

Issue: Group I Written Notice (unsatisfactory performance and failure to follow instructions); Hearing Date: 06/12/15; Decision Issued: 06/16/15; Agency: DSS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10602; Outcome: No Relief - Agency Upheld.



# ***COMMONWEALTH of VIRGINIA***

## ***Department of Human Resource Management***

### **OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

#### **DECISION OF HEARING OFFICER**

In re:

**Case Number: 10602**

Hearing Date: June 12, 2015

Decision Issued: June 16, 2015

#### **PROCEDURAL HISTORY**

On February 9, 2015, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory job performance and failure to follow instructions.

On February 18, 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 she requested a hearing. On May 13, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 12, 2015, 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. 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 Social Services employs Grievant as an Accounting Manager. She began working for the Agency in 2006. Her duties included processing payroll and also "clearing" and reconciling account 24001. This account reflected balances resulting from transactions between the Agency and the Virginia Retirement System. Grievant supervised two employees. No evidence of prior active disciplinary action was presented at the hearing.

On approximately the 24 or 25<sup>th</sup> of each month, VRS notifies the Agency including Grievant of an amount of money that should be reconciled between the Agency and VRS. This money is identified in account 24001. On December 22, 2014, the Supervisor sent Grievant an email stating that she was to reconcile account 24001 before she left on vacation. Grievant indicated that she could not complete the task before she left for vacation on December 23, 2014. On December 22, 2014, the Supervisor instructed Grievant to reconcile the account by the close of business on January 6, 2015. Grievant responded, "[n]ot a problem. I will ensure that this takes precedence over the Quarter close and W – 2 processing as well. Thanks." Grievant returned to work from her vacation on January 5, 2015. She did not reconcile the account on January 5, 2015 or January 6, 2015. She did not notify the Supervisor that she was unable to do so. On January 14, Grievant completed the reconciliation of account 24001.

## 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.”<sup>1</sup> 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.”

Unsatisfactory work performance is a Group I offense.<sup>2</sup> On December 22, 2014, the Supervisor instructed Grievant to complete reconciliation of account 24001 by January 6, 2015. Grievant did not meet the deadline to complete the task. She did not inform the Supervisor that she was unable to complete the task. Grievant’s work performance was unsatisfactory to the Agency. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice of disciplinary action.

Grievant argued that two of her employees were out of work in December 2014. The evidence showed that Grievant had ample opportunity to complete the task herself and that the absence of two employees did not undermine her ability to complete the task within the deadline.

*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 ....”<sup>3</sup> 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.

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

<sup>2</sup> See, Attachment A, DHRM 1.60.

<sup>3</sup> *Va. Code § 2.2-3005.*

## 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 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 14<sup>th</sup> St., 12<sup>th</sup> 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 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto: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.<sup>4</sup>

[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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>4</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.