



COMMONWEALTH OF VIRGINIA

Department Of Human Resource Management

Office of Employment Dispute Resolution

DECISION OF HEARING OFFICER

In re:

Case number: 12100

Hearing Date: May 9, 2024

Decision Issued: May 22, 2024

PROCEDURAL HISTORY

On January 24, 2024, Grievant was issued a Group I Written Notice of disciplinary action for disruptive behavior and violating DHRM Policy 1.60, Standards of Conduct, and violating DHRM Policy 2.35, Civility in the Workplace.

On January 27, 2024, 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 the matter advanced to hearing. On March 25, 2024, the Office of Employment Dispute Resolution assigned this matter to the Hearing Officer. On May 9, 2024, a hearing was held Agency offices near the Facility.

APPEARANCES

Grievant
Agency Advocate
Agency Party Designee
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Group I Written Notice of disciplinary action?
2. Whether the behavior constituted misconduct?

An Equal Opportunity Employer

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:

Grievant is a Licensed Practical Nurse working for a Department of Juvenile Justice Facility. No evidence of prior disciplinary action was introduced during the hearing.

On January 17, 2024, Agency Human Resources staff scheduled a meeting with the Facility's medical staff. The meeting was scheduled to start at 1:00 pm (13:00:00). The meeting was held in a small room with limited chairs available in the room. Some meeting attendees had to bring chairs into the room in order to be able to sit during the meeting. The meeting room also had an operating security camera that captured a video and audio recording of the meeting.

The meeting began at approximately 13:03:20. HR Director started the meeting by introducing the Human Resources staff in the room. HR Director stated that the purpose of the meeting was to provide workplace civility training and that the meeting had been scheduled to allow time for questions and "open discussion." HR Director then turned the meeting over to the Presenter who began her presentation.

Grievant entered the meeting at approximately 13:07:20. Grievant had to roll a chair into the room in order to be able to sit during the meeting. Other meeting attendees turned away from the presentation and looked at Grievant when she entered the room. Presenter continued with her presentation of information.

By approximately 13:11:00, Presenter was presenting information regarding discriminatory harassment. At approximately 13:11:07, Grievant interrupted Presenter's presentation with an audible "Hmmp." Grievant's interruption caused other meeting

attendees to turn away from the presentation and look at Grievant. Grievant's interruption also caused Presenter to stop her presentation to ask if anyone had any questions. Grievant responded "I'm going through all of that right now." Presenter responded, "That's not good" to which Grievant replied "It's not."¹ Presenter then continued with her presentation.

At approximately 13:11:42, Witness 2 was sitting next to Grievant commented "mmhmm" to Grievant. HR Director then asked if there was a question and Witness 2 indicated that she did not have a question at that time.²

At approximately 13:32:22, Presenter was presenting information about retaliation and Grievant could be heard to say "mmhmm ... yeah." This interruption caused other meeting attendees to briefly turn away from the presentation to look at Grievant. Grievant then started to make gestures while Presenter was providing information about retaliation. Grievant at one point raised her arms in a shrug and then shook her head in the negative. As Presenter discussed an example of when a schedule change might rise to the level of retaliation, Grievant again gestured by raising her arms in a shrug type movement.³

By approximately 13:45:00, Presenter had finished with her portion of the meeting, meeting attendees had been provided with handouts, asked to confirm that they had indicated their attendance on the meeting sign-in sheet, and asked to sign a form acknowledging receipt of the Civility in the Workplace training.

HR Director then stood before the group and indicated that she wanted to follow-up and respond to questions that had come up during the training and while she and other HR staff had circulated handouts to the group. HR Director then proceeded to provide additional information and clarification to the meeting attendees on a few topics.

HR Director described that the grievance process sets forth specific deadlines for responses. At approximately 13:59:55, Grievant raised her hand and when HR Director called on her, Grievant asked "My grievance took from September all the way to this month, why was that?" HR Director responded that she did not know about Grievant's grievance and someone (it is unclear who) asked Grievant "was there an investigation" to which Grievant replied "yes, and I know you signed off on the investigation, so I was just asking how long until the investigation gets started." Grievant had pointed in the direction of HR Director as she said, "I know you signed off on the investigation." HR Director responded, "If I signed off on the investigation it should have already started, but I would have to check with Investigations." Grievant replied "Hmm ... ok." HR Director then generally described that the investigations team may be short-staffed and the investigators have to prioritize the investigations that relate to residents.⁴

Grievant then stated, "can I ask, because it's on-going harassment with on-going retaliation so do I have to wait for the investigation to start for that to stop? ... it's continuing." HR Director responded that "so yours ... (inaudible)... we'll have to talk off-

¹ See Agency Ex. Video Clip at 13:11:07-13:11:22.

