

Issues: Group II Written Notice (unsatisfactory performance and failure to follow instructions), with transfer, demotion and salary reduction; Hearing Date: 09/16/14; Decision Issued: 09/22/14; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10421; 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: 10421

Hearing Date: September 16, 2014

Decision Issued: September 22, 2014

PROCEDURAL HISTORY

On May 9, 2014, Grievant was issued a Group II Written Notice of disciplinary action for inadequate job performance and failure to follow policy/instructions. Grievant was demoted to the position of Counselor, transferred to another facility, and given a ten percent disciplinary pay reduction based on the accumulation of disciplinary action.

On June 6, 2014, 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 August 5, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 16, 2014, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee
Agency's 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 Corrections employed Grievant as an Institutional Program Manager until her demotion to Counselor effective May 25, 2014. She had approximately seven employees reporting to her as an Institutional Program Manager.

Grievant had prior active disciplinary action. On January 15, 2014, Grievant received a Group II Written Notice for unsatisfactory performance and failure to follow instructions.

Grievant was responsible for supervising the Office Services Specialist who was responsible for operating the Facility's law library. The Office Service Specialist was involved in ensuring that offenders wanting to go to the law library were on the master pass list and scheduled to visit the law library. The Office Service Specialist was out of the office from March 31, 2014 through April 7, 2014. The Office Service Specialist sent Grievant an email with information to enable Grievant to ensure that the law library was properly operated. She met with Grievant before she left to see if Grievant had any questions, but Grievant did not have any questions. Grievant failed to ensure the master pass list was updated and/or failed to have another employee perform the duties of the Officer Services Specialist. As a result, the law library was not used by inmates from March 31, 2014 to April 7, 2014.

The Facility has job descriptions for its inmate employees. On March 7, 2014, the Supervisor met with Grievant to discuss the offender job position descriptions and told Grievant to have the revisions completed by April 3, 2014 because they were due to be given to Ms. H by April 5, 2014. Grievant submitted the revised position descriptions on April 8, 2014.

On March 3, 2014, the Supervisor instructed Grievant to compile and organize folders necessary for an ACA audit. The outcome of the audit could affect the Facility's peer rating status. Grievant was given a due date of April 3, 2014. Grievant did not complete the assignment by April 3, 2014. On April 4, 2014, the Supervisor asked Grievant about the status of the folders. On April 7, 2014, Grievant brought three-fourths of the folders to the Supervisor. Grievant said the folders were completed but many remained incomplete. On April 9, 2014, the Supervisor discussed the folders with Grievant and asked if she wanted them back as the Supervisor reviewed them or if Grievant wanted them returned to her all at once. Grievant indicated she was not finished with the original set and would rather have them back after she finished the original set. On April 11, 2014, Grievant advised that she should be finished with the ACA folders by April 14, 2014.

The Agency alleged Grievant engaged in other behavior as part of its disciplinary action. It is unnecessary to address that behavior because it did not rise to the level of disciplinary action. For example, the Agency took disciplinary action against Grievant based on the failure of her subordinates to perform their assigned tasks. A supervisor is not responsible for the inadequate behavior of a subordinate merely because of a supervisory relationship.

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."¹ 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."² Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."³

"[I]nadequate or unsatisfactory job performance" is a Group I offense.⁴ In order to prove inadequate or unsatisfactory job performance, the Agency must establish that

¹ Virginia Department of Corrections Operating Procedure 135.1(V)(B).

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

³ Virginia Department of Corrections Operating Procedure 135.1(V)(D).

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

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 show that Grievant's work performance was unsatisfactory. She failed to properly manage the law library to ensure that inmates were able to use the library when the Office Services Specialist was on leave. Grievant updated inmate job descriptions but submitted them late. Grievant failed to fully and timely complete her task of preparing ACA folders.

An agency may issue a Group II Written Notice (and suspend without pay for up to ten workdays) if the employee has an active Group I Written Notice for the same offense in his or her personnel file. Grievant has a prior active Written Notice for unsatisfactory job performance. Because Grievant has committed a second offense of unsatisfactory job performance, the Agency may elevate the disciplinary to a Group II Written Notice.

Upon the accumulation of two Group II Written Notices, an Agency may transfer and demote an employee and impose a disciplinary pay reduction. Accordingly, the Agency's decision to transfer, demote, and reduce Grievant's pay must be upheld.

Grievant argued that she should be permitted to work in an environment free of harassment. No credible evidence was presented to show that Grievant was being harassed.

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.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with transfer, demotion, and disciplinary pay reduction is **upheld**.

⁵ *Va. Code § 2.2-3005.*

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.⁶

⁶ Agencies must request and receive prior approval from EDR before filing a notice of appeal.

[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