



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11836

Hearing Date: August 19, 2022
Decision Issued: September 8, 2022

PROCEDURAL HISTORY

On April 25, 2022, Grievant was issued a Group II Written Notice of disciplinary action failing to report to work as scheduled, seek approval for changes in work schedule, and reporting work hours inaccurately. On April 25, 2022, Grievant was issued a Group II Written Notice of disciplinary action with demotion, transfer, and disciplinary pay reduction for failure to meet job performance expectations.

On May 2, 2022, Grievant timely filed a grievance to challenge the Agency's actions. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On June 6, 2022, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 19, 2022, a hearing was held by remote conference.

APPEARANCES

Grievant
Agency Party Designee
Agency's Representative
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notices?
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 Treatment Plant Superintendent at one of its facilities. He was demoted and transferred to the position of Treatment Plant Operator on April 25, 2022. He received a disciplinary pay reduction. Grievant had been employed by the Agency for approximately six years. He received an overall rating of "Exceeds Contributor" on his November 2021 annual performance evaluation. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant's regular work schedule was from 6 a.m. to 4:30 p.m., Monday through Thursday.

Grievant was absent from work on October 14, 2021. He did not have permission to be absent. He was absent from work due to a family emergency on October 18, 2021. Grievant did not enter his time into the Time Attendance and Leave System as required by Agency policy. Only after the Supervisor reminded Grievant of his obligation to enter the leave in TAL did he do so.

On January 27, 2022, Grievant received a Notice of Improvement Needed / Substandard Performance.¹ His Improvement Plan was to, "Complete all duties in a timely manner. Report to Manager when problems occur. Make sure the proper procedures are performed when problems do occur."²

Grievant was authorized to use a State vehicle as part of his job duties. For example, he was authorized to use the vehicle to leave the Facility and go to stores to purchase parts to be used at the Facility. The vehicle was kept at the Facility. Grievant was not authorized to keep the vehicle at his residence. Grievant had not been instructed to obtain permission before leaving the Facility for work related duties.

On March 21, 2022, Grievant left the Facility in the State truck to obtain supplies for the Facility. He was absent from work on March 22, 2022 and March 23, 2022. Grievant returned the State truck to the Facility and reported to work on March 24, 2022.

On April 7, 2022, Grievant met with the Supervisor and two Managers. During the meeting, Grievant said:

1. He had used a State vehicle to haul a washer and dryer he had purchased with his own money. He said the washer and dryer were for use in the wastewater plant.
2. He used the State vehicle to pick up a weed eater for his own use.
3. He used the State truck to pick up a fish tank to bring back to his office.
4. He said he had come in late to work often and not reported that time in TAL.
5. He said he had taken the State vehicle home on multiple occasions.
6. He said he had left work to look for parts without letting anyone know where he was and had returned to work after the operators were gone for the day.
7. He said he had taken the truck on Monday to go to City H and then returned to City S to take care of a trip to the laboratory and kept the truck to take care of personal stuff for two days.

¹ The Agency's policies do not prohibit it from issuing a written notice for behavior addressed as part of a Notice of Improvement Needed / Substandard Performance.

² Agency Exhibit p. 44.

8. He said he cannot remember every time he used the State truck for personal reasons.

On April 7, 2022, Grievant wrote:

I used the State Ford F250 to pick up a washing machine and a [dryer], I wanted to have one for the plant, but I did not use the proper mode of procurement. This was on two different occasions, first the Dryer that I picked up on my way back from picking up supplies in [City S] and second a washer I picked up local in [Town C]. The exact dates I am not sure but I know the dryer was early January, and the washer was more [recent], I believe one of the days of the week of the 20th.

I have come in one to two hours late on at least several occasions over the last 6 months, and not put time in TAL for [every one].

Took the state truck home to pick up parts for the plant without permission from my supervisor.

Spending the day away from the plant and everyone not knowing what I am doing. This happened once, about mid-December, I can remember that I was going to [store] in [City H] and [City R] to pick up firehose and hose to clean the post EQ to visit. I can try and get more dates, but I need time to figure them out.³

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.”⁴

Group II Written Notice – Reporting to Work and Reporting Leave

Operating Procedure 110.1 governs Hours of Work and Leaves of Absence. Section C(3) provides:

³ Grievant Exhibit 3.

⁴ See, Virginia Department of Corrections Operating Procedure 135.1.

