



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11869

Hearing Date: December 15, 2022
Decision Issued: December 16, 2022

PROCEDURAL HISTORY

On May 31, 2022, Grievant was issued a Group I Written Notice of disciplinary action for failure to follow instructions and insubordination.

On June 15, 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 he requested a hearing. On August 8, 2022, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 15, 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 Virginia Department of Behavioral Health and Developmental Services employs Grievant as a Psychiatric Nursing Assistant and Coach at one of its facilities. He has been employed by the Agency for approximately five years and received favorable evaluations. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant worked as Lead. He was responsible for setting a positive example for other employees. Grievant reported to a supervisor who reported to Ms. B. Ms. B had the authority to give Grievant instructions.

The Facility was subject to inspection by a Regulatory Authority. Even the smallest concern by the Regulatory Authority could result in the Agency having to write a corrective action report to resolve the problem. Facility cleanliness was an issue that the Regulatory Authority would identify as a problem.

One of Grievant's responsibilities was to "ensure core office is clean and ready for the upcoming shift."¹ This would include having empty trash cans when the subsequent

¹ Agency Exhibit J.

shift arrived at the Facility. Removing the trash required approximately ten minutes to take the trash bag from the trash can to the outside bin.

Ms. B entered the Unit on May 19, 2022 at 7 a.m., approximately one half hour before Grievant's shift ended. She observed Grievant and other employees in the Unit core office. She observed a trash can with a black bag. The bag was over filled. The lid could not be placed on the trash can because of the amount of trash. Ms. B told Grievant, "Can you please take the trash out." Grievant replied, "That is not my job; I will not do it." At least one other employee heard Grievant refuse Ms. B's instruction. As Lead, Grievant could have asked another employee to take out the trash, but he did not do so. Grievant left the Unit without taking the Unit trash to the outside bin.

On May 20, 2022, Grievant sent an email to Ms. B stating, in part:

I just wanted to send you an email and let you know that I'm sorry if you felt like I was attacking you the other morning *** I'm sorry if things got awkward or you felt disrespected. That's far from what I wanted, if you would like we can have a conversation about this.²

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."

Failure to follow a supervisor's instructions is a Group II offense.⁴ On May 19, 2022, Ms. B instructed Grievant to take out the trash. Ms. B was a supervisor with authority to give Grievant instructions. Grievant refused to complete the task. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice. The Agency issued Grievant a Group I Written Notice and that notice must be upheld.

The Agency's Written Notice mentions other behavior such as previous refusals to work overtime. The Agency did not establish this and the Hearing Officer only considered evidence relating to Grievant's behavior on May 19, 2022.

² Agency Exhibit C.

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

⁴ See, Attachment A, DHRM Policy 1.60.

Grievant argued that his behavior was not egregious. It is not necessary to show egregious behavior to prove a Group I offense.

Grievant suggested his response followed from Ms. B's raising of her hand. Grievant did not present any evidence to support his assertion that Ms. B made any gesture that provoked his behavior.

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. 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.

⁵ Va. Code § 2.2-3005.

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.