

COMMONWEALTH OF VIRGINIA
Department of Human Resource Management

Office of Employment Dispute Resolution

DECISION OF HEARING OFFICER

In re:
Case Number: 12049

Hearing Date: January 23, 2024
Decision Issued: February 1, 2024

PROCEDURAL HISTORY

The Hearing Officer was appointed effective December 18, 2023. Upon being appointed, a pre-hearing telephone conference was conducted on December 19, 2023 and the Grievance Hearing was scheduled for January 23, 2024, with a copy of all exhibits and list of witnesses to be mailed to the Hearing Officer and to the other party no later than January 16, 2024.

The Hearing Officer received in a timely manner from the Agency the exhibit notebook and list of witnesses. The Grievant provided to the Hearing Officer and to the Agency the Grievant's exhibit notebook but after the agreed deadline. Although the Agency objected to the admission of any of the Grievant's exhibits on the basis that they were not timely provided, the Hearing Officer considering the Grievant's explanation overruled the Agency's objection and admitted the Grievant's notebook of exhibits subject to the Agency's objections raised during the hearing to specific exhibits.

The Grievance Hearing was conducted on January 23, 2024 as scheduled.

The grievance hearing addressed the following Written Notice:

Group I Written Notice issued on September 11, 2023 for violating the Standards of Conduct regarding attendance and excessive tardiness during the period from July 27, 2023 to August 23, 2023 (Agency Exhibit 3)

APPEARANCES

Grievant

Agency Party Designee

ISSUES

1. Did the Agency's evidence prove by a preponderance of the evidence that the Grievant's conduct was in violation of the alleged policy, procedure or directive?
2. Did the Grievant's conduct constitute a Group I violation under the Standards of Conduct?
3. Whether the Agency considered mitigating and aggravating factors as to the Written Notice?
4. Was each Written Notice consistent with law and policy?

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 Grievant 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) section 5.8. a preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM section 9.

EXHIBITS

The Agency Exhibits admitted into evidence are contained in one notebook with tabs 1-13.

The Grievant notebook of exhibits is proffered for the record. However, the Hearing Officer ruled as to the specific exhibits as follows:

Exhibit 1: Admitted over the objection of the Agency that the exhibit was not authenticated.

Exhibit 2: Excluded on the basis of failure to lay a foundation and relevance.

Exhibit 3: Excluded on the basis of failure to lay a foundation and relevance.

Exhibit 4: Only the first two pages were admitted. The remainder of the exhibit was excluded on the basis of relevance.

Exhibit 5: Excluded on the basis of relevance.

Exhibit 6: Was admitted.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness called to testify, the Hearing Officer makes the following findings of fact:

The Agency employed Grievant as a Microsoft Power Apps & BI Developer for the University's Housing & Residence Life with such employment governed by the following:

- HMR-012: Workplace Flexibility (Agency Exhibit 10)
- HRM-014: Standards of Conduct for University Staff Employees (Agency Exhibit 11)
- DHRM Policy 1.60 Standards of Conduct (Agency Exhibit 12)

The Agency's first witness was [REDACTED] former Associate Director of IT Operations, Housing & Residence Life, from June 2022 to October 2023 with eighteen years of experience in IT and fifteen years of managerial experience.

[REDACTED] testified that [REDACTED] was the Grievant's manager during the events covered by the grievance. In turn, [REDACTED] reported to [REDACTED] Director of Information Technology and Assignments, Housing and Residence Life.

The witness reviewed the information set out in the Written Notice (Agency Exhibit 3) as to the Grievant repeatedly failing to report to work on time, even after accommodation was given by changing the Grievant's reporting time from 8:00 am to 10:00 am. The witness pointed out that after a pattern of being excessively late through the month of July, 2023, a Letter of Counseling was issued on July 26, 2023.

Upon reviewing the Letter of Counseling (Agency Exhibit 8), the witness testified that Grievant was told that during the pre-determination meeting held on July 26, 2023, that failure to meet the expectations outlined in the Letter of Counseling may result in disciplinary action. The Letter of Counseling specifically set out the absence and leave procedures as per HRM-0.13-01, HRM-04, Standards of Conduct and the Commonwealth's Standards of Conduct Policy 1.60.

The witness then proceeded to review the various exhibits presented by the Agency which documented the times that the Grievant would arrive to work late or not at all, i.e. the access log for July 27, 2023 to September 1, 2023 (Agency Exhibit 3) and the access log for December 13, 2022 to June 30, 2023 (Agency Exhibit 4). In addition, the witness testified that the witness's office is located directly across from and within view of the Grievant's office, and reviewed the blueprint of the office layout, photos of the offices and the witness's hand written notes documenting dates that the Grievant would not report to work on time or not at all (Agency Exhibit 4).

