

Issue: Group II Written Notice (unsatisfactory performance and failure to follow instructions); Hearing Date: 06/12/17; Decision Issued: 06/23/17; Agency: UVA; AHO: Carl Wilson Schmidt, Esq.; Case No. 11001; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11001

Hearing Date: June 12, 2017

Decision Issued: June 23, 2017

PROCEDURAL HISTORY

On November 4, 2016, Grievant was issued a Group II Written Notice of disciplinary action for unsatisfactory performance and failure to follow instructions or policy.¹

On December 8, 2017, 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 April 18, 2017, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 12, 2017, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency Counsel
Witnesses

¹ The Agency informed the Hearing Officer that the Agency waived its suspension of Grievant.

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. 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 University of Virginia employs Grievant as a Human Resources Associate. She began working for the University in September 2014. Grievant had prior active disciplinary action. On July 20, 2016, Grievant received a Group I Written Notice for unsatisfactory performance and failure to follow instructions and/or policy.

Grievant was responsible for processing paperwork associated with the hiring of wage workers. Once she completed creating the hiring paperwork, she was to scan it and place it in an electronic database. In August 2016, the University noticed that its electronic databased showed it had significantly fewer wage employees than the prior year. University managers investigated and discovered that Grievant had paperwork in her desk drawers for numerous wage employees. Grievant had not scanned and entered files for approximately 60 employees into the electronic database. The files could be accessed by people who were not supposed to have access the files. Because of this error, the University had to delay disseminating one of its reports.

Grievant was responsible for offboarding certain full time employees. Grievant was to enter the date of an employee's retirement into the University's database. Once

the date was entered, the retiree lost access to University Facilities and no longer received compensation from the University.

Ms. S was retiring on September 16, 2016. Grievant was notified of the retirement and was supposed to enter the date of September 16, 2016 into the database. Grievant entered the wrong date of August 19, 2016 into the database. Ms. S's access to University buildings ended on that date. On August 24, 2016, University services called Grievant to have Ms. S's building access restored. Ms. S called the University's HR staff to have the termination reversed. Ms. P asked Grievant to reverse the termination. On August 26, 2016, Grievant re-entered Ms. S's retirement date into the University's databased. Instead of entering the correct date, Grievant entered the wrong date again. She entered Ms. S's termination date as August 19, 2016. Ms. P became upset that Grievant had repeated her error. Ms. P called Grievant's supervisor to complain.

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."² 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."

"[U]nsatisfactory work performance" is a Group I offense.³ In order to prove unsatisfactory work performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

Grievant was obligated to take paperwork related to hiring employees and scan that paperwork into a secure electronic database. Instead, Grievant kept the hiring paperwork for several employees in her desk. This created a risk that hiring information related to these employees could be accessible by people who should not be seeing the information. Grievant was obligated to enter the correct date for Ms. S's retirement. After entering the incorrect date for the first time and being informed of the error, Grievant repeated the error causing frustration and inconvenience to other staff and Ms. S. The Agency has presented sufficient information to show that Grievant's work performance was unsatisfactory.

² The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

³ See Attachment A, DHRM Policy 1.60.

An agency may issue a Group II Written Notice (and suspend without pay for up to ten workdays) if the employee has an active Group I Written Notice for the same offense in his or her personnel file. Grievant had a prior Group I Written Notice for unsatisfactory performance. Accordingly, the Agency's decision to elevate the Group I offense to a Group II offense is upheld.

Grievant argued that the Agency's CFO decided to issue her a Group I Written Notice, not a Group II Written Notice. She asserted that Agency managers waited until the CFO was on vacation to issue the disciplinary action. Grievant did not testify or call any other witnesses. She did not present any documents as exhibits. There is no basis to support this allegation.

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"⁴ 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.

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 file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

1. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

⁴ Va. Code § 2.2-3005.

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. 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 may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must provide a copy of all of your appeals to the other party, EDR, 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.

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.⁵

[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

⁵ Agencies must request and receive prior approval from EDR before filing a notice of appeal.