



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11676

Hearing Date: July 7, 2021
Decision Issued: July 26, 2021

PROCEDURAL HISTORY

On March 3, 2021, Grievant was issued a Group III Written Notice of disciplinary action with removal for lack of civility in the workplace.

On March 5, 2021, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On March 29, 2021, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 7, 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:

Norfolk State University employed Grievant as a Teacher. She began working for the University on January 10, 2019. No evidence of prior active disciplinary action was introduced during the hearing.

The Classroom had glue on the walls. When staff arrived to work on November 7, 2020, the Supervisor asked them to remove the glue from the walls. Glue should not have been placed on the walls because of its ingredients. Grievant sent several text messages to the Supervisor and her co-workers, Ms. W and Ms. G. Grievant's messages said the Supervisor was "mean spirited" and not a good supervisor.

The Supervisor called a staff meeting to discuss Grievant's messages and establish expectations. Grievant attended the meeting with the Supervisor, Ms. W, and Ms. G. The Supervisor began speaking. Grievant loudly interrupted the Supervisor. Grievant was angry. The Supervisor asked Grievant to lower her voice. Grievant began walking towards the Supervisor while pointing her finger at the Supervisor and speaking loudly. The Supervisor stepped backwards to avoid contact with Grievant.

Ms. W was sitting in a chair. Grievant was standing. Grievant approached Ms. W in a threatening manner. Grievant entered Ms. W's "personal space." Ms. W moved back in her chair. Grievant pointed her finger at Ms. W. Grievant sternly told Ms. W, "Don't look at me. I am old enough to be your mother. Show me some respect!" Grievant's voice was

loud enough that she could have been overheard by students in the adjoining room. Ms. W was afraid of Grievant. Ms. W believed Grievant might hit her.

The Supervisor feared Grievant would become “physical” so she instructed Grievant to go home. Grievant refused. The Supervisor again asked Grievant to leave. Grievant said, “I will leave after I get the glue/adhesive off the wall.” The Supervisor said, “No, just go! Leave and if you don’t, I will call the police.” Grievant left the classroom and walked to the Human Resources office.

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.”¹ 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.”

DHRM Policy 2.35 governs Civility in the Workplace. This policy provides:

The Commonwealth strictly forbids harassment (including sexual harassment), bullying behaviors, and threatening or violent behaviors of employees, applicants for employment, customers, clients, contract workers, volunteers, and other third parties in the workplace.

Behaviors that undermine team cohesion, staff morale, individual self-worth, productivity, and safety are not acceptable. ***

Any employee who engages in conduct prohibited under this policy or who encourages or ignores such conduct by others shall be subject to corrective action, up to and including termination, under Policy 1.60, Standards of Conduct.

Bullying is defined as:

Disrespectful, intimidating, aggressive and unwanted behavior toward a person that is intended to force the person to do what one wants, or to denigrate or marginalize the targeted person. The behavior may involve a real or perceived power imbalance between the aggressor and the targeted person. The behavior typically is severe or pervasive and persistent, creating a hostile work environment. Behaviors may be discriminatory if they are predicated on the targeted person’s protected class (e.g., using

¹ The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

prejudicial stereotyping or references based on the targeted person's characteristics or affiliation with a group, class, or category to which that person belongs, or targeting people because they are in a protected class).

Workplace violence is defined as:

Any physical assault, threatening behavior, or verbal abuse occurring in the workplace by employees or third parties. Threatening behaviors create a reasonable fear of injury to another person or damage to property or subject another individual to extreme emotional distress.

On November 7, 2020, Grievant engaged in bullying and threatening behavior. She interrupted the Supervisor, pointed her finger at the Supervisor, walked towards the Supervisor causing the Supervisor to retreat. The Supervisor became afraid that Grievant might harm her or Ms. W. Grievant approached Ms. W and entered her "personal space." Grievant commanded that Ms. W was not to look at her and to show her some respect. Ms. W moved back in her chair fearing for her safety. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, the University's decision to remove Grievant must be upheld.

Grievant argued that her behavior was not so excessive as to justify removal. She asserted that she had been falsely accused of placing glue on the walls. Even if Grievant believed she had been falsely accused, it would not have justified her lack of civility. The University has presented sufficient evidence to show Grievant violated DHRM Policy 2.35 thereby justifying disciplinary action.

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 ..."² 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

² Va. Code § 2.2-3005.

For the reasons stated herein, the University's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal 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.