



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11554

Hearing Date: October 7, 2020

Decision Issued: January 27, 2021

PROCEDURAL HISTORY

On March 13, 2020, Grievant was issued a Group II Written Notice of disciplinary action for using a personnel transaction for another HR Manager to formulate an increase to her benefit contrary to policies and also for unauthorized use of State records.

On April 20, 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. On July 20, 2020, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 7, 2020, a hearing was held by remote conference.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's Counsel
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 Virginia Department of Health employed Grievant as a Human Resource (HR) Manager at one of its locations.¹ She began working for the Agency on February 10, 2019. No evidence of prior active disciplinary action was introduced during the hearing.

A Pay Action Worksheet (PAW) is a form the Agency uses to determine whether to take a salary action. Only HR employees and those in the chain of command of an employee subject to a PAW typically have access to PAWs. The Agency considered PAWs to be confidential documents.

A PAW is typically initiated by an employee's supervisor and not by the employee. If an employee initiated the PAW request, however, it would not be a violation of policy justifying disciplinary action.

Ms. 1 was hired as an HR Generalist in September 2019. She began her role as an HR Manager in January 2020. Grievant assumed Ms. 1's former duties. Ms. 1

¹ Grievant left the Agency prior to the hearing.

performed her work duties so well that Agency managers decided to reward Ms. 1 with a bonus. A PAW was drafted for Ms. 1 and submitted to Agency managers including Ms. P. The PAW for Ms. 1 proposed a one-time bonus equaling ten percent of Ms. 1's base salary. The bonus amount was over \$5,000. Ms. P did not know who wrote Ms. 1's PAW. Ms. 1's personnel records including the PAW were kept "in house" within the Agency's computer systems. Ms. 1's PAW was an electronic document.

The PAW for Ms. 1 was to be approved on February 12, 2020 by Mr. M and Ms. P. Ms. P agreed with the request and Ms. 1 received a bonus exceeding \$5,000 as an internal alignment bonus. Mr. S also felt it was appropriate to give Ms. 1 a bonus for several reasons including that Ms. 1 did "exceptional work."

Grievant reviewed Ms. 1's PAW after Agency managers had already decided to award Ms. 1 a bonus. Grievant reviewed the PAW for Ms. 1 as part of her normal work duties. She was authorized by the Agency to view Ms. 1's PAW. Grievant believed the PAW for Ms. 1 was contrary to policy. Grievant was not given the opportunity to review Ms. 1's PAW prior to it being approved by Agency managers. Grievant did not want to question the decision of Agency managers because she feared having her "head put on a platter." On February 19, 2020, Grievant approved the PAW for Ms. 1 but wrote, "Approved at Ops Director discretion".

Grievant believed the Agency should have given Ms. 1 a recognition bonus under DHRM Policy 1.15 instead of an internal alignment bonus under DHRM Policy 3.05. A recognition bonus would be limited to \$5,000 but Ms. 1 received more than \$5,000.

Grievant contemplated the Agency's error and decided that she could not go along with Agency's action. She did not want her name associated with something she knew was wrong. Grievant felt she would have to "go alone" and "do the right thing." Grievant believed if she directly confronted Mr. S and told him of the Agency's error, her "head would be on a platter." She knew of other employees in the Agency who complained to Agency managers and they suffered consequences for pointing out perceived Agency errors.

Grievant tried to set up a meeting with Manager B to discuss why the PAW for Ms. 1 was in error. She was not able to schedule a meeting with Manager B. Grievant also had a meeting scheduled with Mr. S but the meeting was postponed to February 24, 2020 and then cancelled.

Grievant decided to draft a PAW for herself seeking the same type of bonus Ms. 1 received. Grievant drafted a PAW with an effective date of February 25, 2020. Grievant wrote:

The purpose of this pay action worksheet is to issue a one-time bonus as recognition for [Grievant's] willingness to go the extra mile and "serving" and "willing" attitude in completing her work.²

² Agency Exhibit p. 115.

Grievant wrote:

To compensate for additional duties managed, and internally align the KSAs and experience that [Grievant] possesses, a proposed one-time bonus – 10% of base salary is requested.³

The PAW for Grievant was to be approved by Mr. S and Ms. P. If approved, Grievant's PAW would result in a bonus in excess of \$5,000.

Grievant copied several sentences and phrases from Ms. 1's PAW and included them in Grievant's PAW. Grievant's PAW did not contain Ms. 1's name, employee number, or other personally identifying information about Ms. 1. Someone who was not already familiar with Ms. 1's PAW would not know that Grievant had copied sentences and phrases from Ms. 1's PAW.