² Hearing Recording at 2:03:34-2:05:52.

³ See Agency Ex. Video Clip at 13:33:00-13:34:00.

⁴ See Agency Ex. Video Clip at 13:59:55-14:01:05.

line, not in a group setting.” Grievant responded by stating “ok, but I just wanted to talk in front of people who have witnessed it [be]cause it was like oh we don’t believe you because you are the only one. That is what was told to me.”⁵

HR Director then stated, “So [Grievant] has said she has been harassed and discriminated against ... so you are the witnesses, that is what she is saying and so in that instance we actually sent out a survey to the nursing staff and nobody responded.” Various meeting attendees then indicated to HR Director that they did not receive such a survey. HR Director told the group that she could resend the survey to the nursing staff and also indicated that they could distribute a paper copy of the survey to the nursing staff.⁶

Grievant then stated, “Yeah because the retaliation toward me is trickling on the other nurses and that is making my work environment hostile.” HR Director replied to Grievant and stated, “That is not retaliation.” To which Grievant replied “It is if it is affecting all of the nurses coming from something I said – if I say one thing and then you go and take it from everybody, you’re just trying to retaliate against everybody, so it won’t look like you’re just targeting me.” HR Director asked Grievant “was it a business need?” Grievant responded that it was not a business need. HR Director followed up by asking how Grievant knew there was not a business need. Grievant responded “[Be]cause it wasn’t changed in like 20, 30 years so why would they all of a sudden change it when I just complained about it.” HR Director then stated, “Understand that business need is based on where we are today so a lot of things that we have, or we do, or we’ve done from 15 years ago is not relevant today.” Grievant then asserted that the medical unit was different from other units in the Facility because nothing in medical had changed and medical had not been re-organized like the rest of the Facility. HR Director appeared to disagree with Grievant’s characterization of a supervisor’s role as temporary and then HR Director again told Grievant “so yours is very specific and I don’t think it is appropriate to be discussed ...” Grievant interrupted to say, “I just decided to discuss it in front of people that witnessed it.” HR Director continued by stating “But, hear me out, I don’t think it is appropriate and you’re making a lot of allegations and a lot of it is not true.” To which Grievant responded “It’s fact and it got to an investigation, so I was able to back it up.” HR Director stated, “I’ll leave it alone” and again stated “I’ll talk to you off-line.” At that point in the meeting, another meeting attendee asked a question about staffing levels.⁷

By approximately 14:11:00, HR Director was responding to questions she had received regarding the Agency’s time and leave management system. During a pause, Grievant stated “well sometimes our time sheets don’t get approved ... I’m still waiting on time sheets to get approved from November and now it’s January.” HR Director responded to Grievant and stated “That’s not true...it’s not true because all time sheets are approved. We completed an audit of all time in Cardinal and got that cleaned up before ... I think [Employee T] brought that at the beginning of November for time approved after...(inaudible) ... because we had to send out a message saying that we were not ...umm” Grievant then interrupted HR Director and stated, “I was getting

⁵ See Agency Ex. Video Clip at 14:01:05-14:01:38.

⁶ See Agency Ex. Video Clip at 14:01:38-14:04:09.

⁷ See Agency Ex. Video Clip at 14:04:09-14:06:25.

emails ... me and [Employee D] were getting emails about time being approved for November... about time being approved in December ... and ... January and so was [Employee D].” HR Director responded to Grievant that “[Employee D] wouldn’t have gotten it, but ...um ...” Grievant then stated, “I have the emails and it was sent to me and [Employee D] ... (inaudible).” HR Director replied again and stated, “She’s not getting them right now.” The discussion between Grievant and HR Director then ended when another employee stated that “I have a question that some other staff were asking ...”⁸

At approximately 14:13:38 pm, Grievant put on her coat and pulled the hood of her coat up over her head.⁹

At approximately 14:18:44, Grievant looked at her watch and then stood up and exited the meeting room. Grievant took her chair with her when she exited the meeting room.

