



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11511

Hearing Date: June 5, 2020
Decision Issued: August 12, 2020

PROCEDURAL HISTORY

On February 12, 2020, Grievant was issued a Group II Written Notice of disciplinary action for unsatisfactory work performance. He was removed from employment based on the accumulation of disciplinary action.

Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On March 20, 2020, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 5, 2020, a hearing was held by telephone conference. Grievant was notified of the hearing date and time but did not participate in the hearing.

APPEARANCES

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 University of Virginia employed Grievant as a Custodial Service Worker 1. He had been employed by the University since 2008. Grievant had prior active disciplinary action. On November 2, 2018, Grievant received a Group I Written Notice for unsatisfactory work performance. On April 3, 2019, Grievant received a Group II Written Notice for unsatisfactory performance and failure to follow instruction and/or policy.

Grievant was assigned responsibility for cleaning portions of buildings on the University's grounds. Grievant received adequate training to perform his job duties.

The University performed two types of inspections to ensure that its buildings were properly cleaned by housekeepers. One type of inspection was performed by the Supervisor who applied APPA standards. The second type of inspection was performed by the Quality Assurance unit which was not part of the housekeeping unit.

The Supervisor met with Grievant following inspections to discuss the inspections, point out deficiencies, and remind Grievant of the University's expectations.

The Supervisor inspected Grievant's work area on October 18, 2019, November 4, 2019, and November 14, 2019. The Supervisor applied the APPA standards during

each inspection and concluded that Grievant's work areas were not cleaned to the minimum acceptable level.

On November 22, 2019, an employee manager working in the building where Grievant cleaned complained that the trash can had not been emptied. On another occasion, he complained that the soap dispenser in a restroom where Grievant cleaned had been empty for several days.

On December 12, 2019, the Quality Assurance inspector reviewed Grievant's work areas. The Quality Assurance inspector identified numerous deficiencies in Grievant's work areas resulting from Grievant's failure to adequately perform his work duties.

The University presented evidence including exhibits with pictures and other details identifying stains, excessive dust, and other cleaning inadequacies in Grievant's work areas.

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."¹ 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.² In order to prove unsatisfactory work performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

Grievant was responsible for cleaning his assigned areas. He was trained regarding how to properly perform his job duties. On several occasions, Grievant failed to fully and properly clean his assigned areas. The University has presented sufficient evidence to show that Grievant's behavior was unsatisfactory work performance. Unsatisfactory work performance is a Group I offense but if repeated, an agency may elevate that level of discipline to a Group II offense. In this case, Grievant had prior discipline for unsatisfactory work performance and, thus, the University's decision to elevate his unsatisfactory work performance to a Group II offense is upheld.

¹ The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

² See Attachment A, DHRM Policy 1.60.

Upon the accumulation of two active Group II Written Notices, an agency may remove an employee. Grievant has accumulated two Group II Written Notices thereby justifying the University's decision to remove Grievant from employment.

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"³ 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 removal 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.

³ Va. Code § 2.2-3005.

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.