

Issue: Group III Written Notice with Transfer, Demotion and Pay Reduction (failure to perform duties per instructions, policy and EWP); Hearing Date: 01/24/14; Decision Issued: 02/07/14; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10190; Outcome: Partial Relief.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10190

Hearing Date: January 24, 2014

Decision Issued: February 7, 2014

PROCEDURAL HISTORY

On June 13, 2013, Grievant was issued a Group III Written Notice of disciplinary action with transfer, demotion to a lower pay band and a ten percent disciplinary pay reduction for failure to perform job duties in accordance with policy and procedure, employee work profile, and supervisor's direction/instruction.

On July 12, 2013, 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 she requested a hearing. On December 16, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 24, 2014, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency Advocate
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. 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 an Institutional Program Manager until her demotion to a CIRC effective June 14, 2013. She was responsible for overseeing the initial classification process for offenders received at the Facility. She supervised four institutional counselors and several support employees. No evidence of prior active disciplinary action was introduced during the hearing. Grievant reported to the Supervisor.

The Agency alleged that Grievant failed to adhere to her approved work schedule. On several days, Grievant was tardy or absent from work. For example, Grievant was scheduled to work on April 1, 2013 and April 24, 2013. She failed to report to work and did not notify the Agency she would be absent from work.

Grievant was arrested on April 14, 2013 and charged with several Class 1 misdemeanors regarding a conflict with her husband. She was also charged with Aggressive Driving, a Class 2 misdemeanor. Grievant did not inform the Agency that she had been arrested. Information about Grievant's arrest was published in a local newspaper. Three or four employees became aware of Grievant's arrest from the newspaper. The Warden was informed of the arrest when he was given a copy of the newspaper.

Grievant was responsible for completing performance evaluations for her subordinates. She was expected to draft a proposed performance evaluation for each

subordinate, present the draft to the Supervisor as the reviewer, and then sign and present the evaluation to the subordinate. In November 2012, Grievant signed the evaluations and then submitted them to the Supervisor for his review and signature.

On December 27, 2012, the Supervisor instructed Grievant to complete the necessary documents to implement a reorganization of OSA/PST duties. He instructed her to complete reviewed employee work profile documents for the employees whose job duties were affected by the reorganization. On February 1, 2013, the Supervisor reminded Grievant of the assignment and told her that the document was also supposed to identify assigned backups to each function handled by Support PST. He told her to revise and reissue and send him a copy of the document. Grievant did not respond. On February 15, 2013, the Supervisor asked Grievant about the status of the assignment. He instructed her to complete the assignment by February 22, 2013. He reminded her that revised employee work profiles had to be given to the human resource department by March 1, 2013.

On March 14, 2013, the Supervisor reminded Grievant he had not received from her the required documents. On March 25, 2013, the Supervisor told Grievant that he had not received the required documents from her and advised that the "EWP documents are now 25 days out of compliance with my instruction and the general expectation that revised EWPs are completed within 30 days of position changes."¹ On April 3, 2013, Grievant sent the Supervisor an email claiming that the EWPs were ready on March 1, 2013 but sitting on her desk. She indicated she would make every effort to give the documents to the Supervisor that day. Grievant submitted the documents to the Supervisor on May 3, 2013.

On February 15, 2013, the Supervisor sent Grievant an email stating:

The following offenders, received on 2-13-13, were not finger printed by [Ms. L] until 2-15-13. LOP 810.A requires that fingerprinting occur during the Intake Process, Day 1 (2-13-13). This follows an independent discussion I had with [Ms. L] in 2-12-13 about completing her job duties in a timely manner. I advised her to talk further with you, however, I expected her to complete her duties. She told neither me [n]or [Ms. H] that she had not completed her task as required. Please meet with her and advise me of your findings and any corrective action you might recommend.²

On February 20, 2013, Grievant sent the Supervisor an email stating that she would "take care of it upon her arrival after her training." On March 4, 2013, the Supervisor asked Grievant for her findings. On March 5, 2013, Grievant sent the Supervisor an email stating:

¹ Attachment 13 to the Written Notice.

² Attachment 15 to the Written Notice.

[Ms. H] will find state police document for you.
Have [Ms. L] give you a written statement indicating that she did all the same day.
[Ms. H] is attempting to get copy of entry dates either by Queue records or screen shot.
After all the date is in we will see how to proceed.³

On March 14, 2013, the Supervisor sent Grievant an email stating, “[p]lease provide written findings by 3-18-13.”⁴

On March 25, 2013, the Supervisor sent Grievant an email indicating that “this issue has been open now since [Ms. L’s] return from In Service training. This is my second written prompt for written closure, you have exceeded the most recent deadline by 1 week and have made no contact with me on this issue.”⁵

On May 6, 2013, Grievant presented the Supervisor with a copy of a Notice of Improvement Needed/Substandard Performance given by Grievant to Ms. L. The document was dated March 16, 2013 and stated that Ms. L refused to sign it. The Supervisor was not given an opportunity to review the Notice prior to it being issued by Grievant to Ms. L.

The Supervisor instructed Grievant to perform a minimum of two food service inspections each week. He provided her with a template to document her findings. She did not meet the Supervisor’s expectations for any week since the instruction was given. On October 12, 2012, the Supervisor sent Grievant an email counseling her that her performance was not satisfactory and immediate improvement was needed.

On January 8, 2013, the Supervisor instructed Grievant to revise the offender indigent package process. On March 18, 2013, the Supervisor sent Grievant an email stating, “I am still awaiting your response to this issue.”⁶ Grievant never completed the task. The Supervisor reassigned the task to the Captain who completed the task on May 14, 2013.

In the fall of 2012, the Supervisor instructed Grievant to complete a New Offender Orientation Booklet by January 1, 2013. Grievant failed to meet that deadline and she was given a revised due date of February 25, 2013. Grievant submitted the document to the Supervisor on March 25, 2013.

³ Attachment 15 to the Written Notice.

⁴ Attachment 16 to the Written Notice.

⁵ Attachment 16 to the Written Notice.

⁶ Attachment 19 to the Written Notice.

When offenders arrived at the Facility, an assessment was to be performed on each offender to reduce the risk that the offender would be placed with an incompatible cell mate. This is called a Double Cell Assessment. In April 2013, the Supervisor conducted a Performance Test with respect to offenders arriving at the Facility March 11, 2013 through March 31, 2013 to determine whether the inmates had received Double Cell Assessments. The Supervisor concluded that double cell assessments had not been completed for 176 offenders remaining at the Facility and for 130 offenders who had left the Facility. The Supervisor assigned the task of completing double cell assessments to another employee.

Grievant was assigned responsibility for creating a Revised Initial Classification Activity Tracking Document. Grievant failed to complete the document. The Supervisor worked with Grievant's staff to complete the assignment.

On December 21, 2012, Grievant was assigned the task of documenting and distributing a document that served to restructure the work activities of classification staff to more efficiently conduct offender initial classification process. On February 15, 2013, the Supervisor sent Grievant an email asking her the status of the task. He instructed her to have the task completed by February 22, 2013. She did not complete the task on a timely basis.

On October 15, 2012, the Supervisor selected Grievant to review the existing intake, classification process and create a matrix/flow chart to provide staff with a tool to guide employees and offenders through the reception process. During the Thanksgiving week, the Supervisor met with Grievant to discuss the assignment and provided her with specific flow chart format and graphics. On December 6, 2012, the Supervisor sent Grievant an email stating the he would like to make the matrix effective January 1, 2013. On December 21, 2012, the Supervisor met with Grievant and informed her that she had not met any of the individual milestones and the written expectations for the assignment. The Supervisor met with Grievant and Grievant indicated she could complete the project by February 22, 2013. On February 15, 2013, the Supervisor sent Grievant an email stating that, "I expect a firm completion date identified by you no later than 2-22-13".⁷ Grievant failed to complete the task and the Supervisor assumed responsibility for completing the task.

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."⁸ Group II offenses "include acts and behavior that are more severe in

⁷ Attachment 27 to the Written Notice.

⁸ Virginia Department of Corrections Operating Procedure 135.1(V)(B).

nature and are such that an accumulation of two Group II offenses normally should warrant removal.”⁹ Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”¹⁰

Agencies may not take several offenses that would otherwise constitute Group II offenses and combine them into a Group III offense. This practice is not authorized by the Standards of Conduct. If permitted, it would have the effect of extending the active life of disciplinary action. For example, if an employee received two Group II Written Notices with demotion, the active life of the written notices would be three years. If the Agency issued one Group III Written Notice with removal, the active life of the written notice would be four years. The employee’s behavior would be the same under either scenario but the active life of the disciplinary action would be different based on how the Agency styled the disciplinary action.

When an employee has engaged in several separate offenses, the Hearing Officer must examine each offense separately and determine if any one offense rises to the level of a Group III offense if an agency has issued a Group III Written Notice.

In this case, the Agency combined Grievant’s various Group II offenses into a single Group III offense. None of the offenses, standing alone, rise any higher than a Group II offense. Several of Grievant’s offenses rise no higher than a Group I offense.

“Failure to follow a supervisor’s instructions, perform assigned work, or otherwise comply with applicable established written policy” is a Group II offense.¹¹ On several occasions, Grievant failed to comply with the Supervisor’s instructions and deadlines and with Agency policy. For example, she was instructed on January 8, 2013 to revise the offender indigent package process.¹² She failed to comply with the instruction and the task was given to another employee to perform. DOC Operating Procedure 040.1 governs Litigation. Section IV(A)(1) provides that “[e]mployees receiving a judicial writ, summons, or subpoena shall notify their organizational unit head immediately” Grievant was served with a summons as part of a Warrant of Arrest. She failed to report this information to the Agency thereby acting contrary to policy.

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 workdays. An agency may not demote an employee with a disciplinary pay reduction based on a single Group II Written Notice.

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

¹⁰ Virginia Department of Corrections Operating Procedure 135.1(V)(D).

¹¹ Virginia Department of Corrections Operating Procedure 135.1(V)(C)(2)(a).

¹² If the Agency had issued several Group II Written Notices, it could have demoted Grievant based on the accumulation of disciplinary action. Instead, the Agency mistakenly chose to issue one Group III Written Notice.

Grievant denied her work performance was unsatisfactory. She admitting to failing to notify the Agency of her arrest. The evidence, however, is overwhelming that Grievant did not follow the Supervisor's instructions on several occasions and that she did not follow several Agency policies.

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"¹³ 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 further the disciplinary action.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with demotion and disciplinary pay reduction is **reduced** to a Group II Written Notice with a ten workday suspension. Grievant's demotion to a lower pay band, transfer to a new location, and disciplinary pay reduction are **reversed**. The Agency is ordered to **reinstate** Grievant to her former position, or if occupied, to an objectively similar position. Grievant is awarded full **back pay** with respect to the ten percent disciplinary pay reduction. The Agency may account for the ten workday suspension when awarding back pay. Grievant's full **benefits** and **seniority** are restored.

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:

¹³ Va. Code § 2.2-3005.

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.¹⁴

[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

¹⁴ Agencies must request and receive prior approval from EDR before filing a notice of appeal.