Grievant was out of the office on leave from January 18, 2024, until January 24, 2024.

At approximately 8:44 pm on January 18, 2024, an Agency deputy director issued a “Notification of Intent to Issue Disciplinary Action” to Grievant related to her behavior during the meeting on January 17, 2024. The Notification of Intent to Issue Disciplinary Action provided Grievant until 5:00 pm, Monday, January 22, 2024, to provide a written response and noted that a meeting to discuss the incident had been scheduled for Wednesday, January 24, 2024, at 10:00 am.

Grievant received the email containing the Notification of Intent to Issue Disciplinary Action on January 20, 2024, but Grievant did not respond to the Notification or ask for an extension to respond because, according to Grievant she was on leave at the time and does not work when she is on leave.

On January 24, 2024, Grievant was issued a Group I Written Notice of disciplinary action for disruptive behavior and violating DHRM Policy 1.60, Standards of Conduct, and violating DHRM Policy 2.35, Civility in the Workplace.

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.”¹⁰ 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.”

⁸ See Agency Ex. Video Clip at 14:11:00-14:13:05.

⁹ See Agency Ex. Video Clip at 14:13:38-14:13:49.

¹⁰ The Department of Human Resources Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

Whether Grievant engaged in the behavior and whether the behavior constituted misconduct

Section 2.2-3000 of the Code of Virginia provides that state 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.”¹¹ An employee’s right to discuss their concerns with management, must be balanced against the Agency’s need to efficiently conduct its operations and business.¹²

Therefore, although state employees have the right to discuss freely, and without retaliation, their concerns with their immediate supervisor and management, the Standards of Conduct also set forth the expectation that state employees demonstrate respect for their Agency and toward other employees. Consistent with Virginia Code § 2.2-3000, the Standards of Conduct also set forth the expectation for state employees to resolve work-related issues and disputes in a professional manner and through established processes.¹³ DHRM Policy 2.35, Civility in the Workplace, makes clear that “[b]ehaviors that undermine team cohesion, staff morale, individual self-worth, productivity, and safety are not acceptable.”¹⁴ Demonstrating behavior that is rude, inappropriate, discourteous, unprofessional, unethical, or dishonest is prohibited. The Policy Guide for DHRM Policy 2.35, Civility in the Workplace, clarifies that a “reasonable person” standard is applied when assessing if behaviors should be considered offensive or inappropriate.¹⁵

The credible testimony of the Agency witnesses was that the Agency’s Human Resources staff had been asked to provide mandatory Civility in the Workplace training to Facility staff, including medical staff. The meeting on January 17, 2024, was one of three training sessions that nurses, like Grievant, could attend. Agency witnesses testified that Grievant’s behavior throughout the meeting was disruptive.

Grievant asserted that she was not disruptive, rude, disrespectful, or unprofessional during the meeting and did not otherwise engage in the misconduct with which she was charged in the Written Notice. Grievant offered the testimony of four of her colleagues to support her assertions. Grievant’s witnesses testified that they did not find Grievant’s behavior during the meeting to be rude, discourteous or unprofessional. One of Grievant’s witnesses, Witness 2, testified that she, rather than Grievant, was responsible for making an “mmhmm” noise during the meeting that caused HR Director to ask if anyone had any questions. Two of Grievant’s witnesses seemed to have no or little specific recollection of any comments made by Grievant and two of Grievant’s witnesses did recall that Grievant made comments about being retaliated against and

¹¹ Va. Code § 2.2-3000.

¹² See Va. Code § 2.2-3004(B).

¹³ See DHRM Policy 1.60, Standards of Conduct.

¹⁴ See DHRM Policy 2.35, Civility in the Workplace, General Provisions.

¹⁵ DHRM Policy Guide – Civility in the Workplace, Policy 2.35, Prohibited Conduct and Behaviors.

wanting to make statements in front of witnesses. But those two witnesses also testified that they did not consider Grievant's behavior to be rude, discourteous or unprofessional.

