



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11542

Hearing Date: August 26, 2020

Decision Issued: August 27, 2020

PROCEDURAL HISTORY

On April 28, 2020, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow policy. On April 28, 2020, Grievant was issued a Group III Written Notice of disciplinary action with removal for sleeping during work hours.

On May 25, 2020, Grievant timely filed a grievance to challenge the Agency's actions. The matter proceeded to hearing. On June 8, 2020, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 26, 2020, a hearing was held by audio conference.

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 employed Grievant as a Corrections Officer at one of its facilities. He had been employed by the Agency for approximately ten years. No evidence of prior active disciplinary action was introduced during the hearing.

On February 22, 2020, Grievant went on a "transportation run." Grievant was aware of his obligations under his Post Orders. He was tasked with transporting an inmate from the Facility to a Hospital. Grievant obtained the appropriate equipment to travel to the Hospital and left the Facility. Grievant also took his personal cell phone with him during the trip. Grievant sent text messages and made personal telephone calls during the trip.

On March 19, 2020, Grievant was at the Facility working in a dorm with inmates. He was seated in a chair and fell asleep. His head was tilted forward and his eyes were closed. The Sergeant approached Grievant and observed him sleeping. She loudly said Grievant's name three times, but Grievant did not respond. She said his name even louder the fourth time and Grievant finally awakened. He stood up and appeared like he had just woken up. He was "dazed and confused."

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

Group II Written Notice

Grievant’s Post Order for transportation provided:

Personal cell phones are not allowed. All personal communication devices are prohibited.⁴

“Failure to follow a supervisor’s instructions, perform assigned work, or otherwise comply with applicable established written policy” is a Group II offense.⁵ On February 22, 2020, Grievant took his personal cell phone with him on a transportation run. He used the cell phone to send text messages and make telephone calls. Grievant’s behavior was contrary to his Post Order setting forth the Agency’s written policy governing transportation runs. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow written policy.

Grievant argued that he took his personal cell phone because the Facility was not able to provide him with an Agency-owned phone for the trip. Grievant did not present sufficient evidence to support this allegation. During the Agency’s due process fact finding, Grievant said he took his personal cell phone because he had a personal matter to address. He did not say a State cell phone was unavailable. Even if the Agency failed to provide him with a State cell phone, Grievant did not present sufficient reason to disregard the Agency’s Post Order prohibiting him from carrying a personal cell phone. Grievant would not have been allowed to use a State cell phone for personal use.

¹ Virginia Department of Corrections Operating Procedure 135.1(B). The policy numbering is not consistent.

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

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

⁴ Agency Exhibit p. 36.

⁵ See, Virginia Department of Corrections Operating Procedure 135.1.

Group III Written Notice

“Sleeping during working hours” is a Group III offense.⁶ On March 19, 2020, Grievant fell asleep while at his post in a dorm housing inmates. He placed himself and others at risk of injury. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, the Agency’s decision to remove Grievant must be upheld.

Grievant presented evidence showing he had sleep apnea. Although Grievant’s evidence may explain his sleeping, it does not prevent the Agency from taking disciplinary action. Grievant did not inform his supervisor or Agency managers of his sleeping problems and seek an accommodation. At the time the Agency took disciplinary action, the Agency was not aware of Grievant’s sleep apnea.

Grievant argued the Agency failed to engage in progressive discipline. Although taking progressive discipline is encouraged, the Agency’s Standards of Conduct does not require the Agency to take progressive 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”⁷ 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 is **upheld**. The Agency’s issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is **upheld**.

⁶ Virginia Department of Corrections Operating Procedure 135.1(II)(D)(2)(h).

⁷ Va. Code § 2.2-3005.

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.