VIRGINIA: IN THE DEPARTMENT OF HUMAN RESOURCE MANAGEMENT, OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

IN RE: DHRM CASE NO.: 11495

DECISION OF HEARING OFFICER

The grievant challenges the Group II Written Notice given to her on April 16, 2021. The Notice cites the grievant for failure to follow policy, violation of a safety rule, disruptive behavior, and insubordination. The grievant was suspended, without pay, for two workdays. For the reasons set forth below, I uphold the issuance of the disciplinary action.

I. PROCEDURAL BACKGROUND

The grievant submitted her Form A challenging the disciplinary action on April 29. By letter ruling dated June 3 the Department of Human Resource Management qualified for hearing three of the four issues raised by the grievant. Not qualified for hearing was an alleged violation of the Health Insurance Portability and Accountability Act of 1996, which alleged violation occurred in October 2020 when the grievant's name was disclosed by the agency in connection with a notification to employees that she had tested positive for Covid 19. DHRM found her challenge on this basis to have been untimely. DHRM Ruling No. 2021-5266. I was appointed as hearing officer in this matter on June 15. By prehearing conference call the matter was set for hearing, by agreement, for August 16. After the parties exchanged proposed exhibits, multiple objections were made thereto by each side. I made preliminary rulings on these objections prior to the hearing, as well as on the morning of the hearing prior to the taking of evidence.

II. APPEARANCES

The agency was represented by counsel. The director for the agency facility at which this matter arose served as the agency representative and was present throughout the hearing. Four

witnesses testified for the agency. The grievant was self-represented. She called as her witnesses two individuals who had not previously testified, recalled three of the agency's witnesses, and had two individuals present but declining to testify. Each party presented numerous exhibits.

The agency advocate presented an oral closing statement at the conclusion of the evidence. The grievant requested leave to file a written closing statement within seven days of a hearing. The agency advocate requested leave to file a rebuttal written argument within seven days after the argument of the grievant. Those requests were granted by me. The written argument of the grievant was received on August 23, 2021. The agency advocate sent a short email in response on August 30.

III. ISSUES PRESENTED

As included in the Form A and qualified for hearing, the issues to be determined are:

1. Whether the agency was justified in issuing the grievant a Group II Written Notice and suspending her for two workdays without pay?

2. Whether the grievance process was tainted by unprofessional, improper, or biased behavior?

3. Whether in the process the grievant has been subjected to one or more violations of DHRM Policy 2.35 ("Civility in the Workplace")?

IV. FINDINGS OF FACT

The grievant is an employee of the Department of Forensic Science for the Commonwealth. The agency has employed her for approximately eight years. In her October 2020 evaluation her Supervisor labeled her a "team player." She was praised for growth in her position and received an overall rating of "Contributor."

Prior to January 21, 2021, the facility director had observed the grievant without a mask in violation of the agency's Covid-19 protocols. He orally reprimanded her. When he observed the same behavior by her on January 21, he issued a formal written counseling. (Grievant Ex. C).

In the early morning of March 22 she texted to her direct Supervisor her daughter was not feeling well and that she would not be reporting to work that day. At that time, the daughter was five years old. Later that afternoon, the grievant came to the facility to pick up work that she could do at home. She brought the daughter with her into the facility. The daughter was initially masked but took it off at some point during this visit. The daughter came into relatively close contact with multiple co-workers of the grievant in her section and in the administrative section of the facility. At 4:25 p.m. on that date the Safety Officer for the section texted the section Supervisor of the grievant and apprised her of the presence of the grievant and daughter in the facility. The Safety Officer indicated that the grievant had stated at some point in the previous night the daughter had a temperature of 102 degrees, had been given Tylenol, had not been feeling well, and had been coughing. The Safety Officer recognized the fever and cough as being possible symptoms of Covid 19.

The agency commenced a follow up investigation. The grievant asserted that she did not believe that the daughter was possibly positive for Covid 19, believing that her symptoms were those of allergies suffered by the daughter. On March 29 the facility Director notified the grievant of his commencement of disciplinary proceedings against her based on the March 22 events.

During the step meeting on April 14 the facility Director questioned the grievant using closed-end questions. The grievant attempted to provide context to those short answers, but her efforts were largely ignored by the Director. (Ex, 1, pages 5-9 and 19-26). When the grievant raised the point about the symptoms being consistent with allergies, the Director sharply derided her as

not being a physician. He subsequently apologized for his tone and comments.

