



# ***COMMONWEALTH of VIRGINIA***

## ***Department of Human Resource Management***

### **OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

#### **DECISION OF HEARING OFFICER**

In re:

**Case Number: 11570**

Hearing Date: October 16, 2020  
Decision Issued: November 5, 2020

#### **PROCEDURAL HISTORY**

On March 23, 2020, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory job performance and failure to follow policy.

On April 8, 2020, 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 July 27, 2020, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 16, 2020, a hearing was held by remote conference.

#### **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 Corrections employs Grievant as a Psychology Associate I at one of its facilities. He began working for the agency on June 26, 2019.

Grievant's caseload included five inmates.

Grievant received information regarding the program procedures, leaving time and attendance in September 2019 and February 2020.

The Supervisor audited Grievant's files on a regular basis. She looked to see if certain documents were in each inmate's file. On August 30, 2019, the Supervisor audited Inmate ZJ's file and identified corrections for Grievant to complete by September 13, 2019. On November 13, 2019, the Supervisor audited inmate DR's file and identify corrections for Grievant to complete by November 27, 2019. Grievant did not complete the corrections as of December 18, 2019. The Supervisor issued Grievant corrective action plans with due dates to complete the work between December 2019 and January 2020. As of March 20, 2020, Grievant had not completed the work required by the corrective action plans.

On December 17, 2019, the Supervisor although did inmate CY's filed and identified issues with documentation. Another corrective action plan was issued with

due dates of December 2019 and January 2020. As of March 2, 2020 Grievant not completed the corrective action plan for Inmate CY.

On February 27, 2020, of the Supervisor asked Grievant to prioritize submitting revisions for Inmate CY's discharge summary by the end of March 2, 2020 because his release date was scheduled for March 3, 2020. Grievant and not submit revisions until March 5, 2020.

Grievant's submitted a draft summary discharge on June 7, 2020 for Inmate GS. The Supervisor instructed Grievant to revise the summary but Grievant failed to do so.

### **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." 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." Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."<sup>1</sup>

"[I]nadequate or unsatisfactory job performance" is a Group I offense.<sup>2</sup> 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.

The Supervisor audited Grievant's files and found numerous errors. She identified those errors for Grievant and instructed him to correct them within the specific deadlines. Grievant failed to correct the errors by the deadlines. Grievant's work performance was unsatisfactory to the Agency. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.

Grievant argued that he did not receive adequate training to perform his work duties. The evidence does not support this conclusion. Grievant received adequate training to perform his job duties and to make the changes requested by the Supervisor. Grievant received a power-point presentation as part of his orientation to the program. The program requirements were set forth in documents available to Grievant. Grievant met with the Supervisor on a frequent basis sometimes on a weekly basis and could ask any question he had. Several of the deficiencies related to Grievant failing to meet deadlines. Additional training would not have affected Grievant's ability to meet deadlines. Several of the corrections did not relate to training. For example, Grievant

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<sup>1</sup> See, Virginia Department of Corrections Operating Procedure 135.1.

<sup>2</sup> Virginia Department of Corrections Operating Procedure 135.1(V)(B)(4).

was instructed to remove other inmate names and information from AY's discharge summary. Grievant simply had to comply with the instruction for which no additional training was needed.

*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 ...."<sup>3</sup> 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 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.

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<sup>3</sup> Va. Code § 2.2-3005.

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 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

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<sup>[1]</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.