

Issue: Group I Written Notice (unsatisfactory performance); Hearing Date: 07/01/15;
Decision Issued: 07/21/15; Agency: Department of the Treasury; AHO: Carl Wilson
Schmidt, Esq.; Case No. 10604; 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: 10604

Hearing Date: July 1, 2015
Decision Issued: July 21, 2015

PROCEDURAL HISTORY

On January 29, 2015, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory work performance.

On February 25, 2015, 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 May 26, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 1, 2015, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
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. 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 Virginia Department of Treasury employs Grievant as a Human Resource Assistant. She has been employed by the Agency for approximately eight years. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant is a non-exempt employee under the Fair Labor Standards Act and must be paid overtime for hours worked in excess of 40 per week. Thus, even if Grievant only asked for payment with respect to 40 hours worked, the Agency would be obligated to pay her for overtime hours.

Grievant reported to the Supervisor who began working for the Agency in May 2013.

On August 26, 2014, Grievant received an Interim Evaluation form advising her:

[Grievant] is expected to report to work as scheduled and seek approval for any change to her work schedule. [Grievant] was instructed on multiple occasions to leave on time. *** [Grievant] will work her scheduled hours and communicate with her supervisor as well as seek approval if a change to her work schedule is needed. [Grievant] will complete work assignments as directed by her supervisor in a timely manner and advise her supervisor if additional resources are needed.

[Grievant] will review her work carefully prior to submitting to the [Supervisor].¹

On September 24, 2014, Grievant received a counseling memorandum from the Supervisor stating:

It is my expectation that you show immediate improvement in your attendance so that assigned work is completed on time. *** Future occurrences of unscheduled absences without approval resulting in work not completed in a timely manner may result in disciplinary action under DHRM Policy 1.60 Standards of Conduct.²

One of Grievant's duties includes submitted a Parking Report to the Supervisor. The November parking report was due to the Supervisor by December 19, 2014. Grievant submitted the November parking report to the Supervisor on December 23, 2014.

Grievant's work schedule was from 7:45 a.m. until 4:15 p.m. Monday through Friday with a 30 minute lunch break. On November 14, 2014, Grievant left work at 4:42 p.m. On December 18, 2014, Grievant arrived at work approximately 30 minutes late. On December 19, 2014, Grievant left work at approximately 5 p.m. On December 31, 2014, Grievant reported to work approximately 45 minutes late. On January 13, 2015, Grievant left work at approximately 4:45 p.m. On January 21, 2015, Grievant left work at approximately 4:45 p.m.³

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."⁴ 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."

¹ Agency Exhibit 1.

² Agency Exhibit 1.

³ The Agency alleged Grievant engaged in additional behavior supporting the issuance of disciplinary action. The Agency has not presented sufficient detail to support these allegations or the allegations do not rise to the level justifying the issuance of disciplinary action. The Hearing Officer will not discuss these allegations.

⁴ The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

“[U]nsatisfactory work performance” is a Group I offense. Tardiness is a Group I offense. Failure to follow a supervisor’s instructions is a Group II offense.⁵ The Agency combined separate behaviors into one Group I Written Notice. If any of the behaviors is sufficient to support the issuance of a Group I Written Notice, then the Agency’s disciplinary action must be upheld.

The Agency has presented sufficient evidence to support the issuance of at least a Group I Written Notice. Grievant was tardy for work on at least two days in December 2014. Grievant was instructed to leave on time yet she worked beyond the end of her shift on at least four occasions. Grievant was instructed to submit a parking report on December 19, 2014 but she submitted it late. The Group I Written Notice must be upheld.

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”⁶ 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 contends the disciplinary action should be mitigated because she has Attention Deficit Disorder and Attention Deficit/Hyperactivity Disorder. She testified she notified the Supervisor of this disability in September 2014. She testified that her disability causes her to be forgetful, sometimes disorganized, and easily distracted. On several occasions, she remained after her shift ended in order to organize her desk for the next day’s work.

Grievant’s medical condition is not sufficient to mitigate the disciplinary action. Her condition may have contributed to and, thus, explained her behavior. No evidence, however, was presented showing that her medical condition was so severe as to cause her inappropriate behavior and that her behavior was beyond her control. Grievant’s assertion of a defense under the Americans with Disabilities Act is not sufficient to reverse the disciplinary action. Reversing disciplinary action is not an accommodation required under the ADA. Grievant was aware in September 2014 that she could seek

⁵ See Attachment A, DHRM Policy 1.60.

⁶ *Va. Code § 2.2-3005.*

accommodation under the ADA regarding her claim of disability but she failed to do so. She asked the Agency for an accommodation relating to having a “standing desk” but subsequently withdrew the request. No basis exists to mitigate the disciplinary action.

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 file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

1. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. 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 may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must provide a copy of all of your appeals to the other party, EDR, 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.

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.⁷

[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

⁷ Agencies must request and receive prior approval from EDR before filing a notice of appeal.