



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11794

Hearing Date: June 3, 2022
Decision Issued: June 23, 2022

PROCEDURAL HISTORY

On November 29, 2021, Grievant was issued a Group II Written Notice of disciplinary action with removal for failure to follow instructions.

On December 28, 2021, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On January 12, 2022, the Office of Employment Dispute Resolution issued Ruling 2022-5340 narrowing the issues for hearing. On January 31, 2022, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 3, 2022, a hearing was held by remote conference.

APPEARANCES

Grievant
Agency Representative
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 Virginia Department of Transportation employed Grievant as a Human Resources Consultant Senior at one of its locations. She began working for the Agency in June 2013. Grievant had prior active disciplinary action. On October 22, 2021, Grievant received a Group II Written Notice for failure to follow instructions.

When the Agency had a vacant position, it posted the job opening on the Recruitment Management System (RMS). DHRM Policy 2.10 describes the RMS as:

The automated system that identifies, publicizes, and accepts applications for positions covered under the Virginia Personnel Act for which the Commonwealth is actively recruiting.

Applicants applied for Agency job openings using the RMS. The Agency processed applications on the RMS. Once a candidate was hired by the Agency, Grievant was responsible for updating the RMS within 14 days. Updating the RMS involved uploading documents, notifying candidates of the status of their applications, and closing the job posting.

From August 7, 2021 through August 14, 2021, approximately 19 candidates applied for the position of Information Technology Support Specialist Senior at the location where Grievant worked. They used the RMS system to apply for the position. The Agency considered them to be “active applicants.”

On September 2, 2021, Grievant received a Notice of Improvement Needed/Substandard Performance. Her expectations included:

RMS recruitment – you will ensure that RMS updates and closures are completed with each recruitment within 14 days of the hire date of the candidate.¹

On September 22, 2021, Grievant sought Family Medical Leave for a serious health condition. Her request was approved. It does not appear that Grievant’s health condition affected her ability to calculate the 14 day deadline.

On October 19, 2021, the Manager sent Grievant a memorandum stating:

As a Senior Human Resources Consultant, it is your responsibility to ensure all RMS updates and closures are completed in your recruitment within 14 days of the hire date of the calendar. You are to follow all processes in a timely manner, and due dates as requested by your manager to meet the needs of the Agency.²

On October 25, 2021, a New Employee began working for the Agency. The New Employee was the only recruitment during the pay period. Grievant knew that the New Employee had been hired. On October 28, 2021, she wrote in an email that, “I moved [New Employee] from the “Active” tab to the “To Be Closed” tab today.”³

Grievant was responsible for updating the RMS by November 8, 2021.

On November 9, 2021, the status of the recruitment was “under department review.” This meant Grievant had not updated the recruitment and closed out the job posting.

Grievant had miscalculated the close out date for the recruitment. She mistakenly believed she had until November 10, 2021 to update the RMS and close out the job posting. She closed out the recruitment on November 9, 2021 after regular business hours.

¹ Agency Exhibit p. 92.

² Agency Exhibit p. 88.

³ Agency Exhibit p. 72.

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.”⁴ 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.”

Failure to follow a supervisor’s instructions is a Group II offense.⁵ Grievant was instructed repeatedly “to ensure that RMS updates and closures are completed with each recruitment within 14 days of the hire date.” The New Employee was hired on October 25, 2021. Grievant should have updated the RMS and close the job posting by November 8, 2021. Grievant failed to do so thereby violating a supervisor’s instruction. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

Grievant explained that she intended to comply with the instruction but miscalculated the deadline. Grievant’s explanation does not excuse her failure to meet the deadline. The Agency repeatedly and clearly explained her obligation. Grievant failed to meet that obligation.

Upon the accumulation of two active Group II Written Notices, an employee may be removed from employment. Grievant has accumulated two active Group II Written Notices. The Agency’s decision to remove Grievant must be upheld.

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 ...”⁶ 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.

⁴ The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

⁵ See, DHRM Policy 1.60, Attachment A.

⁶ *Va. Code § 2.2-3005.*

Grievant argued she was treated differently from Ms. M who was her counterpart. On occasion, Ms. M did not meet the 14 day deadline to close out recruitments. Ms. M was not similarly situated to Grievant. Ms. M did not have prior disciplinary action and had a higher case load than Grievant. Ms. M regularly “stopped the clock” meaning she notified applicants of the status of their applications. The Hearing Officer does not believe that the Agency improperly singled-out Grievant for disciplinary action. In light of the standard set forth in the Rules, 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 with removal 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]

^[1] Agencies must request and receive prior approval from EDR 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 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