



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11828

Hearing Date: January 20, 2023
Decision Issued: February 2, 2023

PROCEDURAL HISTORY

On March 3, 2022, Grievant was issued a Group I Written Notice of disciplinary action for failure to follow a supervisor's instructions.

On April 1, 2022, 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 May 9, 2022, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 20, 2023, a hearing was held by remote conference. Grievant was notified of the date and time for the hearing, but did not participate.

APPEARANCES

Agency Party Designee
Agency Representative
Witness

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 for Aging and Rehabilitative Services employs Grievant as a Healthcare Compliance Analyst at one of its locations.

On October 4, 2021, Grievant received an annual evaluation with an overall rating of "Below Contributor." Grievant was advised to develop all claims within 48 hours of receipt. Because of her poor performance, Grievant was re-evaluated three months later. She met the performance standards of the re-evaluation.

On January 18, 2022, the Supervisor sent Grievant an email, "After three weeks, you have cleared 1 claim against your goal of 36."¹

On January 21, 2022, the Supervisor sent Grievant an email:

Please review the claims you have back from the doctors in order to move the claims toward closure. Just a reminder, once the claims are back from

¹ Agency Exhibit H, p. 1.

the doctors, we should aim to close the claim within forty-eight hours.
Thanks.²

On February 1, 2022, Grievant received a Notice of Improvement Needed/Substandard Performance which stated, “[d]elays are a significant concern in your caseload.” Grievant received the document and indicated on February 2, 2022 that she was declining to sign it.

On Wednesday, February 2, 2022, the Supervisor sent Grievant an email:

Please review the most recent aged claims list of claims over 360 days old in our office. *** We have a huge initiative going on right now to decrease the processing times for our initial claims in Virginia. *** We need to get these claims worked and closed. *** Please have your staff perform action on these claims by the end of the week. Then please shoot me an email that all claims are current by COB on Monday. Thanks.³

On February 7, 2022, the Supervisor sent Grievant an email:

We have hit the seventh week, the midpoint of the second quarter. At this point, you have cleared 30 claims against the goal of clearing 72 claims. We need to move forward.⁴

On February 16, 2022, the Supervisor sent Grievant an email:

Your caseload has reached 172 pending claims. You have 55 referrals back from the doctors. *** There are several in the referral queue that are well over that period of time. *** 97 claims are listed as new claims. Over fifty have not been developed. The claims noted are significantly delayed due to not being developed.⁵

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.”⁶ Group II offenses “include acts of misconduct of a more serious

² Agency Exhibit H, p. 6.

³ Agency Exhibit H, p. 9.

⁴ Agency Exhibit H, p. 11.

⁵ Agency Exhibit H, p. 12.

⁶ The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

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.⁷ 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 failed to timely complete claims. The Agency notified Grievant of her obligation to timely process assigned claims. The Agency provided Grievant with the opportunity to timely complete claims, yet she consistently failed to do so. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice for unsatisfactory job performance.

Grievant did not appear at the hearing and did not present any evidence to rebut the Agency’s evidence.

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 ...”⁸ 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 I Written Notice of disciplinary action is **upheld**.

⁷ See Attachment A, DHRM Policy 1.60.

⁸ *Va. Code § 2.2-3005.*

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]

[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.