

**COMMONWEALTH OF VIRGINIA
Department of Human Resource Management**

Office of Employment Dispute Resolution

DECISION OF HEARING OFFICER

**In re:
Case Number: 11748**

Hearing Date: January 6, 2022
Decision Issued: January 13, 2022

PROCEDURAL HISTORY

On September 24, 2021, Grievant received four Group III Written Notices, each for violation of Department of Human Resource Management Policy 2.35, Civility in the Workplace. Each Written Notice terminated Grievant's employment effective September 24, 2021.

Grievant timely filed Grievance Form A to challenge the Agency's action. The Hearing Officer in this matter upon being appointed effective October 25, 2021, conducted a pre-hearing telephone conference on November 11, 2021 and set a hearing date of January 6, 2022.

In the letter from the Hearing Officer dated November 12, 2021 it was set out that a copy of exhibits, in the form of hard copy, a party intends to introduce at hearing and a list of witnesses to be called was to be provided to the Hearing Officer and the other party no later than December 30, 2021. The Agency provided a notebook with the Agency's exhibits and list of witnesses to be called. The Grievant also submitted a notebook with the Grievant's exhibits and list of witnesses to be called.

APPEARANCES

Grievant
Grievant's Attorney
Agency's Party Designee
Agency's Attorney

ISSUES

1. Whether Grievant behaved or acted in the manner set out in each of the four Written Notices?
2. For each Written Notice, whether the Grievant's actions or behaviors violated Policy 2.35?
3. For any Written Notice that Grievant's actions or behavior did violate Policy 2.35, did the alleged actions or behavior constitute a Group III offense?
4. Whether the Agency's issuing each Group III Written Notice was consistent with law and policy?
5. Whether there were mitigating circumstances justifying a reduction or removal of any 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 Grievant 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) section 5.8. a preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM section 9.

EXHIBITS

The Agency Exhibits admitted into evidence are contained in one notebook with the following contents:

1. Grievant's Form A and related documents
2. Written Notice regarding subject C.
3. Written Notice regarding subject T.
4. Written Notice regarding subject W.
5. Written Notice regarding subject C2.
6. Standards of Conduct Policy: 1.60
7. Policy 2.35 Civility in the Workplace
8. Civility in the Workplace course documents
9. Training log
10. Agency chain of command chart
11. Grievant work profile

12. Notes provided by or regarding subject T.
13. Investigation Report
14. Investigation notes provided by or related to subject C.
15. Investigation questionnaire completed by T.A.
16. Investigation questionnaire completed by subject W.
17. Investigation questionnaire completed by subject C2.
18. Investigation notes, 2 pages
19. Email and Interview Assessment form regarding subject C.
20. Emails dated September 21, 2020
21. Counseling memorandum dated January 7, 2021
22. Email from Grievant to supervisor dated August 17, 2021
23. Patient First summary sheet and Notary Handbook regarding subject T.
24. Email regarding receptionist interview panel
25. Article regarding workplace bully dated September 6, 2021

The Grievant Exhibits admitted into evidence are contained in one notebook with the following contents:

1. Text messages from employees
2. Birthday cards from employees
3. Boss's day cards from employees
4. Thank you card from subject T.
5. Photos from Christmas party
6. Photos from boss's day celebration
7. Voicemail from subject W.
8. Performance evaluations
- 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 Agency employed Grievant as a record manager. As such, Grievant was the supervisor of each of the four Agency employees who are the subjects of the four Written Notices.

The Agency's first witness was the Technical & Business Services Director, having come to the Agency in 2013. The witness testified that the Grievant was a Supervisor and had the responsibilities set out in the employee work profile (Agency Exhibit 11), including those set out at page 5, i.e. "creates, promotes and maintains a positive and productive work environment through effective communication among Agency staff and management." The witness further

testified that it was August 24, 2021 that the witness first learned of the Grievant's conduct which led to Grievant's termination of employment.

