



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11797

Hearing Date: June 24, 2022

Decision Issued: July 14, 2022

PROCEDURAL HISTORY

On October 18, 2021, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory performance.

On November 5, 2021, 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 February 21, 2022, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 24, 2022, a hearing was held by remote conference.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's 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 Corrections employs Grievant as a Probation Officer at one of its locations. Grievant began working for the Agency on July 10, 2018. She began reporting to the Senior Probation Officer. Her position status was "Exempt" under the Fair Labor Standards Act. No evidence of prior active disciplinary action was introduced during the hearing.

To learn her job duties, Grievant received an orientation and "shadowed" another probation officer. She learned the CHART format and how to enter CHART notes. She learned about COMPAS scores and how to conduct COMPAS interviews. She learned about major violation reports and how to enter them. Grievant was reminded about timely submitting log notes. Grievant learned how to enter criminal history into VACORIS. Grievant learned about pre-sentence report modules and where to enter the narratives. Grievant observed another probation officer conducting field contacts for elevated cases. Grievant learned how to close out cases. Grievant received training regarding Operating Procedure 920.1, Community Case Opening, Supervision, and Transfer.

On January 10, 2019, Grievant received a Probation Progress Review showing her work performance was at a "Contributor" level. The Senior Probation Officer wrote

that Grievant “has completed most of her in office training requirements, Basic Skills training, and Basic Core Correctional Practices training.”¹

On March 14, 2019, Grievant received an Employee Recognition Award Form.²

On July 11, 2019, Grievant received a Probation Progress Review showing her work performance was at a “Contributor” level. The Senior Probation Officer wrote Grievant:

has completed Basic Skills, Core Correctional Practices, completed VCIN certification, and is engaged in EPIC coaching. She has testified before the Court, written Major Violation Reports, and completed Pre-Sentence Investigation Reports along with Sentencing Guidelines. *** [Grievant] has been utilizing the Compas risk assessment tool to address appropriate supervision levels and moves cases accordingly. *** She works independently in [location] and readily contacts her supervisor if she has any questions or encounters problems.³

Grievant began reporting to the Chief Deputy in April 2020.

Grievant received an overall rating of “Exceeds Contributor” on her October 2020 evaluation.

On March 10, 2021, Grievant received a Notice of Improvement Needed/Substandard Performance. The Notice stated, in part, “A discussion was held during these meetings regarding the following improvement needs: *** Ensure all 920.1 contact requirements are met each month.”⁴ Grievant’s Improvement Plan included a recommendation that Grievant “schedule time in between appointments to allow for the log-notes to be entered the same day to avoid a backlog or missing notes.”⁵

On April 15, 2021, Grievant received an Interim Employee Evaluation addressing, “Performance Areas Identified for Improvement/Substandard.” The Performance Areas Identified section stated, “This plan focuses on three main areas of need: - Documentation, -Case Review Follow-up, [and] Adhering to 920.1 requirements and the supervision of High cases.”⁶

¹ Agency Exhibit p. 34.

² See, Grievant Exhibit p. 202.

³ Agency Exhibit p. 36.

⁴ Agency Exhibit p. 3.

⁵ Agency Exhibit p. 4.

⁶ Agency Exhibit p. 17.

Grievant met the terms of her Improvement Plan. On June 11, 2021, the Chief Deputy sent Grievant an email, "I have reviewed 59 cases between May 1 and June 10 and every one of them has up to date log-notes" The Chief Deputy added, "I'm very impressed with your progress."⁷

The Chief Deputy conducted a full case review of Grievant's assigned cases as of September 3, 2021. The Chief Deputy reviewed 54 cases. Ten of those cases were significantly out of compliance and required immediate action. The problems related to documentations, case review follow-up, 920.1 requirements, and substance abuse screen follow-ups. A Major Violation Report due in June had not been completed. Positive drug screen tests had not been addressed. The cases were:

[RB
DS
AV
BJ
JH
CK
DB
BH
CH
RK]⁸

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three groups, according to the severity of the behavior. Group I offenses "include types of behavior less severe in nature, but [which] require correction in the interest of maintaining a productive and well-managed work force." Group II offenses "include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal." Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."⁹

"[I]nadequate or unsatisfactory job performance" is a Group I offense.¹⁰ In order to prove inadequate or unsatisfactory job 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.

⁷ Agency Exhibit p. 9.

⁸ Grievant Exhibit p. 7.

⁹ See, Virginia Department of Corrections Operating Procedure 135.1.

¹⁰ Virginia Department of Corrections Operating Procedure 135.1(V)(B)(4).

Grievant's job performance was inadequate. The Chief Deputy reviewed 54 of Grievant's cases and determined that ten of them were significantly out of compliance. Grievant has not established that the Chief Deputy's opinion regarding any of the cases was in error. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.

Grievant argued she received inadequate training and support. The evidence showed that Grievant received adequate training. Grievant did not identify any specific training that the Agency had withheld or that she had requested and not received and that would have enabled her to correct the deficiency of the ten significantly out of compliance.

Grievant is capable of performing all of her job duties. This is demonstrated by the fact that Grievant received a Notice of Improvement Needed/Substandard Performance on March 10, 2021 and then corrected all of her performance deficiencies by June 11, 2021.

Grievant argued that her supervisor sometimes was slow in responding to her questions. Grievant did not establish that any delays by the Chief Deputy in answering questions resulted in her ten case files being out of compliance.

Grievant argued her work performance was adversely affected by the COVID-19 pandemic and having to work remotely. The evidence showed that Grievant was able to bring her work performance to a satisfactory level by June 2021 which was while Agency employees continued to experience challenges resulting from the pandemic.

Grievant argued the Agency failed to engage in progressive discipline and should have given her a counseling memorandum instead of a Written Notice. Although the Standards of Conduct encourages progressive discipline, the Agency is not required to afford employees progressive discipline. In this case, Grievant already received a Notice of Improvement Needed/Substandard Performance.

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"¹¹ 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

¹¹ Va. Code § 2.2-3005.

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**.

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].

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

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer