

Issue: Group I Written Notice (unsatisfactory performance); Hearing Date: 01/24/19;
Decision Issued: 01/25/19; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.;
Case No. 11289; 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: 11289

Hearing Date: January 24, 2019
Decision Issued: January 25, 2019

PROCEDURAL HISTORY

On August 15, 2018, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory work performance.

On September 12, 2018, 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 November 19, 2018, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On January 24, 2019, 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 Behavioral Health and Developmental Services employs Grievant as an HVAC Mechanic. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant reported to the Foreman who reported to the Supervisor and the Manager.

Grievant was responsible for obtaining work orders, going to buildings throughout the Facility's campus and completing work tasks. If he observed problems while working at a building or at the request of an employee working in the building, he might perform the maintenance task and then document the work later through a work order. Grievant carried a State-issued cell phone with him.

The Campus has active buildings and inactive or vacant buildings. Building 96 was active meaning that Facility staff and patients utilized the building. Building 66 was inactive and vacant but was being evaluated as a possible evacuation area for Facility clients. The Foreman would perform preventive maintenance by walking through building 66 to make sure there had not been any damage. Among the inactive buildings were several buildings called "the cottages." Building 66 was not one of the cottage buildings.

The Manager was concerned that some staff were not always working and, instead, were driving around the Campus without reason. He was concerned that some staff were going to buildings but not performing work at those buildings. He notified the Supervisor of his concern.

On July 13, 2018, Grievant was observed at the cottages. The Foreman held a staff meeting at approximately 3:10 p.m. During the meeting, he told staff that the cottages were “now off limits” and that if they needed something from the cottages, they should inform the Foreman before going there. The Foreman told staff that excessive driving around campus was to stop. He told staff they were expected to be at either their assigned area of work or back at the shop. During this meeting, Grievant told the Foreman Grievant had been at the cottages looking for a replacement part to use in another building.

On July 17, 2018 between 7 a.m. and 7:30 a.m., the Foreman met with staff including Grievant and told them that the excessive driving around campus was to stop and that they were expected to be at their assigned area of work or back at the Shop. The Foreman “reinforced the issued about driving around and work orders.” Grievant questioned the Foreman about being at certain buildings. The Foreman answered, “As long as you have a work order for the building you are at, there should be no problems with you being in the building or filling out work orders in your van.”

Grievant was assigned to building 96 to complete a work order. While he was working in building 96, he had to use the restroom but believed the restrooms in building 96 were occupied. He left building 96. He got into his State vehicle and drove a short distance away to building 66. He used his key to enter building 66. Grievant did not have a work order requiring him to perform work in building 66.

The Manager was working in the area and observed Grievant’s vehicle at building 66. He contacted the Supervisor who drove to building 66. When Grievant came out of building 66, the Supervisor asked Grievant if he had been issued a work order for that building. Grievant replied he was checking on some HVAC equipment and had to use the restroom.

Grievant completed his work assignments in building 96 on July 17, 2018

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.”¹ Group II offenses “include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action.” Group III offenses “include

¹ The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

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.² 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 Foreman informed Grievant and other staff that they should not be at vacant buildings without a work order for the building. On July 17, 2018, Grievant left building 96 where he was doing work in accordance with his work order and went to building 66, a vacant building. Grievant was not assigned to work in building 66 and did not have any work orders for that building. Grievant’s actions were contrary to the Foreman’s instructions thereby justifying the Agency’s decision to issue a Group I Written Notice for unsatisfactory performance.

Grievant argued that he was permitted to go to building 66 because he was not performing work but rather using the restroom. The Foreman, however, made it clear his expectation that Grievant only go to buildings where he had a work order.

Grievant argued that he did not go to building 66 to perform work and, thus, did not need a work order to go there. The evidence showed that the most reasonable interpretation of the Foreman’s instruction was that employees should not go to vacant buildings unless they had work orders to complete.

Grievant argued that the discipline was excessive because the Agency could have issued a written counseling as preferred by a Human Resource employee and the Foreman. The evidence showed that the Agency considered issuing a Group II Written Notice but decided to issue a Group I Written Notice. The Agency’s final decision overrides the preferences of other Agency staff.

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”³ 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

² See Attachment A, DHRM Policy 1.60.

³ *Va. Code § 2.2-3005.*

consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive.

Grievant argued the Manager singled out Grievant for disciplinary action. Although it is clear the Manager believed the disciplinary action was warranted while at least two other employees believed it was not warranted, this is not sufficient to show that the Manager improperly singled out Grievant for disciplinary action. In light of the standard set forth in the Rules, 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.

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.