

Issue: Group I Written Notice (unsatisfactory performance); Hearing Date: 12/13/18;
Decision Issued: 12/19/18; Agency: JMU; AHO: Carl Wilson Schmidt, Esq.; Case
No. 11276; 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: 11276

Hearing Date: December 13, 2018
Decision Issued: December 19, 2018

PROCEDURAL HISTORY

On June 28, 2018, Grievant was issued a Group I Written Notice of disciplinary action for failure to follow established expectations.

On July 23, 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 he requested a hearing. On October 22, 2018, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On December 13, 2018, a hearing was held at the Agency's office.

APPEARANCES

Grievant
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:

James Madison University employs Grievant as a Housekeeper. Grievant had prior active disciplinary action. On April 10, 2018, Grievant received a Group I Written Notice for having a pattern of unsatisfactory attendance and punctuality. The Written Notice provided:

From this date forward, it is expected and required that you supply documentation for any unscheduled absence to your superior the day that you return to work.¹

On Friday June 22, 2018, Grievant called the Supervisor before his shift began and told her that he missed his ride and would be late to work. Because the Supervisor believed that Grievant would be reporting to work that day, she did not assign his work duties to another employee.

Grievant asked Mr. S to drive him to work. Mr. S was unable to drive Grievant to work because of a medical emergency.

Grievant did not report to work on June 22, 2018. He did not call the Supervisor to tell her that instead of being late he would not be reporting at all. If the Supervisor

¹ Agency Exhibit 6.

had known that Grievant would not be reporting to work that day, she would have reassigned Grievant's work duties to another employee to complete.

On Monday, June 25, 2018, Grievant reported to work. He told the Supervisor that he had been on his way to work when his carpool driver had a medical emergency and could not bring Grievant to work as expected. Grievant did not present a note to the Supervisor explaining his absence.

On June 28, 2018, Grievant reported to work. He presented a note to the Manager. The note was written by Mr. S and stated:

I was unable to give [Grievant] a ride to work on Friday, June 22, 2018 because of a medical emergency.²

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."³ 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.⁴ 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.

June 25, 2018, Grievant was scheduled to report to work. He notified the Supervisor that he would be late to work but did not notify her once he realized he would not report to work that day. Grievant's failure to notify the Supervisor that he would be absent that day adversely affected the Agency's ability to have his work performed by other staff. Grievant's absence on June 25, 2018 was an unscheduled absence requiring him to bring a note to the Supervisor on the next day he reported to work. Grievant reported to work on June 28, 2018, but did not present a note to the Supervisor. Grievant's work performance was unsatisfactory to the Agency thereby justifying the issuance of a Group I Written Notice.

² Agency Exhibit 5.

³ The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

⁴ See Attachment A, DHRM Policy 1.60.

Grievant asserted that Agency managers were untruthful with respect to issuance of a March 23, 2018 counseling memorandum. The Hearing Officer can disregard that March 23, 2018 counseling memorandum without affecting the outcome of this case. The Agency showed that on April 10, 2018, it presented Grievant with a Group I Written Notice containing the requirement that he was expected to “supply documentation for any unscheduled absence to your supervisor the day that you return to work.” Grievant did not meet that expectation.

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**.

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.

⁵ Va. Code § 2.2-3005.

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.