The witness noted that normally an employee holding the position that the Grievant holds would not have an office. The witness testified that the office was provided as accommodation for the Grievant at the Grievant's request, specifically noting the Grievant's complaint that medical conditions required the Grievant to prop the Grievant's leg up. The witness testified that the Grievant never requested an additional accommodation other than the convenience of the office and the Flexwork Agreement (Agency Exhibit 9), which Agreement was entered into on a trial basis from November 27, 2022 to January 26, 2023 allowing the Grievant to work from home each Thursday but otherwise reporting to work Monday, Tuesday, Wednesday and Friday on the accommodated schedule of 10:00 am to 6:00 pm. However, according to the witness, the Grievant did not meet the expectations of the Flexwork Agreement with several occasions of being absent from work without approved leave. As a result, effective March 1, 2023, the Grievant was required to work in person, Monday-Friday. (Grievant Exhibit 9, email dated February 28, 2023).

The witness went on to testify regarding the many efforts which were made to emphasize to the Grievant the importance of the Grievant's compliance with attendance requirements. Examples included the following:

- Email dated June 10, 2022 from [REDACTED] Director to Grievant advising that working at home needs to be approved in advance (Agency Exhibit 5, page 69)
- Email dated August 15, 2022 from Dean of Students stating "It is my expectation that all Student Affairs employees will be working on grounds..." (Agency Exhibit 5, page 71)
- Email directed to students, staff and faculty dated September 9, 2022 which set out procedures for requesting workplace accommodations and remote work guidelines (Agency Exhibit 5, page 73-77)
- Email dated October 14, 2022 from [REDACTED] to the Grievant saying in part "While I understand and can appreciate that your work can largely be completed while working from home, we are still required to come into the office daily unless it is approved beforehand." (Agency Exhibit 5, page 79)

The witness testified that during communications with the Grievant, Grievant was adamant that the Grievant was not required to be on site and called the witness (the Grievant's supervisor) "foolish.". The witness quoted the Grievant as saying that the Grievant's behavior regarding attendance was the Grievant's way of being passive aggressive to show the Grievant's disagreement with the system. The witness testified that although the Grievant asserted in the email dated October 18, 2022 that "...It seems most of my peers are allowed to work from home..." (Agency Exhibit 5, page 81), the witness testified that that was not correct and that only one employee, who was not a peer of the Grievant's, had a long standing remote work

agreement for circumstances unlike circumstances of the Grievant. The witness further testified that while other employees did have adjusted work hours, the adjusted hours were to meet the needs of the Agency, not the employees.

The witness next reviewed the Grievant's calendar year 2022 employee evaluation information. [REDACTED] emailed the Grievant on April 5, 2023 stating that "I will be sending your CY22 eval back to you once more" and asked the Grievant to update and send it back. With a follow up email dated April 12, 2023 and finally the completed evaluation dated April 28, 2023 (Agency Exhibit 7). The witness further referred to an email from the Grievant dated May 12, 2023 asking to work from home on Wednesday May 17, 2023, which request was denied stating that since the Flexwork Agreement ended on February 28th, the Grievant was not present in the office nine business days (Agency Exhibit 7, page 97).

[REDACTED] concluded testimony by reviewing the relevant policies set out at HRM-012: Workplace Flexibility (Agency Exhibit 10), HRM-014: Standards of Conduct for University Staff Employees (Agency Exhibit 11) and DHRM Policy 1.60 Standards of Conduct (Agency Exhibit 12). The witness testified that after meeting with Human Resources it was agreed that a Group I Written Notice was appropriate, considering that management had already discussed the concerns with the Grievant and had issued the Letter of Counseling. The witness also pointed out that the Grievant did not initiate any requests under the ADA until after the Group I Written Notice was issued. The witness further reviewed [REDACTED] email dated September 24, 2023 directed to the person in upper management expressing in detail the concerns with Grievant working remotely (Agency Exhibit 13).

During cross-examination of the witness by the Grievant, the witness emphasized that the Agency requirement to work on site applies to any future employee holding the Grievant's position, not just to the Grievant. Also, the witness testified that regarding the Procedures for Employees with Disabilities to Request Workplace Accommodations, as to the requirement that "The reasonable accommodation process begins when the written request for accommodations is received by the employee's supervisor.", the witness did not believe that the Grievant ever made a request under ADA.