The witness testified that the investigation regarding Grievant began as a result of the information provided by subject T. when asked why the subject no longer wanted to work as the receptionist supervised by Grievant. The Director was concerned that the Agency was going to lose subject T who was an excellent employee. The witness then reviewed the allegations set out at Exhibit 12, pages 2 and 3 provided by subject T., including an allegation that the Grievant on July 30, 2021 called subject T. (and despite being advised by subject T. that she was not well), asked subject T to meet the Grievant at Starbucks to notarize a document. When subject T met the Grievant at Starbucks she discovered that the Grievant wanted not just the Grievant's signature notarized but the Grievant's spouse's signature notarized, without the spouse being present. The subject testified that the subject notarized both signatures fearing there would be repercussions if the subject did not notarize both signatures.

The Director further testified that the Grievant showed subject T. a co-worker's Facebook page (subject W.) and made negative comments about subject W. In addition, the Grievant disclosed to subject T. various co-workers personal business, pointing out staff members who have been arrested or were allegedly on drugs. Subject T alleged that the Grievant gossiped with staff members about other staff members under Grievant's supervision. Subject T included in her notes the fact that other staff members had confided in subject T on what they had experienced with respect to the Grievant and how they felt bullied, threatened and uncomfortable (Subject C. and subject W.). The Director continued by reviewing the investigation notes set out at Agency Exhibits 14, 15,16,17, and 18.

The Director reviewed the Investigation Report including the Findings, Conclusions and Recommendations reached on September 14, 2021. The Director testified that the issue regarding the request that subject T notarize the document would alone justify termination. The Director testified that subject T's resignation caused a domino effect as far as negative impact on Agency operations. The Director further reviewed each Written Notice and testified that the findings of the investigation supported each of the written notices being issued as Group III violations.

During cross-examination, the Director testified that prior to the investigation there had never been an issue regarding the Grievant's conduct or behavior and confirmed that the Grievant was rated as a "Strong Contributor" on Grievant's performance evaluations (Grievant Exhibit 8, page 35-38). The Director testified that at the conclusion of the investigation Human Resources recommended termination and the Director agreed. The Director testified that despite the fact the Grievant was a long-term employee with no previous discipline, the nature of Grievant's conduct set out in each of Written Notices constituted a violation of Policy 2.35 which authorizes termination of employment in the discretion of the Agency.

The Agency's second witness was subject T. who was the front desk receptionist

from October 2020 until September 2021. The witness testified that from the time the witness was hired the Grievant told the witness about other employees' personal problems, such as "He's on drugs" or "He embezzled." The witness testified that the Grievant constantly tried to pit one employee against another and would gossip with each employee about the other employees. The witness testified that when the witness decided to leave the position as receptionist, the personnel office contacted the witness to ask "Why?". It was then that subject T. provided the details of the Grievant's behavior. The witness testified that the witness did not come forward earlier due to fear of retaliation by the Grievant, especially since subject T. was still on probation and could be terminated without cause. Subject T testified that having worked for twenty-five years as a federal government employee and ten as a state employee, the witness had, "Never had a manager like (the Grievant)".

Subject T testified that the Grievant was always saying negative things about subject C. The witness then affirmed and agreed with the statements set out at Written Notice, Agency Exhibit 3, namely that Grievant's behavior negatively impacted the work environment, negatively impacted the relationships in the work environment, caused subject T to feel marginalized, very uncomfortable and threatened.

During cross-examination, the witness confirmed that witness moved to another position just to get away from the Grievant as a supervisor and that the personal messages and cards (Grievant's Exhibits 1, pages 10-12 and Grievant's Exhibits 4) were personal matters and did not refer to Grievant's conduct in the workplace.

