DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case Nos: 12108, 12130

Hearing Date: June 11, 2024
Decision Issued: June 17, 2024

PROCEDURAL HISTORY

On January 29, 2024, Grievant was issued a Group II Written Notice. (#12130)[1] On January 31, 2024, Grievant filed a grievance challenging the Agency's actions.[2] On February 13, 2024, Grievant was issued a Group II Written Notice with termination. (12108)[3] On February 24, 2024, Grievant filed a grievance challenging the Agency's actions.[4] On May 2, 2024, the Director of the Office of Employment Dispute Resolution issued Compliance Ruling Number 2024-5705 and consolidated these two matters. The grievance was assigned to this Hearing Officer on May 6, 2024. A hearing was held on June 11, 2024.

APPEARANCES

Agency Advocate
Agency Representative
Grievant
Witnesses

ISSUES

Did Grievant violate DHRM Policy 2.35 and Departmental Instruction No. 1001(PHI)03?

AUTHORITY OF HEARING OFFICER

Code Section 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code Section 2.2-3005.1 provides that the Hearing Officer may order appropriate remedies including alteration of the Agency's disciplinary action. By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state

[1] Agency Exh. 1, at 5
[2] Agency Exh. 1, at 16
[3] Agency Exh. 1, at 11
[4] Agency Exh. 1, at 22

government.[5] Implicit in the Hearing Officer's statutory authority is the ability to independently determine whether the employee's alleged conduct, if otherwise properly before the Hearing Officer, justified termination. The Court of Appeals of Virginia in *Tatum v. VA Dept of Agriculture & Consumer Servs,* 41VA. App. 110, 123, 582 S.E. 2d 452, 458 (2003) held in part as follows:

> While the Hearing Officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy…the Hearing Officer reviews the facts de novo…as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action. Thus, the Hearing Officer may decide as to the appropriate sanction, independent of the Agency's decision.

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 proof for establishing any affirmative defenses to discipline such as retaliation, discrimination, hostile work environment and others, and any evidence of mitigating circumstances related to discipline. A preponderance of the evidence is sometimes characterized as requiring that facts to be established that more probably than not occurred, or that they were more likely than not to have happened.[6] However, proof must go beyond conjecture.[7] In other words, there must be more than a possibility or a mere speculation.[8]

FINDINGS OF FACT

After reviewing the evidence and observing the demeanor of each witness, I make the following findings of fact: Agency submitted a notebook containing pages 1 through 196. The notebook was accepted in its entirety as Agency Exhibit 1. Grievant submitted electronically 47 pages of evidence. He did not offer any such evidence as evidence during the hearing. Five witnesses testified on behalf of the Agency: a Psychology Supervisor (PS), the Director of Psychology (DP), an Admissions Counselor (AC), a Primary Care Physician (PCP) and the Chief People Officer (HR). The Grievant testified and called his wife (HW) as a witness.

Several Departmental Instructions (DI) policies are relevant to this matter.

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[5] See Va. Code § 2.2-3004(B)

[6] *Ross Laboratories v. Barbour*, 13 Va. App. 373, 377, 412 S.E. 2d 205, 208 1991

[7] Southall, Adm'r v. Reams, Inc., 198 Va. 545, 95 S.E. 2d 145 (1956)

[8] *Humphries v. N.N.S.B., Etc., Co.,* 183 Va. 466, 32 S.E. 2d 689 (1945)

Policy Number RTS-25c(II) defines **Protected Health Information** (PHI) as: *"…individually identifiable, health information that is maintained or transmitted in any medium, including electronic media…"*[9]

DI 1001-3, **Privacy Policies and Procedures**, states: "*This means the Departments official policies and procedures for protecting the privacy of protected health information consistent with the HIPPA Privacy Rule and other relevant state and federal laws and regulations. These policies and procedures are contained in a document entitled Privacy Policies and Procedures for Use and Disclosure of Protected Health Information (PPP)…"*[10]

PPP defines **Breach** as: "*… The … disclosure of protected health information in a manner, not permitted by the HIPPA Privacy Rule, that compromises, the security or privacy of the protected health information*."[11]

HIPPA **Corrective Actions, Levels of Offense** sets forth that a Level 3 offense is the**: "**Unauthorized use or disclosure of protected health information."[12] The recommended 1

