

Issue: Group II Written Notice with Suspension (unable to meet work conditions);
Hearing Date: 07/09/19; Decision Issued: 07/29/19; Agency VCCS; AHO: Carl
Wilson Schmidt, Esq.; Case No. 11359; Outcome: Partial Relief; **Administrative
Review Ruling Request received 08/05/19; EDR Ruling No. 2020-4967 issued
08/19/19; Outcome: AHO's decision affirmed.**



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11359

Hearing Date: July 9, 2019
Decision Issued: July 29, 2019

PROCEDURAL HISTORY

On March 25, 2019, Grievant was issued a Group II Written Notice of disciplinary action with removal for failing to meet the developmental expectation as a Trainer/Instructor I in the Math Lab.

On April 17, 2019, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On April 30, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 9, 2019, a hearing was held at the Agency's office.

APPEARANCES

Grievant
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 Community College employed Grievant as a Lab Instructor at one of its facilities. He began working full time for the Agency on August 10, 2013.

When Grievant was hired, he was responsible for assisting with developmental math students without being required to be proficient in calculus. The Agency changed the requirement for Grievant to be proficient in calculus as it began offering college level calculus courses to engineering students.

Thirty-five percent of Grievant's job duties were with respect to the Core Responsibility:

Tutor students in college level math courses especially MTH 151, 152, 163, 166, 173, 174, and 271. Counsel students regarding prerequisites, contentment and sequencing of math courses at [College] and the math placement test.¹

Courses 173 and 174 were calculus courses.

¹ Agency Exhibit 1.

In February 2018, all of the lab staff were required to complete a calculus assessment in order to verify that their math skills were meeting expectations. On February 13, 2018, Grievant did not complete the final five of the 15 problems in the calculus exam and did not achieve the minimum passing score of 75%. On March 8, 2018, Grievant received a Group I Written Notice. It included a requirement that he take another calculus exam by May 18, 2018.

On May 18, 2018, Grievant took a second calculus exam. He scored 69.5% instead of the required 75%. On June 26, 2018, Grievant received a Group II Written Notice. The Agency determined it would give Grievant another opportunity to pass the exam before October 1, 2018.

On September 27, 2018 Grievant took a third calculus exam. He scored 64.5% instead of the required 75%. On November 27, 2018, Grievant received a Group II Written Notice for failing to meet the developmental expectation of a Trainer/Instructor I in the Math Lab.

On February 19, 2019, Grievant took a fourth calculus exam. He scored 65% instead of the required 75%. On March 25, 2019, Grievant received a Group II Written Notice with removal. Grievant filed a grievance which is now before the Hearing Officer.

CONCLUSIONS OF POLICY

DHRM Policy 1.60 governs Standards of Conduct. Section H provides:

Removal Due to Circumstances which Prevent Employees from Performing their Jobs

1. Inability to meet working conditions

An employee unable to meet the working conditions of his or her employment due to circumstances such as those listed below may be removed under this section. Reasons include:

- loss of driver's license that is required for performance of the job; incarceration for an extended period;
- failure to obtain license or certification required for the job;
- loss of license or certification required for the job;
- **inability to perform the essential functions of the job** after reasonable accommodation (if required) has been considered;
- failure to successfully pass an agency's background investigation;
- conviction of a misdemeanor crime of domestic violence for employees whose jobs require: (a) carrying a firearm; or (b) authorization to carry a firearm; or failure to timely present

appropriate documentation of identity and eligibility to work in the U.S. as required by federal law.

Prior to such removal, the appointing authority and/or Human Resource Office shall gather full documentation supporting such action and notify the employee, verbally or in writing, of the reasons for such a removal, giving the employee a reasonable opportunity to respond to the charges.

Final notification of removal should be via memorandum or letter, **not by a Written Notice form.**

Employees may challenge removals through the Employee Grievance Procedure, and may direct questions regarding this procedure to the Department of Employment Dispute Resolution.

Agencies may, based on mitigating circumstances, demote or transfer and reduce the employee's duties with a minimum 5% reduction in salary, or transfer them to an equivalent position without a reduction in salary as an alternative to termination. (Emphasis added).

Being able to teach calculus at the college level was an essential function of Grievant's job. He was unable to perform that essential function as measured by his repeated failure to score 75% on the calculus exam. The Agency has presented sufficient evidence to support its decision to remove Grievant. Its method of removal, however, was contrary to policy. The Agency should have removed Grievant pursuant to Section H by giving him a letter indicating his removal. Instead, the Agency issued Grievant a Group II Written Notice with a cover letter. The Agency's issuance of a Group II Written Notice must be reversed. Grievant's removal is not reversed as the Agency's cover letter was an adequate substitute to inform Grievant of the Agency's decision to remove him from employment.

Grievant argued that when the Agency hired him he was not required to know calculus. He asserted that he did not need to know calculus to perform his job duties with the same necessity claimed by the Agency. The Agency was permitted to change the essential job functions of his position. Grievant has not established that the change was contrary to any compensation policy. Grievant was obligated to know calculus at the level required by the Agency. Whether Grievant devoted 35 percent of his time to tutoring students regarding calculus did not relieve Grievant of his obligation to be proficient in calculus.

The Agency provided Grievant with adequate training to enable him to pass the calculus test. He was offered one-on-one tutoring, practice tests, textbooks, and allowed to audit calculus courses at the College.

Grievant could not continue in his current position because of his inability to tutor calculus. This placed additional work on the Math Lab Supervisor and Assistant

Supervisor. The Agency elected to remove Grievant and its decision to do so is supported by the evidence.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is **rescinded**. Grievant's removal is **upheld** for failure to meet an essential function of his position.

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