COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11715

Hearing Date: October 15, 2021
Decision Issued: November 4, 2021

PROCEDURAL HISTORY

On May 6, 2021, Grievant was issued a Group II Written Notice of disciplinary action with a five workday suspension for failure to follow policy.

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 July 12, 2021, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 15, 2021, a hearing was held by remote conference.

APPEARANCES

Grievant
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 Motor Vehicles employs Grievant as a Program Support Technician. No evidence of prior active disciplinary action was introduced during the hearing.

The Agency had employees teleworking and working at headquarters and in regional offices. Employees had daily schedules for breaks and lunch, however, due to different customer issues that arose, sometimes employees did not always go on breaks when scheduled. Management implemented a Group Chat for all employees to let the group know when they log in for the day, go on break, and go to lunch. This is so management was always aware of who was on break, and who was available in the event that a customer needed special assistance or if there is a request from Executive Management to assist a specific customer.

On March 18, 2021, the Office Manager sent an email to staff including Grievant stating:

> Effective immediately
>
> So that we can interact as a team to ensure the work is being processed in a timely manner and in case staff need assistance with a question about

> customers, etc., effective immediately each morning please send a message in the [Unit] chat when you sign in and when you go on lunch or break.
>
> If someone doesn't respond in the Chat that they are here in the morning, please do not send a Chat asking if a person is in the office.
>
> If you have any questions, please let me know.[1]

On March 26, 2021, the Deputy Director sent an email to staff including Grievant stating, in part:

> Please send a message in the Work Center Group Chat when you sign in. For example, when you log in every morning, when you go on break, or when you are on lunch or come back from lunch or break.[2]

The Office Manager met with Grievant on April 5, 2021 and explained Grievant's obligation to use the Group Chat. Grievant said she did not see a point in using the Group Chat and that it served no purpose. On April 5, 2021, the Office Manager sent Grievant an email:

> Per our conversation this morning, don't forget to put in the Group Chat when you go on breaks and lunch. I see where you signed out for lunch at 12:00 but don't see it in the Group Chat.[3]

From March 18, 2021 through April 8, 2021, Grievant failed to routinely communicate in the Group Chat when she arrived at work, took breaks, and returned from breaks. Grievant failed to communicate in the Group Chat on April 8, 2021, April 9, 2021, April 12, 2021, April 13, 2021, April 14, 2021, and April 15, 2021.

The Agency decided to take disciplinary action against Grievant. The Agency sent Grievant an "Options Relating to Disciplinary Action" before it issued disciplinary action as follows:

> You have received a draft Group II Written Notice with 5 day suspension without pay for failing to follow your supervisor's instructions. However, DMV has decided to give you two options which are described below:
> *Option 1: The attached draft Group Written Notice with a 5 day suspension without pay will be finalized—dated and signed—and placed in your personnel file. If you accept this option, you are free to use the state's*

[1] Agency Exhibit p. 16.

[2] Agency Exhibit p. 17.

[3] Agency Exhibit p. 18.

grievance procedure to challenge the Written Notice and suspension without pay.

OR

Option 2: The attached Group II notice only will be issued. There will be no suspension without pay. However, if you choose option 2, you will waive your right to use the grievance procedure to challenge the written notice.

You have 2 business days to consider these two options and select one. You are encouraged to seek counsel and advice from others including, but not limited to, the Department of Human Resource Management's Office of Employment Dispute Resolution at 1-888-232-3842 for information about the grievance process and other employment related advice. You must inform me —in writing—of the option you ultimately select. This is to be accomplished by emailing your decision to [email address] your written decision must clearly state which option you have selected: Option (1) the Group II Written Notice with 5 day suspension or Option (2) the Group the Group II written notice with no suspension and, no grievance. If we hear nothing from you by the specified time indicated, the Group II Written Notice with the suspension will be finalized and issued.

Grievant elected to exercise her rights under the grievance procedure. The Agency issued the Written Notice as a Group II with a five workday suspension on May 6, 2021. If Grievant had declined to file a grievance, the Agency would have issued to her a Group II Written Notice without suspension.