The Director consulted with the Human Relations Department for the agency as well as a Deputy Director at the main office for the agency. The decision was made to issue the grievant the Group II Written Notice and to suspend her for two workdays. The facility Director brought to the attention of the group the relatively unblemished work history of the grievant, which did not include any prior formal written notices.

V. ANALYSIS

The Commonwealth of Virginia provides certain protections to employees in Chapter 30 of Title 2.2 of the Code of Virginia. Among these protections is the right to grieve formal disciplinary actions. The Department of Employment Dispute Resolution has developed a Grievance Procedural 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 forward with the evidence. It has the burden of proving, by a 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 Resolutions, Rules for Conducting Grievances. These Rules state that in a disciplinary grievance (such as this matter) a hearing officer shall review facts de novo and determine:

I. Whether the employee engaged in the behavior described in the Written Notice.

II. Whether the behavior constituted misconduct.

III. Whether the discipline was consistent with law and policy; and

IV. 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.

As set forth in the qualification ruling by DHRM, the grievant has the burden of proving by a preponderance of the evidence her allegations of an unfair or biased process and a violation of the civility in the workplace policy.

In the single written notice the agency has combined four separate alleged violations of the Standards of Conduct (DHRM Policy No. 1.60). It did this in lieu of issuing separate formal disciplines to the grievant. In assessing combined offenses, it is proper for a Hearing Officer to assess the evidence globally to determine whether the disciplinary action is justified. DHRM Ruling 2021-5252. The agency is not required to establish each of the cited grounds for me to sustain the discipline.

I find two of the grounds to be duplicative in this case. Those grounds are that of failing to follow policy and violating a safety rule. The agency argues that the grievant violated the relevant policies are the agency's Sars-Cov-2 Policy, as implemented by its Infectious Disease (Covid-19) Preparedness and Response Plan. (Agency Ex. 7 and 8). I view these as being the "safety rule" that the grievant is charged with violating. Section 5 of the Policy requires non-employees to wear face coverings in DFS facilities. The daughter of the grievant certainly qualifies for that status. Because of the age of the child, the grievant is responsible for her actions. Even if the child was exempt from the policy because of her age, the grievant acted with poor judgment in allowing her to be unmasked, given the symptoms exhibited by the child. Therefore, the grievant violated that policy.

The Plan contains a screening protocol for employees. Among the factors listed in the protocol to be considered by an employee as part of her self-assessment are a new fever (100.4°F. or higher) and a new cough that cannot be attributed to another health condition.

Under Section 2 of the protocol (Appendix A to the Plan). An employee who has had close contact with someone with suspected Covid 19 in the past 14 days is to contact either a Supervisor or Laboratory Director. The symptoms exhibited by the child were consistent with those of possible Covid 19 infection. The grievant made the good faith determination the symptoms were the result of the daughter's allergies, rather than the more serious condition. Despite the good faith of the grievant, I cannot excuse her behavior in bringing the child to the facility. Agency employees had been warned to "be careful assuming any symptoms of allergies/hay fever.") (Agency Ex. 10). At no point has the grievant adequately explained the general malaise of the daughter (described by her as "not feeling well"). The grievant acted, at a minimum, negligently in bringing the child to the facility on March 22nd. The violation of a policy need not be intentional to support the issuance of a Group III Written Notice. DHRM Ruling 2021-5252. Therefore, the issuance of a Group II Written Notice need not involve intentional misconduct.

It is undisputed that the grievant committed the act alleged on March 22. The violations of the policy and plan qualify as Group II offenses under DHRM Policy 1.60. She violated a safety rule where there was no direct threat of harm. I express no opinion on whether that classification of that particular offense is appropriate.

Although not necessary to my decision, I cannot find that the grievant engaged in disruptive behavior or was insubordinate. The evidence is that employees occasionally bring their children into the facility. That action by the grievant was not unusual. I recognize that the presence of the child resulted in a work stoppage and extra cleaning of the areas of the facility visited by the child. That was certainly not the intent of the grievant. Her action in bringing the child with her while she came to retrieve work to be done at home was not disruptive in and of itself; only the consequences were.