The Agency's third witness was subject C2, who appeared by Zoom by agreement of the parties. The witness testified that the witness's employment began April 1, 2019 and continued until October 2020, supervised by Grievant. The witness testified that in the beginning the Grievant was very pleasant but then was regularly volatile and unpredictable. The witness testified that the Grievant would talk about co-workers and made the witness feel uncomfortable. Subject C2 testified that the Grievant treated the contract or temporary employees poorly because the Grievant could let them go without cause. The witness testified that the Grievant targeted subject C. the most, regularly demeaning subject C causing subject C to frequently cry by saying or implying that subject C didn't know how to do the necessary work after ten years on the job. In addition, subject C2 stated that the Grievant's comments about subject C2 being biracial made the witness uncomfortable. The Grievant made comments such as "You aren't really black" and "You don't talk like a black girl." In addition, the witness felt uncomfortable when the Grievant would ask if another employee was sleeping on the job, or when another employee arrived at or left work. The witness testified that the work environment was made very stressful due to the Grievant's behavior. In addition, subject C2 confirmed that in July 2019 when the witness's grandfather had died, the Grievant told the witness to go home "We'll take care of you" and Grievant arranged for pay for hours that were not actually worked.

Subject C2 affirmed and agreed with the statements set out at Written Notice, Agency

Exhibit 5, namely that Grievant's behavior was disrespectful, aggressive, unwanted and intimidating.

During cross-examination, subject C2 confirmed that there was some personal interaction outside of work with the Grievant and that subject C2 did not believe that the Grievant disliked subject C2 for being biracial.

The Agency's fourth witness was subject C. who began work November 2010 scanning records and was supervised by Grievant. The witness testified that because the witness was considered a "temp" with no benefits, the witness could be terminated as an employee at any time by the Grievant. The witness testified that the witness's work environment was always chaos with the Grievant's bullying and mental abuse directed toward the witness "from the very beginning."

Subject C. confirmed the allegations set out in the Written Notice at Agency Exhibit 2 and the investigation notes set out at Agency Exhibit 14. The witness testified that the witness did not report Grievant's behavior for fear of retaliation. The witness testified that due to the Grievant talking about the witness to other employees and the Grievant constantly demeaning the witness, the witness frequently went home crying at the end of the day. Subject C. testified that although subject C applied for the receptionist opening, subject C withdrew because of Grievant's comments about other applicants being "real receptionists" and that the other two panel members conducting the interviews did not want subject C. to get a second interview. Note: Agency Exhibit 19, page 2 shows that the interview panel unanimously included subject C. on the list of candidates for second interviews.

Finally, subject C. testified that the Grievant not only gossiped about other employees but also said derogatory things about Grievant's superiors, including calling the Director a "snake."

During cross-examination, subject C. did not deny that subject C had personal interaction with Grievant, including attending Grievant's family functions and sending or signing personal cards to the Grievant.

The Agency's fifth witness was T. A. who appeared by Zoom by agreement of the parties. The witness testified that the Grievant was the witness's peer, each of them answering to the same supervisor. The witness testified that it was the witness's opinion that Grievant was targeting subject C. stating that "I don't want to give (subject C.) a full-time job." The witness testified that the Grievant never gave subject C. credit for anything that subject C did. The witness further testified that in 2020 the witness drove for an hour and a half to participate on an interview panel but upon arriving the Grievant told the witness that the witness was being removed from the panel because the witness did not "look black." The Grievant told the witness that "HR said to do it."

The Agency's sixth witness was the Chief Operating Officer of the Agency for five years and had been with the Agency for twenty-five years. The witness testified that the witness had a good working relationship with the Grievant up until the investigation which was prompted by the information provided by subject T. The witness testified that at the completion of the investigation it was concluded that the Grievant's conduct justified each of the four Group III Written Notices with termination of employment. The witness testified that although mitigation was considered (i.e. long-term employee, no prior discipline) the Grievant's continued employment was not acceptable due to the toxic work environment created by the Grievant, resulting specifically in the loss of an excellent receptionist (subject T) an subject C. who was "good at (subject C) job".

