



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11888

Hearing Date: January 23, 2023
Decision Issued: February 2, 2023

PROCEDURAL HISTORY

On August 25, 2022, Grievant was issued a Group III Written Notice of disciplinary action with removal for refusing to complete a fitness for duty examination.

On August 30, 2022, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On September 19, 2022, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 23, 2023, a hearing was held by remote conference. Grievant was advised of the hearing date and time, but did not participate. Prior to the hearing date, Grievant sought a continuance but did not present just cause for continuing the hearing to another date.

APPEARANCES

Agency Party Designee
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 State Police employed Grievant as an Equipment Repair Tech. He began working for the Agency in November 2019. He had favorable work evaluations.

On April 12, 2022, Captain B asked Agency managers to require Grievant to complete a Fitness for Duty Examination based on Grievant's unusual behavior. The request was approved by Major P and Lieutenant Colonel R. On April 19, 2022, Grievant was placed on Leave with Pay status. Grievant was informed he would have to participate in a Fitness for Duty evaluation on April 25, 2022.

On April 25, 2022, the First Sergeant arrived at Grievant's residence to escort Grievant to the Fitness for Duty Examination. Grievant either was not at the residence or did not answer the door. The First Sergeant used his mobile phone to call and speak with Grievant. Grievant said he did not intend to go to the appointment. Grievant indicated he was aware of the appointment.

On April 28, 2022, the First Sergeant called Grievant to inform Grievant that the First Sergeant would be delivering a memorandum dated April 27, 2022, a copy of the General Order ADM 14.10, the Authorization to Release or Obtain Confidential Health Information form and the VCU Department of Psychiatry fitness for duty instructions. The

First Sergeant instructed Grievant to review, complete, and return the forms to the Human Resource Division before his next scheduled fitness for duty appointment set for May 9, 2022. The First Sergeant told Grievant that failure to complete the paperwork and noncompliance could lead to disciplinary action. On April 28, 2022, the First Sergeant delivered the documents to Grievant's home and taped them on to the front door.

On April 29, 2022, the First Sergeant took copies of the documents he taped to Grievant's door and mailed them to Grievant by USPS certified mail.

Grievant was informed he was to attend a second Fitness for Duty appointment on May 9, 2022. On May 9, 2022, the Lieutenant picked up Grievant at his residence and escorted him to the fitness for duty examination scheduled with Dr. W at the VCU office. The Lieutenant was within Grievant's chain of command. At the doctor's office, Grievant refused to sign a Consent for FFD Examination – Psychiatrist Form required by Dr. W. Grievant's refusal to sign the form prevented Dr. W from conducting the fitness for duty examination. The Lieutenant told Grievant he was obligated to sign the form. The Lieutenant observed Grievant refusing to sign the form. The Lieutenant transported Grievant back to Grievant's residence.

CONCLUSIONS OF POLICY

Unacceptable behavior shall be divided into three types of offenses, according to 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."¹

General Order ADM 14.10 governs Fitness for Duty. This policy provides:

The Superintendent may require mental or physical examinations of an employee by a designed psychiatrist, psychologist, or physician when, in the Superintendent's estimation, it is to the best interest of the employee or the Department. The purpose of these examinations is to assist the Department in making decisions to determine an employee's mental and physical fitness to perform his/her job.²

Grievant displayed behavior that was sufficient for the Agency to be concerned about his fitness for duty. The Agency followed its Fitness for Duty policy and properly referred Grievant for a fitness for duty evaluation.

¹ See, General Order ADM 12.02, Disciplinary Measures.

² Agency Exhibit p. 249.

General Order ADM 11.00 sets forth the Agency's Standards of Conduct and describes violations of its standard to include, "[r]efusal to take physical or mental examination as required, (See General Order ADM 14.10)."

General Order ADM 12.02 governs Disciplinary Measures. Group II offenses include failure to follow a supervisor's instructions and/or failure to comply with policy. Grievant was instructed to attend a Fitness for Duty evaluation on April 25, 2022. He refused to do so. Grievant was instructed to attend a Fitness for Duty evaluation on May 9, 2022 and complete a consent form required by Dr. W. Grievant attended the evaluation but refused to sign the form. The Agency has presented sufficient evidence to show that Grievant refused to comply with a supervisor's instructions thereby justifying the issuance of a Group II Written Notice. In certain circumstances an offense listed as a Group II offense may constitute a Group III offense depending on the unique impact on the Agency. In this case, the unique impact on the Agency is that it was unable to evaluate whether Grievant could perform his job duties which included interacting with other employees in a professional manner. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, the Agency's decision to remove Grievant must be upheld.

Grievant did not appear at the hearing to submit any evidence or argue in his defense.

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"³ 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 III Written Notice of disciplinary action with removal is **upheld**.

³ *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.