Nowhere in DHRM Policy 1.60 is found a definition of "insubordination" or "insubordinate." Using the usual definitions of it, I do not find that the label applies to the grievant based on her attitude about the Director. A statement was attributed to her that she did not care what he thought was made to a trusted Supervisor. It was made only to a trusted co-worker. Insubordination can be viewed as being subsumed in every violation of policy for failing to follow instructions. The agency overreached by including it as a separate ground in this case.

Regarding the allegation that the grievance process has been unfair to her, I also find that she has failed to meet her burden of proof. The facility Director could have asked more open-ended questions and allowed the grievant to provide more detailed responses. He also could have been more forthcoming in prompt disclosure of possible witnesses against the grievant. As evidenced by his apology, he should not have challenged the lack of medical credentials of the grievant in making the assessment of her daughter's condition. (Ex..Y). It is well recognized in the Commonwealth, however, that the opportunity to present claims in a hearing before a neutral Hearing Officer is a sufficient cure for certain defects in the initial stages of the disciplinary process. DHRM Ruling 2017-4448.

The grievant was given great latitude in her proffer of exhibits and questioning of the witnesses. I have reviewed all exhibits proffered, including those to which I have given little, if any, weight (e.g., Exhibits M, N, S, and Z). The defects in the initial stages of the process have not denied the grievant a fair process.

The grievant has also alleged a violation of DHRM Policy No. 2.50. The evidence, viewed as a whole, does not sustain the allegation that the grievant has been subjected to bullying or harassment. That evidence shows something of a toxic environment in the section of the facility in which the grievant works but points more to the section Safety Officer as being the subject of

speculation and behind the scenes intrigue. The efforts to impeach this co-worker's testimony were substantial. All the finger-pointing did not change that his report of what the grievant said and did on March 22 is unchallenged as to its veracity. The other issues in the section do not establish that the grievant has been bullied in violation of DHRM Policy 2.35, certainly not to the extent that her discipline should be further mitigated.

The actions of the facility Director mentioned above at the initial meetings with the grievant do not exemplify the letter or spirit of Section 1.9 of the Grievance Procedure Manual. Again, those actions do not mean the agency was not appropriate in issuing the Group II Written Notice to the grievant. I express no opinion on whether other individuals involved in this process also fell short of the expectations addressed in that section.

The grievant also argues that the failure of the facility director to strictly comply with the Covid-19 Policy should excuse or mitigate her own conduct. I cannot find any failure to post appropriate signage, violating social distancing by sharing a lunch table with his wife (also an agency employee but a member of what some term a member of his "droplet gang"), or other possible violations shown by the evidence to be comparable to the actions of the grievant.

The closest comparator to the grievant is an employee who suffered Covid-like symptoms within 24 hours after receiving a dose of the vaccine. She came into the facility while having the symptoms, or shortly thereafter, and worked for a while before being sent home by the facility director. She received no level of discipline at all. As the vaccination provided a likely explanation for the symptoms and she was well-positioned to self-assess, her actions are not close enough to those of the grievant for me to mitigate the discipline handed the grievant.

The level of discipline was decided by a few individuals, including two who work in the main office of the agency and have no regular contact with the grievant. The facility Director

testified that he supported the issuance of the Group II as opposed to a higher level based on the work history of the grievant. Section VI(B) of the Rules for Conducting Grievance Hearings require that I give substantial deference to the decisions of management. The standard is one of reasonableness; in other words, whether no reasonable manager could have arrived at the challenged decisions. It is not a question of whether, or not, I would have chosen that particular punishment. Applying the required test, I cannot find that the discipline chosen should be further mitigated, is inappropriate, or is in violation of applicable law or. policy.

VI. DECISION

For these reasons, I uphold the issuance of the Group II Written Notice and the suspension for two days.

VII. APPEAL RIGHTS

You may file an administrative review request within **15 calendar** days from the date the following apply:

1. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director
Department of Human Resource Management
101 North 14th St., 12thFloor
Richmond, VA 23219

or send by fax to (804) 371-7401, or e-mail to EDR.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing,

you may request that EDR review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. 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 may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must provide a copy of all your appeals to the other party, EDR, 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.

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.

RENDERED this 2nd day of September, 2021.

/s/Thomas P. Walk, Hearing Officer