After Grievant completed the PAW, Grievant submitted it to Mr. S. Grievant anticipated that when she presented her PAW to Mr. S, Mr. S would say "we can't do this" because of the budget. She would "force the issue" so that Mr. S would see the Agency's action regarding Ms. 1's PAW was wrong.

On February 25, 2020, Grievant sent Mr. S an email with the PAW attached. Grievant wrote:

In recognition of my efforts thus far, and in anticipation of the coming weeks/months throughout this transition, I propose that the same type of IBA-Internal Alignment bonus that was submitted and approved for [Ms. 1] last week be considered for me. Please find the completed PAW attached. As an HR Consultant Sr. I would have placed such a transaction on hold and asked several questions and presented recommendations for a stronger PAW; however after seeing your approval and [another employee] advising me that [Ms. P] presented it to her to submit, when I asked her how she gained it, I approved the transaction, noting, "Approved at Ops Director discretion", in my current role as SBS Pop Health HR Manager. Considering that my efforts thus far in this assignment is a result of backlogged/continuing matters in the area that [Ms. 1] had assumed since her date of hire in September 2019 and under [name] temp status. Should you have any questions or concerns, feel free to contact me.⁴

³ Agency Exhibit p. 116.

⁴ Grievant Exhibit p. 5.

On February 26, 2020, Mr. S sent Grievant an email informing Grievant he received her email and added, "After reviewing it, there are a few concerns."⁵

Once the Agency initiated due process for disciplinary action, Grievant spoke with her attorney. Her attorney had significant experience with employee grievances and advised her to refrain from making any comments to the Agency during the due process steps. Grievant complied with her attorney's instruction.

On April 24, 2020, Grievant participated in a Second Step of the Grievance process. She met with Mr. P. Mr. P told her that the meeting was an opportunity for Grievant to give additional information and that Grievant should do so. Grievant told Mr. P she had nothing to add.

Grievant appealed the Second Step response on May 4, 2020. On May 14, 2020, Grievant met with the Deputy Commissioner. The Deputy Commissioner concluded that Grievant plagiarized another HR Manager's in-band adjustment written documentation which was an ethics violation.

The Agency did not take disciplinary action against Grievant for requesting a bonus. Grievant was not disciplined for submitting her own PAW instead of having it submitted by a supervisor. The Agency disciplined Grievant because she copied personal information written in Ms. 1's PAW and used it for her personal gain.

CONCLUSIONS OF POLICY

The Agency asserted Grievant should receive a Group II Written Notice for violating the Agency's policies governing confidentiality and ethics and because her actions were a misuse or unauthorized use of State records. The Agency has not presented sufficient evidence to support the disciplinary action.

VDA Policy OCOM 1.01 governs Confidentiality. Confidential Information is defined as:

Protected Health Information (PHI) and Personal Information (PI) regarding employees, clients/patients, and the public as well as other forms of confidential information related to proprietary and/or business information.⁶

Agency employees are required to "limit disclosure of confidential information to only authorized persons."⁷

⁵ Grievant Exhibit G-6.

⁶ Agency Exhibit p. 55.

⁷ Agency Exhibit p. 56.

VDH Policy OCOM 1.03 sets forth the Agency's Code of Ethics. This policy addresses integrity, objectivity, respect, and stewardship. Under this policy, employees were expected to "[c]omply with agency policy and law regarding privacy, confidentiality, and inappropriate release of sensitive ... employee ... information."⁸

Ms. 1's PAW was confidential information because someone reading it would see Ms. 1's name and a discussion about her work performance.

Grievant's PAW did not contain Ms. 1's confidential information because someone reading it would not be able to identify Ms. 1 unless the reader had also recently read and remembered Ms. 1's PAW. Grievant used some of the words contained in Ms. 1's PAW. Grievant's use of those words, however, would not allow someone who had not already read Ms. 1's PAW to identify Ms. 1. In other words, if the Hearing Officer looks only at the words Grievant copied from Ms. 1's PAW, those words do not identify any employee.

Grievant had access to Ms. 1's PAW as a part of her job duties. She did not act contrary to policy when she reviews Ms. 1's PAW.

Grievant's disclosure of the words from Ms. 1's was only to her supervisor who had already seen Ms. 1's PAW as part of his job duties.

The Agency alleged Grievant engaged in the unauthorized use of State records. Ms. 1's PAW was a State record developed in the ordinary course of business by the Agency and held by the Agency as one of its records.