The Hearing Officer reviewed the video and audio clip of the meeting. The video showed that Grievant disrupted the meeting when: (i) she entered the meeting late causing other meeting attendees to turn away from the presentation and look at Grievant; (ii) she interrupted Presenter's presentation with an audible "Hmmp" that caused other meeting attendees to turn away from the presentation and look at Grievant and caused Presenter to stop her presentation to ask if anyone had any questions;¹⁶ and (iii) when Presenter was presenting information about retaliation, Grievant interrupted Presenter when Grievant could be heard to say "mmhmm ... yeah" again causing other meeting attendees to briefly turn away from the presentation to look at Grievant and Grievant appeared to again attempt to draw more attention to herself and away from the presentation when she made gestures while Presenter was providing information about retaliation.¹⁷

Although Grievant's questions about the progress of an investigation related to allegations she had made and her concerns about her perception of discrimination and retaliation that she perceived as on-going may be appropriately put to HR Director or other human resources or employee relations staff, Grievant's decision to pose questions in a group training and then become argumentative during the discussion was inappropriate. Grievant argued during the hearing that she believed that the training was the "round-table discussion" to "educate on DHRM Policy 2.35 Civility in the Workplace and the expectations surrounding the policy" that she was provided as partial relief to a grievance.¹⁸ Indeed, in the absence of any evidence to the contrary, the January 17, 2024 mandatory training which HR Director described as allowing for "open discussion" would appear to serve the purpose described in the "Single-Step Response to Grievance Initiated on November 19, 2023" that Grievant received. Based on the video clip of the meeting, Grievant's initial questions about the timing of an investigation and concerns about continuing issues she waited for the investigation to conclude might fall within her understanding of the "round-table discussion." Once HR Director advised Grievant that they should discuss her specific issues "off-line" Grievant should have known at that point that continuing to pursue her questioning of HR Director about matters related to her own grievances should be addressed in another, more appropriate forum, rather in the group training. Grievant, however, chose to continue to try to focus the attention of the meeting on her grievances asserting that "Yeah because the retaliation toward me is trickling on the other nurses and that is making my work environment hostile." Then as HR Director attempted to address Grievant's assertions, Grievant continued with her comments and assertions, becoming more argumentative. Grievant's questions and comments about her personal grievances, based on Grievant's own statements during the meeting, were intended to provide Grievant's perspective of Grievant's issues to a group of people Grievant described as "witnesses" to her claims. As Grievant became more argumentative, her comments and assertions would reasonably be considered as designed to shift the focus of the group meeting to Grievant's personal concerns and

¹⁶ See Agency Ex. Video Clip at 13:11:07-13:11:22.

¹⁷ See Agency Ex. Video Clip at 13:33:00-13:34:00.

¹⁸ Agency Ex. at 11-13.

perspectives and to undermine the expertise and credibility of the Human Resources staff that were providing training and information to the meeting attendees, and who themselves were not necessarily free to disclose information about the Grievant's complaints in the group setting. As such the Agency's characterization of Grievant's behavior as disruptive and rude, disrespectful, and unprofessional was reasonable.

Grievant asserted that she was not the only employee to arrive late to the meeting and to have to bring a chair into the small conference room to attend the meeting. Grievant is correct that another employee also was late to the meeting, however, that employee arrived as the meeting was just getting started, Grievant arrived minutes later. Additionally, Grievant was not disciplined solely for arriving late to a meeting, Grievant was disciplined for her behavior throughout the meeting that was disruptive, and rude, disrespectful, and unprofessional.

Although Grievant's late arrival to the meeting and noise-making during the meeting taken individually might be considered very minor disruptions, the preponderance of the evidence including those actions combined with Grievant's continued efforts to make the group meeting about her and her own grievances after HR Director had advised her that they should be discussed off-line as well as the argumentative nature of Grievant's comments and assertions supports the Agency's assertion that Grievant's conduct was disruptive, rude, disrespectful and unprofessional and the behavior was misconduct.

The Agency has met its burden of proving that Grievant's behavior during the January 17, 2024, meeting was misconduct.

Whether the Agency's discipline was consistent with law and policy

Group I offenses generally have a minor impact on agency business operations but still require intervention. Examples may include tardiness, poor attendance, abuse of state time, use of obscene or disrespectful language, disruptive behavior, and unsatisfactory work performance.

Violation of DHRM Policy 2.35 may be a Group I, Group II, or Group III offense depending upon the nature of the violation.

Grievant's behavior during the training on January 17, 2024, was rude, disrespectful, unprofessional and disruptive. The Agency's discipline is consistent with law and policy.

