

Issue: Group I Written Notice (unsatisfactory performance); Hearing Date: 06/11/19;
Decision Issued: 07/01/19; Agency: DJJ; AHO: Carl Wilson Schmidt, Esq.; Case
No. 11350; 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: 11350

Hearing Date: June 11, 2019

Decision Issued: July 1, 2019

PROCEDURAL HISTORY

On November 14, 2018, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory job performance.

On December 11, 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 she requested a hearing. On April 29, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 11, 2019, a hearing was held at the Agency's office.

APPEARANCES

Grievant
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. 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 Juvenile Justice employs Grievant as a Residential Specialist I at one of its locations. She has been employed by the Agency for approximately 13 years.

Residential Specialists do not take 15 minute morning and afternoon breaks.

The Agency's Facility contained several buildings including the Expansion Building in the Existing Building. Grievant's assigned post was in the Room of the Expansion Building.

On November 29, 2017, Grievant attended a team meeting during which the Community Coordinator instructed staff to make sure residents were escorted to the correct classroom. If another Residential Specialist was not already in the classroom, the employee was to remain in that classroom until relieved by another Residential Specialist.

Grievant attended a Staff Meeting on May 2, 2018 during which staff were informed:

Staff needs to be IN THE CLASSROOM with the residents, not standing in the hallway and not eating in the hallway. ***

Staff should NOT be in other units hanging out or socializing. If you want to go to another unit to work with a resident, you must request permission first. Do not avoid going to school by going into another unit to work with a resident.¹

On May 2, 2018, Grievant was one of several employees receiving an email from the Community Coordinator providing:

As we spoke about today during the team meeting, staff should be IN the classroom during DOE.²

On May 16, 2018, Grievant entered the Room in the Expansion Building. Grievant escorted the Resident from the Expansion Building to the Existing Building. An employee at the Existing Building spoke with Grievant and said “they had the Resident” and would see that the Resident got to his classroom. Grievant did not enter the Existing Building to ensure that the Resident made his way to the classroom in the Existing Building. Grievant stood outside the Existing Building and spoke with another staff member for several minutes before beginning to walk towards the Expansion Building.

Grievant entered the Expansion Building, spoke with an employee in the front office, and then exited the sallyport door to the lobby. Grievant was away from her post for approximately 23 minutes. She was speaking with other employees instead of being at her post in the Room.

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.”³ 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.”

“[U]nsatisfactory work performance” is a Group I offense.⁴ In order to prove unsatisfactory work performance, the Agency must establish that Grievant was

¹ Agency Exhibit P.

² Agency Exhibit S.

³ The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

⁴ See Attachment A, DHRM Policy 1.60.

responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

On May 16, 2018, Grievant escorted the Resident from the Expansion Building to the Existing Building. She was supposed to take the Resident inside the Existing Building and to the proper classroom. Grievant was supposed to verify that another Residential Specialist was in the classroom and, if not, remain in that classroom until another Residential Specialist arrived. After returning to the Expansion Building, Grievant was supposed to go to the Room and remain there at all times while residents were in the classroom. Instead, Grievant left the Room and went to other areas of the building. She was away from the Room for over 23 minutes without justification. The Agency has presented sufficient evidence to show that Grievant's work performance was unsatisfactory thereby justifying the issuance of a Group I Written Notice.

Grievant disputed the Agency's time calculations contending that she "could not be in two places at the same time." Regardless of the Agency's timeline, the Agency has presented sufficient evidence to show that Grievant was away from her post in the Room for several minutes contrary to the Agency's expectations that she remain in the classroom with residents.

Grievant argued that after taking the Resident to the Existing Building, Grievant was told "they had the Resident." Although another employee may have indicated the employee would take responsibility for the Resident, Grievant was instructed to escort residents to their classroom to verify another Residential Specialist was in the classroom. Grievant failed to perform this task thereby justifying the Agency's decision to take disciplinary action.

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.

Grievant argued the Agency retaliated against her because she complained about how the Agency resolved a dispute between two residents. Grievant did not

⁵ *Va. Code § 2.2-3005.*

present sufficient evidence to show a connection between her protected activity and the Agency's disciplinary action. The Hearing Officer does not believe the Agency retaliated against Grievant as a pretext for retaliation.

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 EDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EDR within 15 calendar days of the date the decision was issued.

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 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]

^[1] 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