



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11555

Hearing Date: September 30, 2020

Decision Issued: October 20, 2020

PROCEDURAL HISTORY

On March 25, 2020, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow a supervisor's instructions.

On April 23, 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 13, 2020, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 30, 2020, a hearing was held by audio 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 Juvenile Justice employs Grievant as a Residential Community Coordinator at one of its facilities. No evidence of prior active disciplinary action was introduced during the hearing.¹

Grievant was on leave beginning June 25, 2019 and returned to work November 19, 2019. He was not responsible for performing work duties while on leave.

The Agency used a Tracking Sheet to track community treatment models. Information in the Tracking Sheet had not been entered since August 29, 2019. The Tracking Sheet was supposed to be completed every Friday.

When Grievant returned to work, Grievant and the Supervisor discussed finding the missing information by requesting log books from the Operations Manager and then entering the missing information into the Tracking Sheet. The Supervisor told Grievant if he could not find an entry, he should mark the Tracking Sheet item to show the item was missing. This would allow him to complete the Tracking Sheet even if necessary information was missing from other sources.

¹ The Agency alleged Grievant had a prior active Group I Written Notice but did not present it as an exhibit.

The Supervisor began training another employee to begin completing the Tracking Sheet for 2020 and later. This training did not mean Grievant was not responsible for the 2019 Tracking Sheet.

On November 26, 2019, the Supervisor asked Grievant about the assignment. Grievant said he had not yet started but planned to contact Ms. H to obtain the log books.

On December 6, 2019, Grievant signed out the log books for August, September, and October 2019.

On December 30, 2019, the Supervisor sent Grievant an email, "Ok, the tracking sheet is in pretty bad shape. Were you able to get the logbooks from [Ms. H] like we spoke about?" Grievant sent the Supervisor an email stating, "I have the logbooks and [am] highlighting them[:]; there are very few log entries concerning [initials]."2

On January 14, 2020, the Supervisor informed Grievant he needed to get the task done soon.

On January 19, 2020, the Supervisor sent Grievant an email, "I need the complete 2019 Tracking by January 24, 2020." On January 24, 2020, Grievant responded that he had not read the Supervisor's January 19, 2020 message until January 24, 2020. He indicated he needed more time to complete the Tracking Sheet. The Supervisor gave Grievant a deadline of January 27, 2020 to complete the task and added, "I have to close this out"

As of February 6, 2020, the Tracking Sheet remained uncompleted.

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."

Failure to follow a supervisor's instructions is a Group II offense.⁴ The Supervisor instructed Grievant to complete the Tracking Sheet. Grievant understood the instruction

² Agency Exhibit K.

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.

and began the process of completing the task. He asked for and was given additional time to complete the assignment. He was given a final deadline of January 27, 2020. Grievant did not present the Tracking Sheet to the Supervisor thereby failing to comply with the Supervisor's instruction. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

Grievant argued that no one completed the Tracking Sheet while he was out and that he was being "scapegoated" by the Agency. The evidence showed that Grievant was not held responsible for completing the Tracking Sheet but that he was given an instruction to complete the Tracking Sheet and informed of how to do so. The Agency was authorized to instruct Grievant to complete the Tracking Sheet even though other employees had not done so while he was on leave.

Grievant argued he should have received a written counseling instead of being issued a Group II Written Notice. Although an agency may engage in progressive discipline, it is not required to do so. The Agency's issuance of a Group II Written Notice is consistent with the Standards of Conduct.

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 II Written Notice of disciplinary action is **upheld**.

⁵ Va. Code § 2.2-3005.

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 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 EDR before filing a notice of appeal.