All leave should be requested in far in advance as possible. In the event of illness, injury or other emergency, an employee shall be required to provide adequate notice to the supervisor and request use of leave. ***

Employees who fail to notify their supervisor, or the supervisor's designee, should be considered "absent without leave." This will result in loss of pay and be treated as a violation of Operating Procedure 135.1 Standards of Conduct.

Section C(5) provides:

Leaving the worksite without permission or notification will be considered unauthorized absence or absence without leave, and will result in the loss of pay and treated as a violation of Operating Procedure 135.1, Standards of Conduct.

Operating Procedure 135.1 provides:

Personal Conduct - DOC staff members are employed to fulfill certain duties and fulfill expectations that support the mission and values of the DOC and are expected to conduct themselves in a manner deserving of public trust. The following list is not all-inclusive but is intended to illustrate the minimum expectations for acceptable workplace conduct and performance. Employees who contribute to the success of the DOC mission:

a. Report to work as scheduled, seek approval from the employee's supervisors in advance for any changes to the established work schedule, including the use of leave and late or early arrivals and departures, and report hours of work and leave accurately. ***

Group II offenses include, "Failure to report to work as scheduled without proper notice to supervisor." Group II offenses include, "Leaving the work site during working hours without permission."

Grievant admitted, "I have come in one to two hours late on at least several occasions over the last 6 months, and not put time in TAL for [every one]." Grievant did not notify the Agency he would be late or seek approval from a supervisor. Grievant admitted to, "[s]pending the day away from the plant and everyone not knowing what I am doing."

The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failing to report to work as scheduled and leaving the work site without permission.

Group II Written Notice – Misuse of State Vehicle

Operating Procedure 135.1 provides:

Personal Conduct - DOC staff members are employed to fulfill certain duties and fulfill expectations that support the mission and values of the DOC and are expected to conduct themselves in a manner deserving of public trust. The following list is not all-inclusive but is intended to illustrate the minimum expectations for acceptable workplace conduct and performance. Employees who contribute to the success of the DOC mission: ***

n. Use state equipment, time, and resources judiciously and as authorized.

Group II offenses include, "Unauthorized use or misuse of state property or records." Grievant was authorized to use the State vehicle to conduct Agency business such as picking up parts for use at the Facility. He was not authorized to keep the vehicle at his residence or to transport personal items. Grievant took the State vehicle and kept it at his residence. He transported a washer and dryer to the Facility without obtaining permission to do so. Although Grievant may have acted in a manner that may have benefited the Agency, his actions were not authorized. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for unauthorized use or misuse of State property.

Grievant claimed he had text messages from a supervisor authorizing him to take the State truck home. He did not present those text messages.

Demotion, Transfer, and Disciplinary Pay Reduction

Upon the accumulation of two Group II Written Notices, an employee may be removed from employment. Operating Procedure 135.1(V)(B) provides:

Mitigating circumstances may support, as an alternative to removal, an employee's transfer to an equivalent position in a different work area with no change in salary; suspension without pay, demotion, or transfer to a position with reduced responsibilities and a disciplinary salary action. Suspension without pay in lieu of removal shall not exceed 30 workdays for a Group III Offense or for an accumulation of Group I or Group II Offenses, which would normally result in removal.

Grievant has accumulated two Group II Written Notices. Accordingly, the Agency's decision to demote, transfer, and impose a disciplinary pay reduction is upheld.

Grievant argued that the DOC policy permitted demotion or transfer, but not both. Although the policy language is confusing, a transfer to a position with reduced responsibilities" is the same as a demotion. The Agency transferred Grievant to a position with reduced responsibilities and imposed a disciplinary pay reduction. The Agency's action was consistent with policy. The Agency's calculation of the pay reduction was consistent with its policies.

Grievant argued he was denied due process with respect to several of the allegations in the Agency's written notices. The Hearing Officer only addressed the allegations clearly presented in the written notices. To the extent the Agency failed to provide Grievant with due process, the hearing process cures any such defects.

Mitigation

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"⁵ 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.

Grievant presented evidence that he suffered from ADHD and adjustment anxiety. Grievant did not present evidence showing that these medical concerns prohibited him from following Agency policy.

Grievant argued the disciplinary action was too harsh when compared to the discipline of other employees. Grievant did not present evidence of an employee who was similarly situated to Grievant and engaged in similar behavior but was disciplined materially differently from how Grievant was disciplined. The Hearing Officer does not believe the Agency singled-out Grievant for disciplinary action.

In light of the standard set forth in the Rules, 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 two Group II Written Notices of disciplinary action is **upheld**. The Agency's demotion, transfer, and disciplinary pay reduction is **upheld**.

⁵ 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.