

Issue: Group I Written Notice (unsatisfactory performance); Hearing Date: 04/09/19;
Decision Issued: 04/29/19; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case
No. 11322; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11322

Hearing Date: April 9, 2019
Decision Issued: April 29, 2019

PROCEDURAL HISTORY

On October 10, 2018, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory job performance.

On November 8, 2018, 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 requested a hearing. On February 26, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 9, 2019, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency Counsel
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 Corrections employs Grievant as a Customer Service Specialist at one of its facilities. She began working for the Agency in April 2015. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant was responsible for receiving orders from customers and processing those orders so that customers would receive the correct items.

On June 16, 2018, Grievant received a Notice of Improvement Needed/Substandard Performance placing her on an Improvement Plan. The Improvement Plan required, in part:

- [Grievant] must review procedures, reference guides, and cheat sheets for accuracy in order entry steps.
- [Grievant] must adhere to and comply with all standard procedures and department protocols. Specifically [Grievant] must compare line for line the account, item code, and description to an estimate to eliminate errors in order entry. Any discrepancy found she must notify by email the customer, the Sales Representative, and the supervisor in a professional business manner.

- [Grievant] must compare hardcopy Importer orders to Item screen in the SyteLine to ensure item codes exist – – if code does not exist in SyteLine a request by email for the code to be set up must be sent. Importer orders are not to be deleted because code does not exist and then order manually keyed.

The Reviewer wrote:

Employee must adhere to policy & procedures governing VCE and the Department. Communication must be positive and respectful to fellow employees.¹

On July 9, 2018, the Customer submitted a Purchase Order containing inconsistent information. The Customer wanted product number 33595. The Product Description on the Purchase Order was:

USE 33595TAG: ST=IRELEVATION STOOL NO ARMSBLACK POLY SEAT/BACK BLACK FINISH

The Catalog Number was:

33590 04
U019

The Customer sought a quantity of two with a total cost of \$500.

Grievant reviewed the Purchase Order and processed the request as an order for product 33590.

When the items were delivered to the Customer, the Customer refused to accept delivery because “customer advised incorrect stools these are fabric should be black poly back and seat.”²

In Grievant’s Grievance Form A, Grievant wrote:

It is correct that I did not thoroughly investigate the item code which was pulled from an older quote from 2 years ago which I did not know. The item description was incorrect and did not match the item code. Corrections had to be made to this oversight was also missed in the audit process and an incident report was done which made note of the fact that the incorrect item description was missed twice. I accept responsibility for this oversight.³

¹ Agency Exhibit 6.

² Agency Exhibit 10.

³ Agency Exhibit 2.

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.”⁴ 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.”⁵ Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”⁶

[I]nadequate or unsatisfactory job performance” is a Group I offense.⁷ In order to prove inadequate or unsatisfactory job 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 received a Notice of Improvement/Substandard Performance requiring that she:

Specifically [Grievant] must compare line for line the account, item code, and description to an estimate to eliminate errors in order entry.

Grievant’s work performance was unsatisfactory to the Agency. Grievant failed to compare the product description with the catalog number on the Customer’s purchase order. If she had compared that information, she would have recognized the Customer’s error and been able to follow up with the Customer to order the correct item. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.

The Agency presented three other examples of errors it believe Grievant made. Grievant argued that she did not make or was not responsible for the three additional errors. It is not necessary for the Hearing Officer to resolve the merits of the additional errors. Grievant was specifically tasked with comparing descriptions and item codes on purchase orders. The Agency has met its burden of proof by establishing that Grievant made the first error discussed above. Grievant admitted to making the error.

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

⁴ Virginia Department of Corrections Operating Procedure 135.1(VI)(B).

⁵ Virginia Department of Corrections Operating Procedure 135.1(VI)(C).

⁶ Virginia Department of Corrections Operating Procedure 135.1(VI)(D).

⁷ Virginia Department of Corrections Operating Procedure 135.1(V)(B)(4).

“in accordance with rules established by the Department of Human Resource Management”⁸ 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.

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

⁸ Va. Code § 2.2-3005.

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 EEDR before filing a notice of appeal.