The Agency's second witness was [REDACTED] Director of Information Technology and Assignments, Housing and Residence Life. [REDACTED] reported to [REDACTED]. The witness testified that early on (i.e. February 2022) [REDACTED] began noticing the Grievant's absence from work and reviewed the email sent to the Grievant on June 10, 2022 noting "I didn't see you in the office yesterday or today... I hope you're doing okay.", the Grievant's response with explanations and the witness's follow up email to the Grievant stating "Just as a reminder for the future, any working at home needs to be approved in advance." (Agency Exhibit 5)

[REDACTED] testified that [REDACTED] is a good manager and began advising [REDACTED] of Grievant's attendance problems. Referring to the office blueprint and photographs, the witness testified that [REDACTED] office

was also located in the immediate area of the Grievant's office, allowing the witness to observe the Grievant's attendance, and lack of attendance, in the office. ■ testified that the decision to issue the Group I Written Notice was reached after consideration of all of the circumstances.

During cross-examination, ■ testified that ■ did not consider the email from the Grievant dated October 18, 2022 as an ADA request. (Agency Exhibit 5, page 81) The witness further pointed out that in the Grievant's email directed to ■ dated October 14, 2022 that the Grievant stated... "Please consider this a formal request for alternative work location ... the various reasons for this request is health related and my difficulty in walking among other issues. I recently saw my doctor regarding my extreme knee pain and was sent for x-ray... Personally, I think a hybrid schedule is ideal and I certainly want to be available for in-person meetings when possible..." (Agency Exhibit 2, page 20)

During follow up questioning by the Agency counsel, ■ testified that the Grievant did in fact submit an ADA request (after the Group I Written Notice was issued), that ■ notified the Grievant by email dated December 15, 2023 that the ADA accommodation request had been denied due to the Agency's need for onsite presence and that the Grievant agreed by email dated December 19, 2023 to report to work as required (Agency Exhibit 13).

The Agency rested its case.

The Grievant briefly testified and attempted to refer to exhibits which were objected to by the Agency and ruled by the Hearing Officer as not relevant and introduced without proper foundation. The Grievant emphasized in the Grievant's testimony (as Grievant did in cross-examination of the Agency's witnesses), the Grievant's belief that both ■ and ■ failed as managers, and that the Grievant's request for accommodation should have been submitted under the ADA.

The hearing concluded with both parties being given the opportunity to make closing statements.

CONCLUSIONS

Unacceptable behaviors are divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action." 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." (Standard of Conduct)

Virginia Code Section 2.2-3005.1 authorizes Hearing Officer's to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must

be “accordance with rules established by the Department of Human Resource Management...”. Under the rules for Conducting Grievance Hearings “[a] hearing officer must give deference to the agency’s consideration in the 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.

The Commonwealth of Virginia provides certain protections to employees Chapter 30 of Title 2.2 of the Code of Virginia. Among these protections is the right to grieve formal disciplinary action. The Department of Equal Employment and Dispute Resolution has developed Grievance Procedure 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 forth with the evidence. It also has the burden of proving, by preponderance of 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 Resolution, *Rules For Conducting Grievance Hearings*. These Rules state that on a disciplinary grievance a Hearing Officer shall review the facts *de novo* and determine:

- A. Whether the employee engaged in the behavior described in the written notice;
- B. Whether the behavior constituted misconduct;
- C. Whether the discipline was consistent with law and policy; and
- D. 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.

After reviewing all of the Exhibits, the testimony of all of the witnesses and the arguments made by the Agency’s Attorney and the Grievant, the Hearing Officer concludes as follows:

1. The Agency proved by a preponderance of the evidence that the Grievant was repeatedly tardy for work or absent without prior leave, that such behavior is misconduct and constituted a violation of HRM-014: Standards of Conduct for University staff employees and could be charged as a Group I offense.
2. The Agency proved by a preponderance of the evidence that the Agency considered mitigating and aggravating circumstances and concluded that the Grievant’s repeated violation of policy after verbal and written counseling justified at least a Group I

Written Notice.

3. The Agency proved by a preponderance of evidence that the Group I Written Notice was consistent with law and policy.

DECISION

For the reasons stated herein, the Agency's Group I Written Notice is upheld.

APPEAL RIGHTS

You may request an administrative review by EEDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EEDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Equal Employment and Dispute Resolution
Department of Human Resources 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.

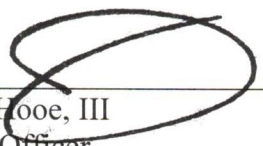
A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to 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]

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

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation or call EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

ENTERED: 2/1/24
Date



John R. Hooe, III
Hearing Officer