



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11639

Hearing Date: April 26, 2021

Decision Issued: May 17, 2021

PROCEDURAL HISTORY

On September 3, 2020, Grievant was issued a Group II Written Notice of disciplinary action with a three day suspension for failure to follow policy.

On September 28, 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 December 28, 2020, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 26, 2021, 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 employed Grievant as a Probation Officer at one of its locations. He began working for the Agency in December 2019 and resigned effective January 4, 2021. He was responsible for supervising probationers. No evidence of prior active disciplinary action was introduced during the hearing.

On January 6, 2020, Grievant received training regarding the Agency's computer system COMPUS. He regularly entered information into the Agency's computer system VACORIS.

VACORIS was the Agency's electronic database used by employees to record their work. A probation officer had to use VACORIS to obtain probationer telephone numbers and to mail letters. When Grievant completed tasks, he was to update VACORIS to show the tasks were completed. The Agency used VACORIS to verify that employee work was completed.

Employees began teleworking March 16, 2020. Grievant signed a telework agreement on March 16, 2020. Under this agreement, Grievant was to "complete all assigned work according to work procedures mutually agreed upon by the employee and the supervisor."

Grievant began working at home due to the pandemic on April 3, 2020. The Supervisor asked Grievant and other employees to submit an itinerary identifying the specific assignments and probationers to be contacted. Grievant was to provide the itinerary the day before he was scheduled to work from home.

Employees were expected to show their hours worked by signing into and out of Google Calendar.

On May 29, 2020, Grievant signed into Google Calendar at 7:45 a.m. but did not sign out. Grievant submitted an itinerary listing eight tasks.¹ He only completed two of those tasks.

On June 1, 2020, Grievant worked in the office beginning at 8:33 a.m. He accessed VACORIS from 9:02 a.m. to 9:16 a.m., 11:15 a.m. to 11:57 a.m. and at 3:21 p.m. Grievant did not sign out for the day.

On June 2, 2020, Grievant logged into Google Calendar from home at 7:30 a.m. He did not access VACORIS. He did not log out for the day. He submitted an itinerary with six items, but only completed one item.

On June 3, 2020, Grievant did not sign into Google Calendar or access VACORIS.

On June 4, 2020, Grievant logged into Google Calendar from home at 8:00 a.m. but never signed out. He accessed VACORIS at 12:19 p.m. and had no activity after 2:39 p.m.

On June 8, 2020, Grievant reported to work and logged into Google Calendar at 8:42 a.m. but did not sign out. He accessed VACORIS from 9:21 a.m. until 11:58 a.m. and then at 2:44 p.m. and 2:45 p.m.

On June 10, 2020, Grievant logged into Google Calendar from home at 8:05 a.m. but did not sign out. He accessed VACORIS from 9:20 a.m. to 2:09 p.m. He submitted an itinerary listing eight items to be completed but he only completed two of those items.

On June 12, 2020, Grievant logged into Google Calendar from home at 7:45 a.m. He did not log out. He submitted an itinerary showing seven items to be completed. He only completed four of the items.

On June 16, 2020, Grievant logged into Google Calendar from home at 8:05 a.m. He did not sign out. Grievant accessed VACORIS from 9:47 a.m. until 10:16 a.m. He submitted an itinerary showing eight items to be completed but he completed only one of them.

¹ In some cases, the itineraries were modified later with additional information.

On June 18, 2020, Grievant logged into Google Calendar from home at 8:00 a.m. He did not sign out. He accessed VACORIS from 2:01 p.m. until 4:32 p.m. Grievant submitted an itinerary listing 10 items to be completed but only completed five of them.

On June 24, 2020, Grievant logged into Google Calendar from home at 8:00 a.m. He did not sign out. He submitted an itinerary listing eight items to be completed but only completed four of them.

On June 26, 2020, Grievant logged into Google Calendar from home at 7:50 a.m. but did not log out. He accessed VACORIS from 9:31 a.m. until 10:33 a.m. He submitted an itinerary listing 11 items to be completed but only completed five of those items.

On June 29 2020, Grievant logged into Google Calendar from the office at 8:30 a.m. He accessed VACORIS from 11:29 a.m. until 4:32 p.m.

On June 30, 2020, Grievant logged into Google Calendar from home at 8:00 a.m. and logged out at 5:00 p.m. He accessed VACORIS from 11:21 a.m. until 4:27 p.m. He submitted an itinerary listing nine items to be completed but only completed six of those items.

