

Issue: Group II Written Notice with Termination (unsatisfactory performance); Hearing Date: 08/30/17; Decision Issued: 12/05/17; Agency: DMV; AHO: Carl Wilson Schmidt, Esq.; Case No. 11055; Outcome: No Relief – Agency Upheld;
Administrative Review: Ruling Request received 12/11/17; EEDR Ruling No. 2018-4655 issued 01/16/18; Outcome: AHO's decision affirmed.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11055

Hearing Date: August 30, 2017
Decision Issued: December 5, 2017

PROCEDURAL HISTORY

On June 1, 2017, Grievant was issued a Group II Written Notice of disciplinary action for unsatisfactory performance. Grievant was removed based on the accumulation of disciplinary action.

Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On July 10, 2017, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On August 30, 2017, 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:

The Department of Motor Vehicles employed Grievant as a Program Support Technician Senior at one of its facilities. Grievant had been employed by the Agency for approximately 17 years. Grievant had prior active disciplinary action. Grievant received a Group I Written Notice on May 17, 2016 for unsatisfactory work performance. Grievant received a Group II Written Notice with a five workday suspension on September 20, 2016 for unsatisfactory work performance.

Grievant was responsible for receiving telephone calls from customers, listening to their questions, researching the Agency's records, if necessary, and providing customers with accurate information.

The Agency's objective was to have customer questions resolved upon their first contact with the Agency so that customers did not have to call a second time. The Agency recorded Grievant's telephone calls from customers.

Agency managers randomly selected several of Grievant's telephone calls and then graded those calls based on Greeting, Verification, Identify Customer Needs, Telephone Technique, Meeting Customer Needs, and Closing. Grievant was expected to score at least 89 out of 100 points every month for her work to be considered Contributor.

Grievant scored at a below contributor level for her telephone customer service. The Agency decided to place Grievant on a Corrective Action Plan. Beginning on October 6, 2016, the Manager provided Grievant with side by side coaching and passive monitoring of her telephone calls. They met weekly to discuss Grievant's overall performance, review Grievant's telephone calls, and provide Grievant with helpful tools to improve her work performance. Grievant was notified that "if at any point during this three month period (or thereafter) [Grievant's] performance falls below an acceptable level, DMV may use the Standards of Conduct to address any such shortcomings, which could include Written Notices that may result in termination of employment."¹

Agency managers reviewed Grievant's calls and concluded Grievant's score for February 2017 was 82.33, March 2017 was 79, and April 2017 was 89.

On April 11, 2017, Grievant received a call from Customer 1. Customer 1 wanted to know what he had to do to obtain his license once his revocation time ended. Customer 1 held a learner's permit approximately 14 years earlier. Grievant told Customer 1 that because it had been so long since he held a learner's permit, he would have to "fully test" and hold a learner's permit for 60 days. Customer 1 told Grievant he had been previously advised that since he once held a learner's permit, he would not be required to have a learner's permit. Grievant contacted Ms. F for assistance with the call. Ms. F told Grievant that she would check a separate system only accessible to help desk agents and supervisors. Ms. F told Grievant that if the system showed a license history, then Customer 1 would be required to fully test but the holding period for a learner's permit would be waived. Ms. F located license history in the system and told Grievant that she would note in the record for the Customer Service Center to determine where Customer 1 was to go to test. Grievant spoke with Customer 1 and incorrectly advised him he would have to hold a learner's permit and then noted this requirement in the Agency's record for Customer 1.

On May 3, 2017, Grievant spoke with Customer 2. Customer 2 called to update her customer service address to reflect her Maryland residency and provide information on the insurance monitor on her record. Customer 2 asked if there was an option for payment plan for the fees she owed. Grievant incorrectly told Customer 2 she would have to visit an Agency customer service center to speak with a manager to enter into a payment plan for the fees. Only Virginia residents were eligible to be placed on a payment plan for fees. Grievant should have told Customer 2 that no payment plan was available.

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

¹ Agency Exhibit 5.

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.

The Agency presented sufficient evidence to support the issuance of a Group I Written Notice for unsatisfactory work performance. Grievant’s work performance was unsatisfactory to the Agency because her calls for January and February 2017 were rated lower than 89. She provided incorrect information to a customer regarding obtaining a learner’s permit. She provided incorrect information to a customer regarding a payment plan for fees.

An agency may issue a Group II Written Notice (and suspend without pay for up to ten workdays) if the employee has an active Group I Written Notice for the same offense in his or her personnel file. Grievant had two prior written notices for unsatisfactory work performance. Thus, the Agency’s decision to elevate the Group I offense to a Group II offense must be upheld.

Upon the accumulation of two Group II Written Notices, an agency may remove an employee. Grievant has accumulated two Group II Written Notices. Accordingly, the Agency’s decision to remove Grievant must be upheld.

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”⁴ 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.

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.

⁴ *Va. Code § 2.2-3005.*

Grievant argued that her otherwise satisfactory work performance and length of service should serve to mitigate the disciplinary action against her. Rarely are prior satisfactory work performance and length of service mitigating factors to reduce disciplinary action. Grievant's prior satisfactory work performance and length of service are significant and important considerations but they are not, standing alone, sufficient to reduce the disciplinary action. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

Grievant asserted that the Agency discriminated against her because of her age and race. No credible evidence was presented to support Grievant's opinion.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II 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.

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.