Due Process

Grievant asserted that the Agency did not provide her with sufficient time to respond to the notice that the Agency was considering disciplinary action. Grievant testified that she was on leave from January 18, 2024, until January 24, 2024. At approximately 8:44 pm on January 18, 2024, an Agency deputy director issued a

“Notification of Intent to Issue Disciplinary Action” to Grievant related to her behavior during the meeting on January 17, 2024. The Notification of Intent to Issue Disciplinary Action provided Grievant until 5:00 pm, Monday, January 22, 2024 to provide a written response and noted that a meeting to discuss the incident had been scheduled for Wednesday, January 24, 2024 at 10:00 am. Grievant received the email containing the Notification of Intent to Issue Disciplinary Action on January 20, 2024, but Grievant did not respond to the Notification or ask for an extension to respond because, according to Grievant she was on leave at the time and does not work when she is on leave. Grievant also asserted that a former Employee Relations employee advised her that she had 24 hours from the time to returned to work to respond to a notification of intent to issue disciplinary action. Grievant essentially argued that the Agency did not provide her with sufficient due process as it considered its disciplinary action against Grievant. The hearing process cures any such deficiency. Grievant had the opportunity to present any evidence and arguments she wished during the hearing.

Retaliation

Grievant asserted that this disciplinary action was retaliation for Grievant’s prior grievances. In order to succeed with a retaliation defense, Grievant must show that (1) she engaged in a protected activity; (2) she experienced an adverse employment action; and (3) a causal link exists between the protected activity and the adverse action.¹⁹ If the Agency presents a non-retaliatory business reason for the adverse employment action, then Grievant must present sufficient evidence that the Agency’s stated reason was a mere pretext or excuse for retaliation.²⁰ The evidence suggests Grievant had engaged in protected activity on at least one prior occasion. Grievant experienced an adverse employment action when she received the Written Notice on January 24, 2024. Grievant engaged in protected activity, however, it is clear that the Agency had non-retaliatory business reasons for the disciplinary action taken against Grievant. The Agency has demonstrated that Grievant engaged in misconduct by being disruptive, rude, disrespectful and unprofessional during the training meeting on January 17, 2024. Because the Agency had non-retaliatory reasons for its disciplinary action and Grievant has offered no evidence to suggest that those reasons are mere pretext, Grievant has not met her burden to prove the Agency’s disciplinary action was retaliation.

Mitigation

Virginia 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....”²¹

The Agency did not identify any mitigating factors that it considered with respect to this disciplinary action. The Agency noted that Grievant had not taken the opportunity provided to offer written information in response to the proposed disciplinary action.

¹⁹ See *Netter v. Barnes*, 908 F.3d 932, 938 (4th Cir. 2018) (citing *Univ. of Tex. S.W. Med. Ctr. v. Nassar*, 570 U.S. 338, 360 (2013)); *Villa v. CavaMezze Grill, LLC*, 858 F.3d 896, 900-901 (4th Cir. 2017).

²⁰ See, e.g., *Felt v. MEI Techs., Inc.*, 584 Fed. App’x 139, 140 (4th Cir. 2014).

²¹ Va. Code § 2.2-3005.

Grievant asserted that she believed that the purpose of the meeting on January 17, 2024, was to provide a round-table discussion regarding Civility in the Workplace that Grievant was expecting as partial relief to a grievance she had filed in November 2023. Grievant's understanding of the purpose of the meeting might have been a mitigating factor for the Agency to consider, as Grievant's understanding that the meeting was in the format of a "round-table" discussion.

Although Grievant's understanding that the training meeting was to be a "round-table" discussion may have been a mitigating factor for the Agency to consider, the extent to which this Hearing Officer may consider it as a mitigating factor is limited. The Rules for Conducting Grievance Hearings ("Rules"), provide that a Hearing Officer is not a super personnel officer. Therefore, in providing any remedy, the Hearing Officer should give the appropriate level of deference to actions by the Agency management that are found to be consistent with law and policy. Specifically, in disciplinary grievances, if the Hearing Officer finds that (1) the employee engaged in the behavior described in the Written Notice; (2) the behavior constituted misconduct; and (3) the Agency's discipline was consistent with law and policy, then the Agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the 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

For the reasons stated herein, the Agency's issuance to Grievant of a Group I 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.²²

Angela Jenkins

Angela Jenkins, Esq.
Hearing Officer

²² 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.