Policy 2.35, **Civility in the Workplace** states as its Purpose: "*It is the policy of the Commonwealth to foster a culture that demonstrates the principles of civility, diversity, equity, and inclusion. In keeping with this commitment, workplace harassment (including sexual harassment), bullying (including cyber bullying), and workplace violence of any kind are prohibited in state government agencies*."[13]

Policy 2.35, **Prohibited Conduct Application** states: "*The Commonwealth strictly forbids harassment (including sexual harassment), bullying behaviors, and threatening or violent behaviors of employees… and other **third parties** in the workplace*."[14] **(Emphasis added)**

Policy 2.35, **Engaging in Prohibited Conduct** states: "*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."*[15] **(Emphasis added)**

The Policy Guide for Policy 2.35 states in part **Prohibited Conduct/Behaviors** may include**:'** *(1) engaging in behavior that creates a reasonable fear of injury to another person; (2) demonstrating behavior that is rude, inappropriate, discourteous, unprofessional…; (3) behaving in a manner that displays a lack of regard for others, and significantly distresses, disturbs, and/or offends others…*[16]

Regarding case #12108, Grievant received a Due Process notification on February 1, 2024.[17] As a part of his response, on February 1, he sent and email to DP stating in part: "*I want to inform you that I*

[9] Agency Exh. 1, at 84
[10] Agency Exh. 1, at 88
[11] Agency Exh. 1, at 97
[12] Agency Exh. 1, at 130
[13] Agency Exh. 1, at 34
[14] Agency Exh. 1, at 36
[15] Agency Exhibit 1, Page 57
[16] Agency Exh. 1, at 42
[17] Agency Exh. 1, at 14.

made a mistake using my personal email…It was not my intent to forward the wrong email. I use my personal email for HR related material when I do not have access to the State email. Please consider this in that a mistake can occur when they are not intentional."[18]

During the course of DP's testimony, Grievant stipulated that he sent PHI to his personal email address. Doing so is a Level 3 offense, and the recommended Corrective Action is a Group II Written Notice.[19] Pursuant to this Group II Written Notice, along with the active Group II Written Notice (#12130) and an active Group I written Notice,[20] Grievant's employment with the Agency was terminated on February 13.

On February 24, Grievant filed Grievance Form A regarding the PHI disclosure and stated: "*I was dealing with a 500 level Glucose (Diabetes Type 1) and sinus infection which affected my health*.[21] This is the first time that a medical condition was used as a justification for Grievant's stipulated error. DP testified that she was unaware that Grievant had diabetes and that there had never been a request by Grievant for any accommodation for this illness. HR testified that there was no request for accommodation on file for Grievant.

PCP testified he has been a family physician since 1998 and has treated many patients with diabetes. He was not the Grievant's physician. He testified none of the data found at page 23 of Agency Exh. 1 presented a medical emergency. He also pointed out this was a urinalysis and not a blood screen. He stated a UA Glucose 500 (A) reading, while high, in his medical experience, should not impact cognition. He reviewed the medical records Grievant submitted with Grievance form A,[22] and found there was nothing contained therein which would prevent the Grievant from being able to perform his duties as an employee of the Agency.

Grievant testified that he felt his high glucose level impacted his thought process and resulted in his error regarding PHI. He offered no medical experts to corroborate that opinion. He offered no credible explanation for only bringing his diabetes into issue after his termination. He made no claim that he had requested an accommodation because of his diabetes. I find there was no medical excuse for the release of the PHI.

Because the Agency relied upon Group II Written Notice (#12130) and an active Group I Written Notice to justify termination[23], I will now deal with #12130. This matter involved a violation of DHRM Policy 2.35.[24] AC testified that her office was in reasonable proximity to that of the Grievant. On Thursday, January 4, Grievant came to her office to apologize for his behavior. AC did not understand why an apology was needed. On Friday, Grievant asked AC if she would come to the dining area and he gave her his phone. HW was on this call and told AC to leave her husband alone. Otherwise, AC would lose her job, she would go in hell, and she would need to watch her back. On Sunday, Grievant brought his wife to work and introduced her to AC.

