

Issues: Group I Written Notice (unsatisfactory performance), and Termination due to accumulation; Hearing Date: 04/10/18; Decision Issued: 04/11/18; Agency: VCU; AHO: Carl Wilson Schmidt, Esq.; Case No. 11171; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11171

Hearing Date: April 10, 2018
Decision Issued: April 11, 2018

PROCEDURAL HISTORY

On January 18, 2018, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory performance. Grievant was removed from employment due to accumulation of disciplinary action.

On January 22, 2018, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On February 12, 2018, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On April 10, 2018, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
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:

Virginia Commonwealth University employed Grievant as an Emergency Communication’s Officer. Grievant had prior active disciplinary action. Grievant received a Group III Written Notice with a ten workday suspension on February 5, 2016.

Grievant worked in the VCU Emergency Communications Center and was responsible for dispatching VCU Police officers to locations requiring police presence. Grievant was supposed to read information entered into the Computer Aided Dispatch (CAD) system and then dispatch a police officer using a radio.

On December 5, 2017, Grievant entered the Building at 1:58:48 p.m. At 1:58:34, an employee at the Hospital called the Emergency Communications Center and spoke with Mr. T. The Hospital employee told Mr. T that a panic button in the Hospital had been activated and a disruptive patient had to be placed in four point restraints. Mr. T made an entry into the CAD at 2:00:45 p.m. At 2:00:55 p.m., Grievant began logging into the CAD system. At approximately 2:01:38, Grievant’s CAD system appears to be fully operational. She began looking at her personal cell phone.

At 2:04:33 p.m., an employee with the security unit at the Hospital called for assistance. Mr. T answered the call. He updated his prior entry in the CAD to show a second call was made indicating a panic button at the Hospital had been activated. Grievant did not respond to Mr. T’s entry.

At 2:11:45 p.m., a third employee from the Hospital called for assistance. Mr. T answered the call. The employee said that the panic button had been pushed twice without any response from the police. Mr. T entered information into the CAD regarding the third call. He then began speaking with Grievant asking her about whether police had been dispatched to the Hospital.

At 2:13:55 p.m., Grievant dispatched the police to the hospital.

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.”

The Agency’s Policy requests for assistance provides:

When any person applies for assistance or advice, or makes complaints or reports, either by telephone or in person, all pertinent information will be obtained in an official and courteous manner and will be properly and judicially acted upon consistent with established department procedures.

The Agency’s mission statement provides:

We consider accuracy and timeliness as two of the highest standards of effective performance.

Under the Agency’s Standards of Conduct, unsatisfactory performance includes the “inability to perform assigned tasks.”

“[U]nsatisfactory work performance” is a Group I offense.² In order to prove unsatisfactory work performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

Grievant’s CAD system was fully operational at approximately 2:01 p.m. Grievant should have used her computer mouse to click on a priority tab which would have shown the entry made by Mr. T in the CAD system. Grievant knew that the CAD system default setting was to a different tab and she needed to click on the priority tab to be fully informed. Grievant failed to do so until 2:13:55 p.m. and only after being questioned by Mr. T. Grievant should have read the entry within a few seconds of the first entry by Mr. T and dispatched police within a few seconds after reading the entry. Grievant failed to timely and promptly dispatch police thereby justifying the Agency’s issuance of a Group I Written Notice for unsatisfactory performance.

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

² See Attachment A, DHRM Policy 1.60.

Grievant had prior active disciplinary action consisting of a Group III Written Notice. Upon the accumulation of a Group III Written Notice and a Group I Written Notice, an agency may remove an employee. Accordingly, the Agency's decision to remove Grievant must be upheld.

Grievant argued that the CAD system was malfunctioning and the Agency refused to make repairs. She points out that the system should default to the priority tab and that the system used to make a sound when an entry was made in the system to notify Grievant. The evidence showed that the system was owned by another agency and the Agency could not change its default parameters. Grievant received training on the system. Grievant knew that she had to change the default setting. The evidence showed that the system stopped producing a sound in 2015 and Grievant was aware she would not be notified by sound of a new event.

Grievant argued that Mr. T was not properly trained and made an incorrect entry. The evidence showed that Mr. T's actions did not affect Grievant or prevent Grievant from accessing the event entry in the CAD system.

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 I Written Notice of disciplinary action with removal is **upheld**.

APPEAL RIGHTS

You may request an administrative review by EEDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EEDR within 15 calendar days of the date the decision was issued.

³ *Va. Code § 2.2-3005.*

Please address your request to:

Office of Equal Employment and 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 EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

^[1] Agencies must request and receive prior approval from EEDR before filing a notice of appeal.