Grievant was authorized to access Ms. 1's PAW because she was expected to review the PAW and approve the PAW.

The words copied from Ms. 1's PAW were not published works or business secrets or other intellectual property having monetary value. Grievant did not undermine or destroy the value of Ms. 1's PAW because it had no monetary value. Grievant did not take those words and present them as her own writing the way a writer might claim to have authored a book or publication.

There is nothing in State policy that would prohibit an employee from copying selective words from one routine business record to use in another routine business record. The Agency described Grievant's behavior as "plagiarizing" Ms. 1's PAW. A PAW begins as a form document with additional information to be added relating to the request. The Agency did not present evidence of the identity of the person who wrote Ms. 1's PAW or that the author of Ms. 1's PAW crafted an original writing.⁹ It could be

⁸ Agency Exhibit p. 107.

⁹ The Deputy Director of HR testified the person who wrote Ms. 1's PAW was no longer employed by the Agency.

the case that the author of Ms. 1's PAW relied on the wording of other PAWs or at least reviewed other PAWs in order to get an idea of what to write in Ms. 1's PAW.

Much of Grievant's behavior as protected. Virginia Code § 2.2-3000(A) states:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints. To that end, employees shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management. To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes that may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

DHRM has broadly interpreted Virginia Code § 2.2-3000 to define as protected activities (otherwise protected by law) attempts by employees to freely discuss their concerns with Agency management.

The Agency issued Ms. 1 a bonus pursuant to DHRM Policy 3.05 which governs Compensation. Under this policy an In-Band Bonus is defined as:

A pay option that allows an agency to provide a lump-sum payment in lieu of a base pay adjustment to an employee for changes in duties, the application of new knowledge, skills or abilities, retention, or internal salary alignment.

Grievant believed the bonus to Ms. 1 should have been pursuant to DHRM Policy 1.15 which governs Employee Recognition and Engagement. This policy provides:

B. ORGANIZATIONAL RECOGNITION FOR ALL AGENCY EMPLOYEES: Employee and Organizational Recognition is characterized by a variety of formal, planned, and immediate or "spot" recognition or engagement activities that are designed to acknowledge employee or team accomplishments and contributions that support the mission and objectives of an agency. Examples include, but are not limited to, noteworthy achievements, successful completion of a project or special assignment, stellar customer service, attendance, safety, teamwork, innovation, the nomination for a Governor's Award, Virginia Public Service Week, and agency-wide success stories.

1. ORGANIZATIONAL RECOGNITION AWARDS:

a. Monetary and non-monetary awards up to five thousand dollars (\$5,000) per employee per fiscal year.

Whether the bonus given to Ms. 1 was contrary to policy is not significant.¹⁰ What is significant is that Grievant believed giving Ms. 1 a bonus in excess of \$5,000 pursuant to DHRM Policy 3.05 was contrary to DHRM Policy 1.05.

Grievant's submission of a PAW to her supervisor was a protected activity regardless of Grievant's motive. Grievant was attempting to discuss with her supervisor her concern that she had "signed off" on Ms. 1's PAW in which she believed the Agency had acted contrary to policy.¹¹ Grievant copied several of the sentences in Ms. 1's PAW in order to make her PAW look similar to Ms. 1's PAW. Although Grievant's method of communication is unusual, Grievant believed if she directly pointed out the Agency's error, her head would be "on a platter." In other words, Grievant believed she would suffer harsh consequences for directly challenging Agency managers so she elected to use a different method.

The Agency asserted Grievant copied words from Ms. 1's PAW to seek a pay increase for her own benefit. The Agency's assertion is consistent with the wording of Grievant's PAW. If Grievant solely was seeking a bonus from the Agency, her behavior still would be protected. There is no policy that prohibits an employee from asking a supervisor to create a PAW to award that employee a bonus. The fact that Grievant initiated the PAW is not basis for disciplinary action. Grievant's use of wording from Ms. 1's PAW was not sufficient behavior to justify disregarding the protected nature of her request for a bonus.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is **rescinded**.

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:

¹⁰ Grievant presented testimony from the Deputy Director of HR who concluded Ms. 1's PAW was not correct. She described Ms. 1's PAW as "absolutely incorrectly done." This conclusion is consistent with Grievant's interpretation of policy. In other words, Grievant's interpretation of policy was not unreasonable.

¹¹ Grievant wrote in her PAW, "I would have placed such a transaction on hold and asked several questions and presented recommendations for a stronger PAW." This language is consistent with Grievant's testimony that her objective was to have the Agency realize it erred in approving Ms. 1's PAW.

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.