

Issues: Group I Written Notice (unsatisfactory performance) and Arbitrary/Capricious Performance Evaluation; Hearing Date: 03/10/16; Decision Issued: 03/30/16; Agency: JMU; AHO: Carl Wilson Schmidt, Esq.; Case No. 10767; Outcome: No Relief – Agency Upheld; **Administrative Review: EDR Ruling Request received 04/14/16; EDR Ruling No. 2016-4344 issued 05/10/16; Outcome: AHO’s decision affirmed; Administrative Review: DHRM Ruling Request received 04/14/16; DHRM Ruling issued 06/06/16; Outcome: Request denied – no policy violation identified.**



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10767

Hearing Date: March 10, 2016
Decision Issued: March 30, 2016

PROCEDURAL HISTORY

On October 9, 2015, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory job performance. The Agency issued a Notice of Improvement Needed and an Annual Performance Evaluation with a Below Contributor rating.

On November 5, 2015, 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 February 9, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 10, 2016, 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?
5. Whether the Agency issued a Notice of Improvement Needed and Annual Performance Evaluation in accordance with State policy?

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 burden of proof is on Grievant to show that the relief he seeks should be granted with respect to the Notice of Improvement Needed and Annual Performance Evaluation. 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 an HVAC Senior Technician. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant had several Core Responsibilities. Core Responsibility 1 was:

- Repairs and maintains HVAC and refrigeration equipment.
- Performs inspection on equipment and repairs problems in timely manner.
- Quality service with minimal work (call backs)
- Completes work in timely manner to satisfy customer needs.
- Documentation of refrigerant usage for EPA records.

Core Responsibility 4 was:

- Follows written and verbal instructions and provides clear communication with customers, supervisor, and associates.
- Reports status of major repairs to supervisor
- Follows written and verbal instructions
- Has good communication skills

Grievant did not testify during the hearing. Most of the Agency's evidence is un rebutted. Grievant's witnesses were not sufficient to support the arguments he made challenging the Agency's actions.

Grievant began reporting to the Supervisor approximately six years ago. Approximately eight full time and one part-time employees reported to the Supervisor. The Supervisor assessed Grievant's work performance by looking at the requirements of each task, assigning Grievant the task, allowing Grievant to ask questions before completing the task, and then determined how well Grievant performed the task.

In October 2014, Grievant attempted to troubleshoot a chiller unit. He put 130lbs of refrigerant into the unit but the unit failed to function. When the Supervisor inspected the unit, he realized that the unit was overcharged because Grievant had unnecessarily filled the unit with refrigerant. Grievant acted contrary to the manufacturer's instructions. The Supervisor removed 108lbs of refrigerant. The cost of the refrigerant was approximately \$4000 although some of the refrigerant could be reused if properly removed and retained.

Grievant received a Notice of Needs Improvement on November 14, 2014. The NIN identified Areas for Corrections:

Work on trade knowledge, trade skills, trade practices, communication skills & teamwork.

Adjusting your daily schedule in order to be on time for beginning of day, breaks/lunches & end of day scheduling sessions to promote punctuality.

Time management can be improved by job planning, accurate skills & following instructions.¹

The NIN set forth an Improvement Plan:

Improve your diagnosis, troubleshooting, critical thinking, knowledge, repair, and maintenance of HVAC and refrigeration equipment and systems through the exploration of source documents and/or additional training. Please consult with your supervisor for assistance.

Perform service call responsibilities while working independently or working with other HVAC technicians in the shop to increase diagnosis and repair capabilities, thus delivering good customer service.

Improve time management by reviewing shop procedures with your supervisor and by being prepared to work diligently to follow the shops operational procedures and EWP expectations.

Decrease call-backs (rework) by following instructions and by providing quality service and repairs.

¹ Agency Exhibit 1.

Decrease communication problems by asking questions about specific services and/or service practices to be implemented as well as concerns you have with the course of action recommended.²

The NIN was scheduled to remain in effect for 180 days. Grievant and the Supervisor typically met every two weeks to discuss Grievant's work performance. The Supervisor advised Grievant about how to perform his duties better such as how to use superheating and subcooling to accomplish his tasks. The Supervisor gave Grievant a pressure temperature chart to help with troubleshooting. The Supervisor told Grievant to look at the whole system he was to troubleshoot rather than just the low side.

Grievant suffered an injury and was placed on light-duty restriction. On May 1, 2015, Grievant was notified:

The purpose of his memorandum is to confirm our recent conversation of freezing your Notice of Needs Improvement (NIN) process and evaluation until you are able to return to work without restrictions. Once you are able to return, the NIN will begin where it left off. We want to ensure that we adhere to the restrictions from your doctor, however, with the restrictions we are unable to effectively evaluate your technical ability on some equipment as the restrictions hinder your ability to work on them.

