

Issue: Group II Written Notice (unsatisfactory performance, failure to follow instructions, failure to work OT as required); Hearing Date: 08/16/19; Decision Issued: 09/05/19; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 11352; Outcome: Full Relief.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11352

Hearing Date: August 16, 2019
Decision Issued: September 5, 2019

PROCEDURAL HISTORY

On January 17, 2019, Grievant was issued a Group II Written Notice of disciplinary action for unsatisfactory performance, failure to follow instructions, and refusal to work overtime as required.

On February 15, 2019, 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 May 6, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 16, 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 Corrections employs Grievant as a Corrections Officer at Facility 1. He had been working for the Agency for approximately ten years. His work performance was satisfactory to the Agency. No evidence of prior active disciplinary action was introduced during the hearing.

The Agency had a significant shortage of staff to fill mandatory positions at Facility 2. The Agency decided to "draft" employees from Facility 1 to work at Facility 2 for two weeks. Employees from Facility 1 were to work 12 hour shifts for seven days, have 7 days off, and then work another seven days of 12 hour shifts at Facility 2.

The security level of Facility 1 was lower than the security level of Facility 2.

On September 25, 2018, the Lieutenant instructed Grievant to report to Facility 2 on September 27, 2018. Grievant was next on the seniority draft list. Grievant told the Lieutenant he would not be going because of medical and personal reasons.

On October 12, 2018, the Major met with Grievant to discuss his refusal to work at Facility 2. Grievant said he was having "some medical issues" and would not be able to perform his job duties at Facility 2. Grievant continued to refuse to work at Facility 2.

Grievant did not report to work at Facility 2.

On November 8, 2018, as part of the due process meeting with the Agency, Grievant wrote, in part;

I, [Grievant], am writing this as I wish to state my reasons for not wanting to be drafted for a term at [Facility 2]. Firstly, as I stated before, I have several medical issues. High Blood Pressure, Bursitis in both hips, 3 Hernia surgeries, skin cancer, and a Heart Attack just last year. And while I am able to perform my duties here, I believe it would be much harder on me at [Facility 2].¹

CONCLUSIONS OF POLICY

An agency may not discriminate against an employee who has requested a reasonable accommodation under the Americans with Disabilities Act. Executive Order 1 prohibits discrimination against "otherwise qualified persons with disabilities." DHRM Policy 2.05 requires that all aspects of human resource management be conducted without regard to disability.

THE EEOC addressed requests for accommodation in Questions and Answers for Mediation Providers: Mediation and the Americans with Disabilities Act (ADA)²:

8. Does a mediation participant's request for accommodation for a disability have to take any particular form?

No. An individual seeking accommodation should advise the mediation provider what accommodation is needed and why. The request can be oral rather than written, and need not contain any magic words, such as "ADA" or "reasonable accommodation," but it must be sufficient to give notice of the need for a change or adjustment due to a physical or mental condition.³

In *Johnson-Morgan v. Dep't of Labor*, EEOC Appeal Nos. 0120110728 & 0120112988 (January 9, 2013), request for reconsideration denied, EEOC Request Nos. 0520130243 & 0520130244 (July 30, 2013):

The Commission noted that an employee is not required to use "magic words" when making a request for accommodation. In this case, Complainant told the Director that she needed a new monitor due to her medical condition,

¹ Agency Exhibit 9.

² <https://www.eeoc.gov/eeoc/mediation/ada-mediators.cfm>

³ Although this matter does not involve mediation, the principles addressed by the EEOC apply in this case.

and the Director should have treated the request for equipment as a reasonable accommodation request.

On September 25, 2018 and October 12, 2018, Grievant informed Agency managers that he could not perform work duties at Facility 2 because of his “medical condition.” Before the Agency issued disciplinary action, Grievant informed the Agency his medical condition included, “High Blood Pressure, Bursitis in both hips, 3 Hernia surgeries, skin cancer, and a Heart Attack just last year.” Grievant informed the Agency of medical conditions that could be viewed as disabilities. He connected those medical conditions to a work assignment and asserted that he could not perform that assignment due to his medical conditions. Grievant’s statements adequately informed the Agency of a request for reasonable accommodation under the Americans with Disabilities Act. Prior to taking disciplinary action, the Agency should have begun an interactive process to review Grievant’s possible disabilities to determine if a reasonable accommodation should be granted. Instead, the Agency took disciplinary action thereby discriminating against Grievant based on what could have constituted a disability under the Americans with Disabilities Act.

The Agency argued that Grievant did not request a reasonable accommodation. Grievant was not obligated to use the words “reasonable accommodation” or submit paperwork requesting an accommodation in order to constitute a request for reasonable accommodation. Grievant placed the Agency on notice of his request by stating he had a medical condition preventing him from working at Facility 2. The Agency should have begun an interactive process to determine the extent of Grievant’s disability and whether a reasonable accommodation could be afforded to him. The Agency’s failure to begin that process renders as unpersuasive the Agency’s assertion that Grievant should have disregarded his medical conditions and complied with the Agency’s instruction.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group II Written Notice of disciplinary action is **rescinded**.

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]

[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

^[1] Agencies must request and receive prior approval from EDR before filing a notice of appeal.