



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11820

Hearing Date: September 7, 2022
Decision Issued: September 23, 2022

PROCEDURAL HISTORY

On February 18, 2022, Grievant was issued a Group III Written Notice of disciplinary action with removal for failure to follow policy.

Grievant filed a grievance to challenge the Agency's action. The matter advanced to hearing. On April 18, 2022, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 7, 2022, a hearing was held by remote conference. Grievant was advised of the hearing date and time but she did not appear.

APPEARANCES

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 a Procurement Officer I at one of its facilities. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant was responsible for making "small" amount purchases for the Facility. The Agency provided her with a Small Purchase Card. Grievant was required to use the Commonwealth's procurement portal, eVa.gov, to purchase items for the Facility.

The Facility had "delegated authority" from the Department of General Services meaning that it could make small purchases without prior approval from DGS. The Facility's delegated authority was further delegated to Facility procurement staff including Grievant. If Grievant failed to follow the proper procurement requirements, she could undermine the Agency's delegated authority.

On April 21, 2021, Grievant received a Notice of Improvement Needed / Substandard Performance. As part of an Improvement Plan, Grievant was required to take additional training and meet with the Supervisor on a daily basis.

On October 14, 2021, Grievant's delegation authority was removed by the Agency. Grievant was told that all of her purchase orders placed in eVa.gov had to be reviewed and approved by the Supervisor or Deputy Director.

On October 26, 2021, Grievant placed an order for a sump pump and an adapter using the online order system of the Store. She did not have a purchase order approved by the Supervisor at that time. She did not use eVa.gov to order and purchase the items.

On October 26, 2021 at 5 p.m., Grievant told the Supervisor she was going to pick up a sump pump on the way home. The Supervisor told Grievant not to pick up the sump pump because of the lack of controls in place, for example, that the sump pump would be left unsecured in her car overnight and that either Buildings and Grounds or Warehouse staff should pick up the sump pump on the following day. Grievant did not pick up the part on October 26, 2021.

On October 28, 2021, Grievant went to Store 1 and obtained an adapter. Grievant paid cash for the adapter instead of using the Small Purchase Card. On November 3, 2021, the Warehouse Specialist received the adapter and took it to Building and Grounds staff on November 4, 2021.

On October 29, 2021, Grievant cancelled the adapter on the Store's online order system but did not cancel the item on the purchase order.

On November 2, 2021, Grievant went to Store 2 and obtained a sump pump. Grievant kept the sump pump in her personal vehicle overnight. The Warehouse Specialist received the sump pump on November 3, 2021 and took the sump pump to Buildings and Grounds staff on November 4, 2021.

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."

Va. Code 2.2-1110(B) provides:

The Division shall maintain the Department of General Services' central electronic procurement system. At a minimum this procurement system shall provide for the purchase of goods and services and the public posting of all Invitations to Bid, Requests for Proposal, sole source award notices, emergency award notices, awarded contracts and modifications thereto, and reports on purchases. All using agencies shall utilize the Department of General Services' central electronic procurement system as their

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

purchasing system beginning at the point of requisitioning for all procurement actions, including but not limited to technology, transportation, and construction, unless otherwise authorized in writing by the Division.

Failure to follow policy or instructions is a Group II offense.² Grievant failed to comply with Va. Code 2.2-1110 because she did not use eVa.gov to procure a sump pump and adapter. Instead, she used the Store's ordering system. Grievant failed to comply with the Supervisor's instructions not to pick up the sump pump and keep it overnight. Grievant failed to use the Small Purchase Card as required by the Agency. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice. In some extreme cases a Group II offense may be elevated to a Group III offense based on the unique impact of the offense on the Agency. In this case, the Agency elevated the disciplinary action to a Group III because Grievant violated State statute and undermined the Agency's delegated authority. Procurement employees are held to a high standard regarding compliance with purchasing requirements. 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. According, the Agency's decision to remove Grievant must be upheld.

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**.

² See, DHRM Policy 1.60.

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.