On July 2, 2020, Grievant logged into Google Calendar from home at 7:42 a.m. and logged out at 4:30 p.m. He submitted an itinerary listing six items to be completed but only completed two of them.

On July 6, 2020, Grievant logged into Google Calendar from home at 8:00 a.m. and logged out at 5:00 p.m. He submitted an itinerary listing eight items to be completed but only completed five of them.

On July 10, 2020, Grievant logged into Google Calendar from home at 8:00 a.m. and signed out at 5:00 p.m. He submitted an itinerary listing 13 items to be completed and completed 12 of those items.

On July 14, 2020, Grievant logged into Google Calendar from home at 8:00 a.m. and signed out at 5:15 p.m. He accessed VACORIS at 10:16 a.m. and from 12:40 p.m. until 3:52 p.m.

On July 16, 2020, Grievant logged into Google Calendar from home at 7:50 a.m. and logged out at 5:15 p.m. He did not access VACORIS.

On July 20, 2020, Grievant logged into Google Calendar from home at 8:00 a.m. and logged out at 5:00 a.m. He did not access VACORIS.

On July 22, Grievant logged into Google Calendar from home at 7:57 a.m. He was in court from 9:00 a.m. until 11:30 a.m. He did not sign out of Google Calendar. Grievant accessed VACORIS from 12:45 p.m. until 4:42 p.m. He submitted an itinerary listing six items and completed five of them.

On July 24, 2020, Grievant logged into Google Calendar from home at 7:30 a.m. but did not sign out. He accessed VACORIS from 8:30 a.m. until 10:51 a.m. and at 2:32 p.m. He submitted an itinerary listing 10 items to be completed but only completed one of those items.

On July 28, 2020, Grievant logged into Google Calendar from home at 7:57 a.m. and logged out at 4:30 p.m. He submitted an itinerary listing eight items to be completed and completed five of those items.

On July 30, 2020, Grievant logged into Google Calendar from home at 7:55 a.m. and logged out at 5:00 p.m. He accessed VACORIS from 10:46 am. until 10:48 a.m. and from 2:30 p.m. until 5:30 p.m. He submitted an itinerary listing seven items to be completed but only completed one of them.

On August 3, 2020, Grievant logged in to Google Calendar from home at 8:02 a.m. but did not sign out. He did not access VACORIS. Grievant submitted an itinerary listing seven items to be completed but only completed two of those items.

On August 5, 2020, Grievant logged into Google Calendar from home at 7:55 a.m. but did not log out. He had not logged into VACORIS for several days so he was instructed to report to the office. His teleworking privileges were removed.

Grievant claimed to be working on the days listed above. The Agency gave Grievant the opportunity to show he performed work not documented in VACORIS. He was unable to present documents showing additional items were completed.

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.”² 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.”³ Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”⁴

“Failure to follow a supervisor’s instructions, perform assigned work, or otherwise comply with applicable established written policy” is a Group II offense.⁵ The Supervisor

² Virginia Department of Corrections Operating Procedure 135.1(VI)(B).

³ Virginia Department of Corrections Operating Procedure 135.1(VI)(C).

⁴ Virginia Department of Corrections Operating Procedure 135.1(VI)(D).

⁵ Virginia Department of Corrections Operating Procedure 135.1(V)(C)(2)(a).

instructed Grievant that while working from home, he was to record his work time in Google Calendar, record in VACORIS the tasks he performed, and perform his identified tasks. The Agency has shown a pattern where Grievant did not record his work hours in Google Calendar, perform work during all of his shift, and complete tasks as expected. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice. Upon the issuance of a Group II Written Notice, an agency may suspend an employee for up to ten work days. Accordingly, Grievant's three workday suspension must be upheld.

Grievant argued the Agency did not fully account for his work product because he would type up his notes and then cut and paste them into VACORIS. The Supervisor reviewed VACORIS on August 5, 2020 and Grievant's information was not in VACORIS. During the Step Process, Grievant submitted documents supposedly reflecting his work product. The Agency was unable to verify the date the documents were created. The documents had not been timely entered into VACORIS. Grievant has not established that the Agency failed to account for his work product.

Grievant argued he was not properly trained. For example, he received basic skills training in September 2020 instead of earlier in his employment. Grievant was not disciplined for the quality of his work, he was disciplined for not performing work duties at all. Grievant's training was not a factor in whether he worked his entire shift as claimed.

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"⁶ 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 with suspension is **upheld**.

⁶ 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.