

Issue: Group I Written Notice (unsatisfactory performance); Hearing Date: 08/23/17;
Decision Issued: 12/01/17; Agency: UVA; AHO: Carl Wilson Schmidt, Esq.; Case
No. 11051; 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: 11051

Hearing Date: August 23, 2017
Decision Issued: December 1, 2017

PROCEDURAL HISTORY

On January 30, 2017, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory job performance.

Grievant filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On July 5, 2017, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On August 23, 2017, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency's 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 University of Virginia employs Grievant as an Administrative Coordinator. She became a classified employee in 2014. No evidence of prior active disciplinary action was introduced during the hearing. Grievant resigned from her position prior to the hearing, and moved to another position in a different department within the University.

Grievant began working for the Supervisor in March 2016. In June 2016, the Supervisor began noticing that Grievant was inaccurate in some of her work. The Supervisor began meeting with Grievant to review and explain Grievant's duties. The Supervisor gave Grievant a spreadsheet showing Grievant's duties.

Grievant was responsible for scheduling meetings.

The Supervisor repeatedly told Grievant to schedule meetings with notice of at least two weeks to the employee who was expected to attend the meeting.

On November 1, 2016, Grievant was presented with a Notice of Improvement Needed/Substandard Performance. She was informed the Agency has concerns about her initiative, accuracy, communication, and responsibility for follow-through. Grievant was informed of the Agency expectations to:

Schedule and coordinate meetings accurately and without error, complete follow up tasks, work proactively to learn calendar management preferences of Director and Associate Director.

The Agency scheduled a mid-year staff meeting. The date was changed to December 14, 2016. On October 12, 2016, Grievant sent staff scheduled to attend the meeting a reminder reflecting an incorrect date for the meeting. Grievant wrote, "DON'T FORGET ... REMINDER 12-13-2016. Please note the changes to this meeting Invita that is for [employees] to attend starting promptly at 8:00 a.m. with breakfast served. Agenda to be sent at later date prior to meeting."¹

Grievant scheduled the Associate Director for two meetings on December 12, 2016 at overlapping times. At 8:45 a.m. on December 12, 2016, Grievant attempted to reschedule one of the meetings. The first meeting started at 10 a.m. and 1:15 hours was not a sufficient amount of notice to the Associate Director to prevent the time conflict.

On November 28, 2016, Grievant sent reminders to staff to complete certain performance management tasks by December 31, 2016. The correct deadline was January 20, 2017. Grievant should have identified the correct date by looking at a calendar entry.

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."² 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."

"[U]nsatisfactory work performance" is a Group I offense.³ 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 received a Performance Improvement Plan outlining her responsibilities during the period of November 1, 2016 through December 31, 2016. The Supervisor repeatedly spoke with Grievant about Grievant's patterns of errors and the importance

¹ Agency Exhibit 10.

² The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

³ See Attachment A, DHRM Policy 1.60.

of avoiding errors. Grievant continued to make errors such as reminding employees to attending a meeting but listing an incorrect date, scheduling an employee for two meetings at the same time without providing adequate time to correct the error, and reminding staff of deadlines but using the wrong date. The Agency has presented sufficient evidence to show that Grievant's work performance was unsatisfactory.⁴

Grievant argued that the Agency redesigned her position after her departure to reflect a higher level of duties and responsibilities. The errors Grievant made, however, did not relate to a misclassification of her job duties.

Grievant argued that she was bullied and experienced stress caused by her managers. She argued she could not perform her work duties in eight hours but was not allowed to work overtime. Insufficient evidence was presented to show that Agency managers bullied Grievant. The evidence showed that Agency managers were concerned with Grievant's poor performance and focused their attention on Grievant to ensure she completed her duties correctly. Grievant's errors did not relate to a lack of time to complete her duties. She was not disciplined for failing to complete her work. Grievant completed her duties, but did so with errors.

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**.

⁴ No employee is perfect. In this case, however, the Agency has established a pattern of Grievant making errors, being informed of the importance of avoiding errors, and Grievant continuing to make errors.

⁵ Va. Code § 2.2-3005.

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 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.