AC filed a complaint with the Agency's Human Resources following the threatening phone call. Because of her concerns regarding HW, AC accepted an offer from the Agency for Security to make

[18] Agency Exh. 1, at 15
[19] Agency Exh. 1, at 130
[20] Agency Exh. 1, at 195
[21] Agency Exh. 1, at 22-23
[22] Agency Exh. 1, at 23-26
[23] Agency Exh. 1, at 11
[24] Agency Exh. 1, at 5

additional rounds. An investigation ensued and the Agency found AC's complaint to be founded.[25] Grievant received a Due Process notification on January 23.[26]

On January 25, in his written response to the Due Process Notice, Grievant stated in part as follows: "*During the months of April 2023 through January 2024…I had previously spoken to [AC] privately in her office a few times and in my office as well. My focus was to discuss my patients…I began to notice that she shared personal information about her life about her husband being deceased, living in Dinwiddie County, and being 10 minutes away from CSH…I would later reflect that [AC] was becoming more personal by also sharing that she also took care of her mother…I did not realize that she was becoming more close and intimate with her soft-spoken voice, so I started to take steps to avoid any further personal engagement with her. So I eventually both informed and apologized to [AC] for the appearance of inappropriate behavior by no longer going into her office alone around the later half of September to early October..*"[27]

Subsequently, on January 11, Grievant facilitated a phone call between HW and AC. His stated purpose was to prove he was married.[28] AC testified that HW told her to watch her back and that she would be fired if AC continued her actions toward Grievant. AC told HW that there was nothing going on between AC and Grievant.

As part of his Third Resolution Step, Grievant stated in his support documentation: *"[HW] informed both of us that if we had and/or continued in appropriate relationship, we would both be going to hell in a religious context. No verbal threat was given."*[29] In the document, Grievant stated that he and AC *"did not act in any inappropriate way that would construe either sexual harassment or behavior."*[30]

PS testified that he had never observed an inappropriate relationship between AC and Grievant. DP testified that nothing had ever been reported to her about a problem between AC and Grievant. HR testified that when she interviewed Grievant regarding this matter, he admitted that HW told AC she would need to watch her back and that she was going to hell if anything further continued between AC and Grievant.

HW testified she told both AC and Grievant that they would go to hell if they did not stop what was going on. Several times in her testimony, HW stated her concern for AC's coquettish tone of voice when addressing Grievant. HW stated Grievant did not know what she was going to say on the call.

Had Grievant made these statement to AC, it would be a clear violation of Policy 2.25. These statements were rude, inappropriate, unprofessional, dishonest and created a reasonable fear of injury. The question here is can the Agency assign HW's statements to Grievant. The only information source HW had regarding AC was through the Grievant. The only way HW could be aware of AC using a "coquettish" voice is from Grievant. I find that Grievant knew or should have known that there was an extreme likelihood that this phone call would not be pleasant. His stated reason to prove that he was married is not credible. Here Grievant encouraged or allowed the conduct of HW to engage in conduct prohibited by Policy 2.35. Further, it seems more than a serendipitous coincidence, that Grievant brought HW to the Agency with 48 hours of the abusive call and choose to introduce her to AC. While

[25] Agency Exh. 1, at 5
[26] Agency Exh. 1, at 8
[27] Agency Exh. 1, at 9-10
[28] Agency Exh. 1, at 10
[29] Agency Exh. 1, at 20
[30] Agency Exh. 1, at 19

nothing untoward happened at this introduction, the timing is suspect unless the purpose was to send a message similar to that conveyed by the phone call. I find that Grievant has violated Policy 2.35.

MITIGATION

Va. Code § 2.2-3005(C)(6), authorizes and grants Hearing Officers the power and duty to receive and consider evidence in mitigation or aggravation of any offense charges by an Agency in accordance with rules established by EDR. 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.

Hearing Officers are authorized to make findings of fact as to the material issues of the Case and to determine the grievance based on the material issues and the grounds and the records for those findings. The Hearing Officer reviews the facts *de novo* to determine whether the cited actions constitute misconduct and whether there were mitigating circumstances to justify a reduction or removal of the disciplinary action, or aggravating circumstances to justify the disciplinary action. The Hearing Officer has the authority to determine whether the Agency has established by a preponderance of the evidence that the action taken was both warranted and appropriate under all the facts and circumstances.

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, (3) the disciplinary action was free of improper motive, (4) the length of time that Grievant has been employed by the Agency, and (5) whether or not Grievant has been a valued employee during the time of his/her employment at the Agency.

I find no reason to mitigate this matter.

DECISION

I find that the Agency has borne its burden of proof in this matter and the issuance of Group II Written Notice (#12130) and Group II Written Notice (#12108) with termination was proper.

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 that 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 where 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].

William S. Davidson
William S. Davidson, Hearing Officer

Date: June 17, 2024

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