During cross-examination, the COO testified that the Grievant was put on administrative leave during the investigation because management wanted the employees to come forward without fear of retaliation. The witness further testified that the witness believed there had been no complaints against the Grievant for ten years because of fear of retaliation.

The Agency's seventh and final witness was the HR Director who had been with the Agency for eighteen years. The witness testified that the witness had never met the Grievant before the Grievant's hearing. The witness reviewed the matters set out in the Investigation report (Agency Exhibit 13) and testified that the Grievant's conduct in each case set out in the four separate Written Notices were violations of Policy 2.35 Civility in the Workplace (Agency Exhibit 7). The witness further testified that contract employees and P-14 employees are covered under this policy even though they have no state benefits or grievance rights. The witness testified that the Standards of Conduct provide that violation of 2.35 may, depending on the nature of the offense, constitute a Group III offense. The witness pointed out that the Grievant completed training regarding civility in the workplace both on January 24, 2019 and January 21, 2021 and that the Agency holds a supervisor to a higher standard than an employee who is not a supervisor. Finally, the witness testified that HR never takes a person off an interview panel based on skin color, contrary to the alleged statement made by the Grievant.

The Grievant did not testify or call any additional witnesses. The Grievant's Exhibits 1 to 7 (text messages, birthday cards, etc.) do not conflict with a finding that the four subjects are credible.

CONCLUSIONS

The Commonwealth of Virginia provides certain protections to employees Chapter 30 of Title 2.2 of the Code of Virginia. Among these protections is the right to grieve formal disciplinary action. The Department of Equal Employment and Dispute Resolution has developed Grievance Procedure Manual (GPM). This manual sets forth the applicable standards for this type of proceeding. Section 5.8 of the GPM provides that in disciplinary grievances the

Agency has the burden of going forth with the evidence. It also has the burden of proving, by preponderance of the evidence that its actions were warranted and appropriate. The GPM is supplemented by a separate set of standards promulgated by the Department of Employment Dispute Resolution, *Rules For Conducting Grievance Hearings*. These Rules state that on a disciplinary grievance a Hearing Officer shall review the facts *de novo* and determine:

- A. Whether the employee engaged in the behavior described in the written notice;
- B. Whether the behavior constituted misconduct;
- C. Whether the discipline was consistent with law and policy; and
- D. Whether there were mitigating circumstances justifying the reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances.

The Agency's evidence, even in light of the Grievant's assertions contained in Grievant's Form A and Grievant's Exhibits, established by a preponderance of the evidence that the Grievant did behave in the manner set out in each Written Notice and that in each of the four instances the Grievant's conduct was a violation of Policy 2.35 Civility in the Workplace. The Agency's evidence further established by a preponderance of the evidence that the Agency had the authority to classify in each of the four instances as a Group I, II or III offense. In addition, the Agency established by a preponderance of the evidence that the Agency was justified in classifying each of the four as a Group III offense. Finally, the Agency proved by preponderance of the evidence that the Grievant's misconduct was of the most serious nature, severely impacting Agency operations, creating a toxic work environment and justifying termination of employment.

Virginia Code Section 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 Resources Management ...". Under the rules for Conducting Grievance Hearings "[a] hearing officer must give deference to the agency's consideration in the 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.

The Hearing Officer finds no mitigating circumstances which exist to further reduce the disciplinary action imposed by the Agency.

DECISION

For the reasons stated herein, the Agency's issuance of each of the four Group III Written Notices is upheld.

APPEAL RIGHTS

You may request an administrative review by EEDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EEDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Equal Employment and Dispute Resolution
Department of Human Resources 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.

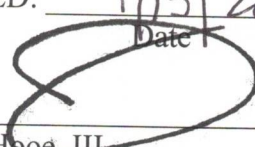
You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.[1]

[1] Agencies must request and receive prior approval from EEDR 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 EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

ENTERED:

1/13/2022
Date



John R. Hooe, III
Hearing Officer