

Issue: Group II Written Notice with Suspension (refusal to work overtime); Hearing Date: 04/16/19;  
Decision Issued: 04/30/19; Agency: DOC; AHO: Thomas P. Walk, Esq.; Case No. 11294;  
Outcome: No Relief - Agency Upheld.

VIRGINIA: IN THE VIRGINIA DEPARTMENT OF HUMAN RESOURCE  
MANAGEMENT, OFFICE OF EQUAL EMPLOYMENT AND DISPUTE  
RESOLUTION

IN RE: DHRM CASE NO.: 11294

## **DECISION OF HEARING OFFICER**

HEARING DATE: APRIL 16, 2019

DECISION DATE: APRIL 30, 2019

### **I. PROCEDURAL BACKGROUND**

The agency issued the grievant a Group II Written Notice on August 3, 2018. The grievant submitted his Form A commencing this grievance on September 1, 2018. I was appointed Hearing Officer on December 3, 2018. A prehearing conference was held by telephone on December 19, setting the matter for hearing on a date in January, 2019. Due to my illness, I continued the matter from that date. I rescheduled the hearing with the agreement of the parties for April 16, 2019. The hearing was conducted on that date.

### **II. APPEARANCES**

The agency was represented by an attorney advocate. He presented two witnesses. A notebook with four exhibits was proffered and accepted into evidence. At the conclusion of the hearing the advocate submitted copies of the Hearing Officer Decision in Case No. 11275 and the Administrative Review Ruling in that same matter, being Ruling 2019-4876.

The grievant represented himself and testified as his only witness. At the conclusion of

the hearing he moved to submit a document as an exhibit, being an implementation memorandum dated September 1, 2018. I accepted the document as an exhibit over the objection of the advocate for the agency.

### **III. ISSUE**

Whether the agency acted properly in issuing the grievant a Group II Written Notice on August 3, 2018 for refusal to work overtime and suspending him without pay for one day?

### **IV. FINDINGS OF FACT**

On June 27, 2018 superior officers told the grievant that he would be required to work at a different agency facility commencing July 1, 2018. This temporary assignment was to be for seven days. The assignment was necessary due to a staffing shortage at the other facility, one not close-by the one in Southwest Virginia where the grievant was regularly working. Other facilities throughout the western region were also supplying employees to the other facility on a temporary basis. The grievant has been selected through a “draft” process whereby employees were chosen in a sequential alphabetical rotation. This rotation was one that rolled over from earlier selection processes for similar needs.

The grievant stated that he chose not to accept the temporary assignment. His reason for not wanting to accept it was that his child had only recently come to stay with him for a three week visitation. The time during which the child was to be with him included the week of July 1. The grievant did not have that week reserved for personal leave and was scheduled to work at his “home” facility on at least some of the days during that week.

The grievant was advised that if he refused to work at the remote facility, he would be subject to disciplinary action. He again declined to accept the assignment.

## V. ANALYSIS

The Commonwealth of Virginia provides certain protections to employees in Chapter 30 of Title 2.2 of the Code of Virginia. Among these protections is the right to grieve formal disciplinary actions. The Department of Equal Employment and Dispute Resolution has developed a *Grievance Procedure Manual (GPM)*. This manual sets forth the applicable standards for this type of proceeding. Section 5.8 of the *GPM* provides that in disciplinary grievances the agency has the burden of going forward with the evidence. It also has the burden of proving, by a preponderance of the evidence, that its actions were warranted and appropriate. The *GPM* is supplemented by a separate set of standards promulgated by the Department of Employment Dispute Resolution, *Rules for Conducting Grievance Hearings*. These *Rules* state that in a disciplinary grievance (such as this matter) a hearing officer shall review the facts *de novo* and determine:

- I. Whether the employee engaged in the behavior described in the Written Notice;
- II. Whether the behavior constituted misconduct;
- III. Whether the discipline was consistent with law and policy; and
- IV. Whether there were mitigating circumstances justifying the reduction or removal of the disciplinary action, and, if so, whether aggravating circumstances existed that would overcome the mitigating circumstances.

The grievant does not dispute that he refused to accept the temporary assignment to the

remote facility. Agency Operating Procedure 135.1 establishes categories of offenses that an employee can commit and be subject to formal discipline. The grievant was given a Group II offense. Those 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 termination.” Operating Procedure 135.1(V)(C). Group II offenses are further stated to include the failure to perform assigned work or a refusal to work overtime hours as required. In this instance, the written notice cites the refusal to work overtime. A refusal to work overtime is the subject of Agency Operating Procedure 110.2. As stated, no dispute exists about whether the grievant refused the assignment. Such refusal clearly is a Group II offense for failing to perform assigned work.

The grievant has argued that the written notice is deficient in that it cites only, in Section 2, the refusal to work overtime. I agree that the grievant did not refuse to work overtime. I note, however, that the attached narrative to the Written Notice clearly sets forth the events on which the disciplinary action is based. I cannot find that the failure of the agency to cite the more appropriate portion of Operating Procedure 135.1 to be a denial of the procedural rights of the grievant. In a similar case, the Department of Human Resource Management, Office of Equal Employment Dispute Resolution has upheld a determination by another Hearing Officer that a technical error by the agency in labeling the misconduct of the employee does not require dismissal of the written notice. See DHRM Ruling No. 2019-4876. Here, the grievant was similarly adequately apprised of the alleged misconduct through the various steps of the grievance procedure and issuance of the discipline.

The grievant has made no supported argument that the issuance of the discipline was inconsistent with law or established policy. He has made two arguments that I have considered

as possible basis for mitigation of the offense. First, he argues that the agency had no established written procedure for drafting employees to work at other facilities. No evidence was presented by the agency to the contrary. I do not find this argument to be helpful to the grievant. The question was not whether he was ordered arbitrarily but not unreasonably; the question is whether he refused a lawful command from his superior. If this was a situation where he was being disciplined for failing to implement a policy or procedure that was not written and somewhat unclear, his argument would carry more weight. As someone who was subject to the direction to work at a different facility, his refusal should not be mitigated on that basis.

The second argument he makes is that one of the agency witnesses testified that the grievant had previously declined to accept a temporary work assignment, thus giving the refusal on June 27, 2018 a different context. I do find the testimony of the grievant to be credible in his denial he had previously been able to avoid a temporary assignment to a different facility. But I do not find this discrepancy in the evidence to be sufficient to mitigate the punishment. Even if the direction on June 22, 2018 was the first time that the grievant had been told to work elsewhere, his refusal to do so clearly qualifies as a Group II offense. I find nothing unreasonable or arbitrary in the agency's action in giving the grievant this level of offense. Mitigation is proper only if the agency action "exceeds the limits of reasonableness." Rules for Conducting Grievance Hearings Section IV(A). After giving the agency the required level of deference, I cannot find grounds for mitigation.

## **VI. DECISION**

For the reasons stated herein, I uphold the issuance of the Group II Written Notice of

August 3, 2018 and the one-day suspension from employment.

## VII. 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.

Please address your request to:

Office of Equal Employment and Dispute Resolution  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto: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.<sup>[1]</sup>

[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].

**ENTERED** this April 30, 2019.

/s/ Thomas P. Walk, Hearing Officer