



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11560

Hearing Date: October 5, 2020

Decision Issued: January 7, 2021

PROCEDURAL HISTORY

On March 17, 2020, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow policy and violation of DHRM Policy 2.35.

On March 26, 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 5, 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 Department of Corrections employs Grievant as a Clinical Coordinator at one of its facilities. She has been employed by the Agency for approximately 23 years. Grievant received a satisfactory 2019 performance evaluation. No evidence of prior active disciplinary action was introduced during the hearing.

In November or December 2019, Ms. R was seated working in front of a computer. Grievant came to Ms. R to see what Ms. R was doing. Grievant told Ms. R, "You need to sit up straight." Grievant placed her hand on Ms. R's back. Grievant mentioned she was all about ergonomics and that Ms. R needed to sit up straight.

Ms. R's first name began with the letter "C" and was very similar to the first name of Ms. P whose first name began with the letter "S". The letters in their names were the same except for the first letter. The Agency hired these employees at approximately the same time.

Grievant and Ms. R worked in the same unit but Ms. R did not work in Grievant's chain of command. Ms. R testified she was a "member of the LGBT community."

Grievant called Ms. R using Ms. P's first name and then said "whatever your name is." Ms. R corrected Grievant several times regarding her first name and how to

pronounce it. Ms. R was annoyed by Grievant's continuing errors with pronouncing her name.

Ms. R believed she had corrected Grievant at least ten times but Grievant continued to say her first name incorrectly. Grievant did not apologize to Ms. R for speaking her first name incorrectly. Other staff had also corrected Grievant.

On December 19, 2019, Dr. F met with Grievant and told Grievant that he had faith that she would learn each person's first name. He said she should get the names right so they could move past this before it became a problem.

Grievant purchased bagels and brought them into work to share with her co-workers. Grievant, Ms. Re, Ms. G, and Ms. K were in Grievant's office eating bagels. As Ms. R passed by the office, Grievant invited Ms. R into the office to eat a bagel. Ms. R declined Grievant's offer. Ms. R was wearing slacks, sweater, and button up shirt. As Ms. R walked away, Ms. R believed she heard Grievant say, "she or he or whoever she is." Ms. R was not in the room when the statement was supposedly made. Ms. R believed Grievant was referring to Ms. R. Ms. G did not hear Grievant make any offensive comments towards Ms. R. Ms. Re was in Grievant's office from 7:30 a.m. until 8 a.m. She considered that to be "the entire time." She did not hear Grievant or anyone else make an offensive comment about Ms. R. Ms. Re testified that when Ms. R walked by no one made an offensive comment about Ms. R. Ms. Re did not hear anyone claim to not know whether to refer to Ms. R as a "he or she." If someone had made such a comment, Ms. Re believed she would have heard it. Mr. R entered the office briefly to make a cup of coffee and then left. He did not hear Grievant make any negative comments about Ms. R. Ms. P heard Grievant say, "I don't know how to refer to her as a he or a she."

The Unit held a staff meeting on January 15, 2020. Grievant attended the meeting along with several other staff. Grievant was asked who was assisting her with moving her telephone and office. Ms. P was the person assisting Grievant. Grievant paused and said, "Um um um, [Ms. P's first name] has been helping me." Ms. Re heard Grievant start to say a first name, then pause, and said Ms. P's first name, not Ms. R's first name. Ms. P2 testified adamantly that she attended the January 2020 staff meeting and was sitting across from Ms. R. Ms. P2 testified she heard Grievant say the names incorrectly. Contrary to her assertion, Ms. P2 was not at the January 15, 2020 staff meeting.

On January 22, 2020, Ms. R spoke with Ms. S and stated she felt Grievant's behavior was hostile towards her and that she felt ill from stress because of Grievant's treatment.

On January 22, 2020, Dr. F held a second meeting with Grievant regarding Grievant's failure to correctly express first names correctly. Grievant denied continuing to confuse the names.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three groups, according to the severity of the behavior. Group I offenses “include types of behavior less severe in nature, but [which] require correction in the interest of maintaining a productive and well-managed work force.” Group II offenses “include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal.” Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”¹

DHRM Policy 2.35 governs Civility in the Workplace. Non-discriminatory workplace harassment is defined as:

Any targeted or directed unwelcome verbal, written, social, or physical conduct that either denigrates or shows hostility or aversion towards a person not predicated on the person’s protected class.

The DHRM Policy Guide provides:

Non-discriminatory conduct is demeaning, intimidating, or insensitive behavior that is not targeted specifically toward individuals based on their characteristics or affiliation with a particular group, class, or category.

The context of the behaviors, nature of the relationship between the parties, frequency of associated behaviors, and the specific circumstances must be considered in determining if the behavior is prohibited. A “reasonable person” standard is applied when assessing if behaviors should be considered offensive or inappropriate.

In November or December 2019, Ms. R was seated and working in front of a computer. Grievant placed her hand on Ms. R’s back. Grievant told Ms. R, “You need to sit up straight.” It was inappropriate for Grievant to place her hands on Ms. R in response to Ms. R’s poor posture. Grievant’s behavior was not based on Ms. R’s protected status. The relationship between Grievant and Ms. R was not one where Ms. R could have expected Grievant to place her hands on Ms. R. Grievant’s behavior was unwelcomed and insensitive. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

The Agency alleged Grievant should be disciplined for confusing Ms. R’s and Ms. P’s first names. Their first names are similar and Grievant’s confusion appears to have been genuine and not a pretext to being disrespectful to either Ms. R or Ms. P or because of Ms. R’s protected status. Grievant’s actions did not rise to the level justifying disciplinary action until such time as Dr. F brought the issue to her attention and informed her she was obligated to learn and correctly use Ms. R’s first name. The

¹ See, Virginia Department of Corrections Operating Procedure 135.1.

Agency did not present sufficient evidence to show that Grievant violated Dr. F's instruction. The Agency presented evidence that some employees believed Grievant continued to confuse the first names, but without specifics such as when it occurred and who was present, the Agency's evidence is not sufficient. The Agency offered as an example a staff meeting on January 15, 2020 where Grievant supposedly confused the first names of Ms. R and Ms. P. The evidence showed that Ms. P assisted Grievant and when asked who assisted Grievant, Grievant paused before saying Ms. P's name and then said Ms. P's name. It may be the case that others attending the staff meeting believed Grievant had confused the two names because Grievant paused before saying Ms. P's name.

The Agency alleged Grievant displayed a lack of civility by saying she did not know what to call Ms. R after Ms. R passed by Grievant's office. The evidence showed that only Ms. R and Ms. P heard Grievant made the alleged comment. Others attending the gathering deny Grievant made any offensive comment. A key fact is to whom Grievant was speaking when she allegedly made the inappropriate comment. If Grievant made the comment, it is clear she would have directed the comment at one of the employees in her office. There is no reason to believe she simply "blurted out" the comment in her office without it being heard by everyone in the office. Given the conflicting testimony and the absence of a key fact, namely to whom Grievant was speaking, the Agency has not established that Grievant made the alleged comment.

This grievance is difficult because several of the Agency's primary allegations remained unproven. There remains, however, sufficient evidence to support the issuance of a Group II Written Notice.

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.

² *Va. Code § 2.2-3005.*

DECISION

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

^[1] Agencies must request and receive prior approval from EDR before filing a notice of appeal.

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer