



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11878

Hearing Date: December 21, 2022
Decision Issued: January 10, 2023

PROCEDURAL HISTORY

On July 27, 2022, Grievant was issued a Group III Written Notice of disciplinary action with removal for being absent for three days without authorization.

On August 6, 2022, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On September 6, 2022, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 21, 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 Department of Behavioral Health and Developmental Services employed Grievant as an SSTT at one of its locations. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant's work shift began at 10 p.m. and ended at 8:30 a.m. the following morning.

Grievant was scheduled to work on July 13, 2022. She did not report to work for her shift.

Grievant was scheduled to work on July 16, 2022. She reported to work and completed her shift.

Grievant was scheduled to work on July 17, 2022. She did not report to work for her shift.

Grievant was scheduled to work on July 20, 2022. She reported to work and completed her shift.

Grievant was scheduled to work on July 21, 2022. She did not report to work for her shift.

Grievant was scheduled to work on July 22, 2022. She did not report to work for her shift.

Grievant was scheduled to work on July 25, 2022. She reported to work and completed her shift.

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.”¹ 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.”

DHRM Policy 1.25 governs Hours of Work and requires employees to adhere to their assigned work schedules and notify their managers as soon as possible if they are unable to adhere to their schedules, such as late arrivals or early departures.

Group III offenses include, “[a]bsence of three or more **consecutive** work days without approval.”² (Emphasis added.) The Agency’s Due Process Notice provides:

We received medical document[s] to excuse the dates of June 23, 2022 through July 12, 2022. However, since July 12, you have missed an additional 3 shifts from work. In accordance with DHRM Policy 1.60, Standards of Conduct, missing an excess of 3 working days without authorization may be issued a Group III Written Notice with discharge.³

The Agency did not establish that Grievant was absent from work for three consecutive shifts without approval. For example, Grievant was absent on July 21, 2022 and July 22, 2022 but came to work on the third consecutive work day, July 25, 2022. There is no basis for Grievant’s removal.

“[P]oor attendance” is a Group I offense.⁴ The Agency has established that Grievant’s attendance was poor. She was absent from work four days in July 2022 after July 12, 2022. Grievant displayed a pattern of absences thereby establishing Grievant’s

¹ The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

² See, Attachment A, DHRM Policy 1.60.

³ Agency Exhibit page 1.

⁴ See, Attachment A, DHRM Policy 1.60.

poor attendance. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.

Grievant asserted she had medical documentation to excuse her absences. She did not present sufficient medical documentation or explanations to excuse her absences after July 12, 2022.

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 ...”⁵ 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 further the disciplinary action.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group III Written Notice of disciplinary action is **reduced** to a Group I Written Notice. The Agency is ordered to **reinstate** Grievant to Grievant’s same position at the same facility prior to removal, or if the position is filled, to an equivalent position at the same facility. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal. The Agency is directed to provide **back benefits** including health insurance and credit for leave and seniority that the employee did not otherwise accrue.

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

⁵ Va. Code § 2.2-3005.

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]

[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

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