

Issue: Group I Written Notice (unsatisfactory performance); Hearing Date: 03/29/18;
Decision Issued: 03/30/18; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case
No. 11154; 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: 11154

Hearing Date: March 29, 2018
Decision Issued: March 30, 2018

PROCEDURAL HISTORY

On July 7, 2017, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory work performance.

On August 2, 2017, 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 1, 2018, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On March 29, 2018, a hearing was held at the Agency's office.

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 facilities. Prior to the hearing, Grievant accepted another position within the Agency. Grievant had been employed as a Probation Officer since May 2014. No evidence of prior active disciplinary action was introduced during the hearing.

Most probation officers at the Facility had caseloads of approximately 100 cases. Grievant's case load was an average of 40. Of those 40, approximately 15 were interstate transfer cases meaning that the offender was located in another state and Grievant's responsibilities were limited.

On Mondays and Fridays, Grievant was responsible for serving as the "intake officer". Approximately one to four offenders would enter the office for intake. If Grievant was not performing duties relating to intake offenders, he was free to work on his 40 person case load.

The Agency used COMPAS as an assessment tool to determine whether an offender was to receive a low, medium, or high level of supervision once the offender was assigned to a probation officer.

As an intake officer, Grievant was responsible for entering information into COMPAS Lite. Once the level of supervision was determined, the offender was

assigned to a probation officer. The probation officer was to input more information into COMPAS (called full COMPAS) and begin supervising the offender. A full COMPAS was to be completed within 45 days of the offender contacting the probation officer.

A case plan determined when a probation officer was to meet with an offender. A case plan was to be completed within 90 days of the offender contacting the probation officer.

When an offender under supervision violated parole, the offender would be taken into custody and a court date would be set to review the offender's actions. The probation officer was required to draft a Major Violation Report (MVR) to address the parole violation. The report was reviewed by a supervisor and then forwarded to the court, the Commonwealth's Attorney, and defense attorney. Whether the report had typographical and grammatical errors reflected on the Agency.

Grievant received training regarding how to use COMPAS and how to create case plans and draft Major Violation Reports.

On January 31, 2017, Grievant received a Formal Counseling Notice because he was not completing COMPAS Lite assessments accurately. He was presented with examples of how he inaccurately counted the number of offender arrests and offender supervisions. These inaccuracies resulted in an incorrect level of offender supervision. Grievant was instructed regarding the practices to ensure accuracy of the COMPAS assessments.

On March 28, 2017, Grievant received a Notice of Improvement Needed/Substandard Performance because of continued inaccurate COMPAS Lite, full EBP¹ and CSR² assessments. He was given an Improvement Plan requiring:

- Use COMPAS tools and instruction guides to decrease the number of errors to zero on COMPAS Lite, full EBP, and CSR assessments in the next 90 days.
- Increase the timeliness of completing COMPAS Lite assessments on new cases, on a weekly basis, by submitting no less than one delinquent COMPAS Lite assessment to the PO assigning cases in the district.
- Meet policy 050.1 as it relates to documenting log notes and ICOTS³ messages in CORIS⁴, on a weekly basis, with no less than 3 occurrences of delinquent log notes in the next 90 days.

¹ EBP refers to evidence based practice.

² CSR refers to Case Supervision Review.

³ ICOTS is a system used to transfer cases to another jurisdiction. Information must be entered into ICOTS and then also entered into CORIS.

⁴ CORIS is the Agency's computer system recording information about offenders.

- Decrease the number of grammatical, sentence structure, and punctuation errors to no less than 4 on each report submitted for review in the next 90 days.
- Increase the timeliness of completing case plans on all assigned cases to no less than 2 delinquent case plans in the next 90 days.⁵

The Supervisor met with Grievant to review his work product and discuss how to properly comply with the Agency's policies. Some of the meetings lasted several hours. Grievant and the Supervisor met on March 16, 2017, March 24, 2017, March 28, 2017, April 11, 2017, April 25, 2017, and May 23, 2017.

On July 7, 2017, the Supervisor reviewed Grievant's work and observed deficiencies with respect to 33 offender files. Grievant continued to draft inaccurate COMPAS Lite, full EBP, and CSR documents and files. He continued to make grammatical, sentence structure, and punctuation errors on Major Violation Reports. He continued to have untimely and inaccurate case plans.

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."⁶ 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."⁷ Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."⁸

"[I]nadequate or unsatisfactory job performance" is a Group I offense.⁹ 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.

From the period March 28, 2017 through June 30, 2017, Grievant continue to make numerous errors. Grievant continued to draft inaccurate COMPAS Lite, full EBP, and CSR documents and files. He continued to make grammatical, sentence structure,

⁵ Agency Exhibit 5.

⁶ Virginia Department of Corrections Operating Procedure 135.1(VI)(B).

⁷ Virginia Department of Corrections Operating Procedure 135.1(VI)(C).

⁸ Virginia Department of Corrections Operating Procedure 135.1(VI)(D).

⁹ Virginia Department of Corrections Operating Procedure 135.1(V)(B)(4).

and punctuation errors on Major Violation Reports. He continued to have untimely and inaccurate case plans. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.

Grievant argued that he had approximately seven different supervisors in a three year period and this meant he was held to different standards depending on the supervisor. He argued that his training was inadequate and not timely.

The evidence showed that Grievant was not overworked when compared to other probation officers. Grievant was informed his performance was unsatisfactory through the issuance of Formal Counseling and a Notice of Improvement Needed. He was provided individual training by the Supervisor. Grievant continued to make mistakes when using COMPAS. Grievant is well-educated, yet he continued to make a significant number of grammatical and sentence structure mistakes. His errors reflected a lack of attention to detail and not a lack of training.

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”¹⁰ 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.

¹⁰ *Va. Code § 2.2-3005.*

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.

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.