



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11822

Hearing Date: September 9, 2022
Decision Issued: September 26, 2022

PROCEDURAL HISTORY

On February 28, 2022, Grievant was issued a Group II Written Notice of disciplinary action for refusing to work mandatory overtime.

On March 8, 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 April 25, 2022, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 9, 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 Behavioral Health and Developmental Services employs Grievant as a Licensed Practical Nurse at one of its facilities. Grievant's position was designated as "Mission Critical." Grievant had prior active disciplinary action. On August 6, 2020, Grievant received a Group I Written Notice for poor attendance.

On November 23, 2021, Grievant received an Employee Counseling regarding disruptive behavior. Grievant was directed to, "[p]lease follow the policy and/or supervisors directive. According to A.P. 27, the Supervisor or RN charge nurse make staffing decisions regarding emergency stayover. *** Please display positive, professional behaviors including following directives given by a supervisor."¹

Grievant's regular work shift was from 3 p.m. to 11 p.m.

The Facility operated on a continuous basis. It had to be staffed at all times. If Facility supervisors expected an oncoming shift to be inadequately staffed, they could notify employees on a list to report to work or remain at work until a shift to ensure the shift was adequately staffed. The Facility had a stay over list which listed employee

¹ Agency Exhibit p. 52.

names. Employees were to be selected on a rotating basis. The list was posted on the notice board at the Facility.

On February 11, 2022, Facility managers concluded that the shift beginning at 11 p.m. lacked adequate staffing. They were unable to obtain volunteers to work overtime so they reviewed the stay over list.

On February 11, 2022 at approximately 7 p.m., the Supervisor informed Grievant that she needed to stay and work beyond her regular shift. Grievant said, "No, I can't stay." At approximately 8:30 p.m., the Supervisor asked Grievant again to work overtime. Grievant refused. When Grievant's shift ended at 11 p.m., she did not continue working at the Facility.

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."² 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."

Administrative Policy 27 governs Emergency Mandatory Stay Overs. This policy provides:

Mandatory overtime will be utilized in the event of emergency staffing situations and float pool is not available, and no staff agrees to work voluntary OT. ***

The Supervisor or Charge Nurse determines which staff members will double back or work two shifts utilizing the following criteria: establishing a MANDATORY stay-over list to follow when EMERGENCY coverage is needed.

Early notification to staff at the beginning of each shift for MANDATORY stay-over may not be possible. ***

Providing needed coverage during EMERGENCY is part of each staff member's job responsibilities.

Refusal to provide coverage during EMERGENCY may result in progressive disciplinary action.

² The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

Refusal to work overtime is a Group II offense. Failure to follow instructions is a Group II offense.³ On February 11, 2022, Grievant was instructed to stay after the end of her shift to work overtime. Grievant refused to do so. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

Grievant argued that she was not in the number one position on the stay over list and, thus, should not have been asked to work overtime. The Supervisor testified that she used the list to conclude Grievant was obligated to work overtime. Neither party presented the stay over list. Grievant did not present testimony showing that the Agency failed to comply with the policy.

Grievant acknowledged that her behavior should result in some level of disciplinary but she believed a Group II was excessive. The Agency presented sufficient evidence to support the issuance of a Group II Written Notice.

Grievant asserted she did not receive a bonus because of the disciplinary action. The Agency established that it properly issued the Group II Written Notice and that Grievant did not receive a bonus during the first quarter but received bonuses in the following three quarters.

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 II Written Notice of disciplinary action is **upheld**.

³ See, DHRM Policy 1.60.

⁴ *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.