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."

"Failure to follow supervisor's instructions or comply with written policy" is a Group II offense.[5] Grievant received several instructions from a supervisor that she was to log into the Group Chat when she began working and when she began and ended her breaks.

[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.

Grievant was aware of the instruction and chose to disregard the instruction. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

Grievant argued it was not logical or necessary to say "Good morning" in the Group Chat when she was present at the Agency's office. The Agency showed that it needed to know whether every employee was working or on break because inquiries from headquarters or other localities may require immediate contact. If an employee was on break, Agency managers would know immediately to contact another employee who was working. The Agency had a legitimate business reason for its instruction to Grievant and she was obligated to follow the Agency's required practice.

Grievant argued she was being targeted for raising other issues. For example, she believed the Agency disregarded her military drill schedule and disliked that she complained about the Agency's action. The Agency presented evidence that it accommodated Grievant's work and school schedule. The Hearing Officer does not believe the Agency took disciplinary action against Grievant in order to target her for prior complaints. The Agency took disciplinary action because Grievant refused to follow instructions from supervisors.

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 …."[6] 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.

Retaliation

Grievant argued her suspension was unjust. Her assertion is supported by the evidence.

Va. Code § 2.2-3003, et seq. grants classified State employees the right to file grievances challenging disciplinary action including suspensions. A State agency may not abridge or interfere with that right. If an employee chooses not to file a grievance for fear

[6] Va. Code § 2.2-3005.

of being suspended, that employee has not made an independent and free decision to refrain from filing a grievance. The employee has not acted voluntarily.

The Agency retaliated against Grievant by compelling her to choose between avoiding suspension if she waived her grievance rights and exercising her grievance rights and receiving a five workday suspension. In Jones v. Va. Commonwealth University, 2021 U.S. Dist. LEXIS 2530, the Court held:

> According to the Fourth Circuit, direct evidence of retaliation is "evidence that the employer 'announced, admitted, or otherwise unmistakably indicated that [the forbidden consideration] was a determining factor'" in the challenged conduct. Stover v. Lincoln Pubrg., Inc., 73 F.3d 358, [published in full-text format at 1995 U.S. App. LEXIS 37129] 1995 WL 764180, at *2 (4th Cir. 1995) (alteration in original) (quoting Cline v. Roadway Express, Inc., 689 F.2d 481, 485 (4th Cir. 1982)). The Eighth Circuit more recently stated that "[d]irect evidence of retaliation is evidence that demonstrates a specific link between a materially adverse action and the protected conduct, sufficient to support a finding by a reasonable fact finder that the harmful adverse action was in retaliation for the protected conduct." Young-Losee v. Graphic Packaging Int 'l, Inc., 631 F.3d 909, 912 (8th Cir. 2011).
>
> Here, VCU made Jones choose between continuing to pursue her first EEOC charge and participating in the University's internal grievance process. The Court recognizes that VCU's enforcement of its "one or the other" policy did not preclude Jones from ever pursuing her EEOC complaint; VCU forced this choice at a time when Jones would still have time to refile her EEOC complaint after the conclusion of the internal process. [*13] But VCU's policy delayed Jones's access to her Title VII remedies, and a successful Title VII claimant can suffer tremendous harm because of a delayed remedy. Thus, the Court finds that Jones sufficiently pleads direct evidence of retaliation.

In this case, the Agency forced Grievant to choose between exercising her grievance rights or losing a week's pay. The Agency's objective was to force Grievant to refrain from challenging its disciplinary action. If she did not waive her right to file a grievance, the Agency would punish her with a five workday suspension. In other words, if Grievant chose to exercise her protected grievance rights she would suffer the materially adverse action of suspension. The Agency retaliated against Grievant and its intimidation cannot stand.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with suspension is **reduced** to a Group II Written Notice without suspension. The Agency is directed to provide the Grievant with **back pay**

for five workdays. 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.

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.