings. Grievant asserted she was not trained on the TMS system involving work orders.

The Supervisor denied treating Grievant differently because of her gender. He claimed Grievant had worked for the Agency longer than he had and that he considered one of her strengths to be using the TMS system. He testified he met with Grievant many times regarding the TMS system and if she had any questions he was available to her. He said the Agency employed a "TMS person" who anyone could call with questions about TMS. He testified he provided help to Grievant when needed but he felt Grievant was sometimes hesitant to ask for help. He indicated the Agency had looked at Grievant's concerns before and "nothing came out of it."

Grievant's former supervisor described Grievant as a "loner."

Based on the evidence presented, the Hearing Officer cannot conclude the Agency discriminated against Grievant based on her gender.

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]

[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.