



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11804

Hearing Date: June 29, 2022
Decision Issued: July 19, 2022

PROCEDURAL HISTORY

On January 26, 2022, Grievant was issued a Group I Written Notice of disciplinary action with removal for interference with State operations.

On February 6, 2022, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On February 28, 2022, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 29, 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 Veterans Services employed Grievant as an Environmental Service employee at one of its facilities. She had been employed by the Agency for approximately 14 years. Grievant had prior active disciplinary action. On September 1, 2020, Grievant received a Group I Written Notice for failure to follow policy or instructions. On September 1, 2020, Grievant received another Group I Written Notice for failure to follow policy or instructions. On June 17, 2021, Grievant received a Group II Written Notice for failure to follow instructions or policy.

Grievant worked at a Facility that provided care to residents 24 hours per day. Inadequate staffing could undermine the Agency's ability to provide services to residents.

On February 19, 2021, the Facility distributed a Memo to staff informing them that "we are expected to be here when scheduled to work, even in adverse weather conditions. Be prepared for snow, ice or inclement weather by monitoring weather reports and *** Spend the night at work *** Arrange for alternate means of transportation ... calling work to inquire about being picked up."¹

On January 15, 2022, Grievant and other employees received an email:

¹ Agency Exhibit 1-9.

Winter weather is headed out way. Resident care and employee safety is out top priority. If you are scheduled to work, you are needed and expected to be at work. Plan for the weather. Be safe. Leave early and allow extra time so that you will be on time. If you need assistance, notify your supervisor so arrangements may be made to get you to work on time.²

Snow fell in the area of the Facility and where Grievant worked. Roads were difficult to pass. Grievant's residence was approximately 1.5 miles from the Route. It usually took her 30 minutes to drive from her home to the Facility and included traveling over a mountain. The Route had not been cleared of snow and Grievant believed it was not safe for her to drive to the Facility.

Grievant was scheduled to work at the Facility beginning at 7 a.m. on January 17, 2022. At 5:32 a.m., Grievant called the Facility and left a voice message saying she would not be reporting to work as scheduled. She said she could not get down her driveway. Grievant did not report to work on January 17, 2022.

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."³ 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."

Poor attendance and unsatisfactory performance are Group I offenses. The Agency informed Grievant that she was obligated to report to work as scheduled regardless of inclement weather. On January 17, 2022, Grievant failed to report to work thereby justifying the Agency's issuance to Grievant of a Group I Written Notice. Upon the accumulation of four active Group I Written Notices, an employee may be removed from employment. Grievant has accumulated one active Group II Written Notice and three active Group I Written Notices. The Agency has presented sufficient evidence to support its decision to remove Grievant from employment.

Grievant argued she was incapable of safely traveling to the Facility. Although Grievant's assertion is likely true, it does not form a basis to reverse the disciplinary action. The Agency instructed Grievant to plan for inclement weather. Grievant could have spent the night at the Facility to avoid having to drive in snow. Grievant could have asked

² Agency Exhibit 1-8.

³ The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

to have someone pick her up and driver her to the Facility. Grievant did not seek to exercise any of these options.

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”⁴ 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 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.

⁴ Va. Code § 2.2-3005.

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.