Effective April 29, 2015, we will be freezing the Notice of Needs Improvement until your work restrictions are lifted.

Grievant was released to full duty on September 29, 2015 and the NIN was reinstated.

During the NIN period, Grievant was responsible for changing a compressor at a dining hall. He did not remove all of the refrigerant from the machine. This meant that the equipment was "still live" and pressurized. This placed Grievant and any other workers at risk of physical harm. For example, if a header broke there would have been an explosive release of gas.

A common practice among HVAC technicians was to turn on the crank case heater when liquid was being evacuated from a unit. Turning on the heater helped drive gases out of the system. In March 2015, Grievant failed to turn on the crank case heater when he should have done so.

Grievant showed poor troubleshooting skills. For example, he used a gauge to measure liquid levels. When the gauge showed a reading Grievant disagreed with, he concluded the gauge was faulty and used a second gauge which gave the same reading yet Grievant disagreed with the reading. He continued to insist the gauges were wrong rather than identifying the nature of the underlying problem.

² Agency Exhibit 1.

Grievant failed to use the pressure temperature chart that the Supervisor gave him to assist with troubleshooting.

At the conclusion of the NIN period, the Supervisor determined that Grievant's job performance had not improved during the NIN period to a level meeting the Agency's expectations.

On October 9, 2015, Grievant received an annual performance evaluation with an overall rating of Below Contributor. For Core Responsibility 1, Grievant received a Below Contributor rating. The Supervisor noted that "I am seeing a consistent lack of fundamental refrigerant circuit troubleshooting skills." For Core Responsibility 3, Grievant received a Moderate Contributor rating. The Supervisor wrote Grievant "has had some difficulty keeping up with his tools and whether they have been sent for service or loaned/swapped with other techs." For Core Responsibility 4, Grievant received a Below Contributor rating. The Supervisor observed that Grievant had "misspoken" and individuals have repeated the "misspoken" word or phrase back to you to help correct the conversation or subject and you didn't catch it. This is demonstrating a lack of knowledge on your part and places the entire conversation into question."

On November 3, 2015, Grievant was given a 90 day Performance Re-Evaluation Plan.

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.

The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice. Grievant made several mistakes during the NIN period such as

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.

not removing all of the refrigerant on equipment he was servicing and demonstrating poor troubleshooting skills.

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.

A Notice of Improvement Needed is:

A form completed by the immediate supervisor during the performance cycle to document substandard performance and the need to improve performance.⁶

The Agency showed that Grievant’s work performance was not adequate after the 2014 annual performance evaluation there by justifying the issuance of a Notice of Needs Improvement on November 14, 2014. Grievant’s work performance did not improve during the 180 day performance period. As a result, the Agency took disciplinary action.

According to DHRM Policy 1.40, an employee cannot be rated “Below Contributor” on the annual evaluation unless he/she has received:

- At least one Notice of Improvement Needed/Substandard Performance form; OR
- A Written Notice for any reason as defined in Policy 1.60, Standards of Conduct.

Receipt of a Notice of Improvement Needed/Substandard Performance form or a Written Notice does not require that an employee be rated “Below Contributor.” Rather, it allows a “Below Contributor” rating if the employee’s overall performance reasonably supports a “Below Contributor” rating.

⁵ Va. Code § 2.2-3005.

⁶ DHRM Policy 1.40.

On October 9, 2015, Grievant received an annual performance evaluation with an overall rating of Below Contributor. Grievant received a Notice of Improvement Needed during the performance cycle. The Agency has presented sufficient evidence to support its opinion that Grievant's work performance during the annual performance period was unsatisfactory.

Grievant argued that he was placed on light duty on March 9, 2015 and the NIN should have been placed on hold at that time instead of on April 29, 2015. The Supervisor admitted that he was unsuccessful in having the NIN "backed up" to March 9, 2015 but explained that Grievant's difficulties "were not related to mobility, they were related to knowledge/service skills ...". Grievant did not present sufficient evidence to show that the Agency failed to follow policy or inaccurately evaluated his work performance by not placing the NIN on hold sooner.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action is **upheld**. Grievant's request for relief is **denied**.

APPEAL RIGHTS

You may file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

1. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. 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 may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must provide a copy of all of your appeals to the other party, EDR, 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.

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.⁷

[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

⁷ Agencies must request and receive prior approval from EDR before filing a notice of appeal.