

Issue: Group I Written Notice (unsatisfactory work performance); Hearing Date: 08/04/15; Decision Issued: 08/21/15; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10621; 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: 10621

Hearing Date: August 4, 2015
Decision Issued: August 21, 2015

PROCEDURAL HISTORY

On March 10, 2015, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory work performance.

On March 31, 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 he requested a hearing. On June 22, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 4, 2015, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's Counsel
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 Department of Corrections employs Grievant as a Case Management Counselor at one of its facilities. The purpose of Grievant's position was:

Provides case management services, as well as conducts counseling sessions; assess individual program needs and develop case plan; evaluate offenders' progress; and maintenance associated documentation. Prepare all relevant classification documents and conduct programs. Provide guidance for offenders in a correctional facility to enhance the security of the facility and promote the offenders' long-term pro-social behaviors.¹

The Agency did not permit Grievant to work in excess of 40 hours per week. Grievant received an overall rating of Contributor on his 2014 annual performance evaluation. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant worked in Housing unit 3A. This housing unit held approximately 80 offenders.

Grievant was expected to complete Annual Reviews for the offenders assigned to his caseload. To complete an Annual Review, Grievant was expected to meet with

¹ Agency Exhibit 2.

each offender to confirm that the offender's security level was appropriate. An Annual Review was not required for offenders who were leaving the Facility within 30 days. Grievant was supposed to complete these reviews for each offender within 30 days after the offender's Annual Review Date set forth in the Agency's computer database.

The annual date for Offender D was November 21, 2014. The annual date for Offender S was December 29, 2014. The annual date for Offender W was December 6, 2014.

On February 9, 2015, the Supervisor realized that Grievant had not timely completed Annual Reviews. On February 10, 2015, she sent Grievant an email stating:

Per our meeting earlier today with [Mr. B], I have attached the annuals due for Dec., Jan., and Feb. for 3A. Keep in mind that you will need to complete the annual, update the case plan, and complete other COMPAS assessments for each one of them. Please submit the dockets for the case plan and annual no later than Feb. 27, 2015.²

The email included a list of offenders name and their Annual Review date.

Grievant did not complete an Annual Review for Offender D.³ Grievant completed the Annual Review for Offender S on February 23, 2015. Grievant completed the Annual Review for Offender W on February 26, 2015.

The Supervisor created a spreadsheet with the names of the offenders and the Annual Review dates for November and December. She added additional offender names to the spreadsheet. On February 27, 2015, the Supervisor reviewed Grievant's work and concluded he had not completed all of the remaining items.⁴ Because the Supervisor believed Grievant had not completed all of the items, she notified her supervisor, Mr. B.

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."⁵ Group II offenses "include acts and behavior that are more severe in

² Agency Exhibit 5.

³ Grievant testified he did not complete the review for Offender D because when he "pulled" the report, he "just missed it."

⁴ Grievant completed Offender S on February 23, 2015 and Offender W on February 26, 2015.

⁵ Virginia Department of Corrections Operating Procedure 135.1(V)(B).

nature and are such that an accumulation of two Group II offenses normally should warrant removal.”⁶ Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”⁷

“[I]nadequate or unsatisfactory job performance” is a Group I offense.⁸ In order to prove inadequate or unsatisfactory job 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 obligated to complete Annual Reviews within 30 days of an offender’s Annual Review Date. Grievant failed to complete timely Annual Reviews for one offender within Annual Review Date in November 2014 and two offenders in December 2014. Grievant was instructed to complete the work by February 27, 2015. He did not complete the Annual Review for Offender D. Grievant’s work performance was unsatisfactory to the Agency thereby justifying the issuance of a Group I Written Notice.

Grievant argued that he completed the reviews by February 27, 2015. The evidence showed that he completed the Annual Reviews only for Offender S and Offender W before February 27, 2015.

Grievant argued that Offender D’s review was not due because he was a sex offender who would be placed outside of the Facility. The evidence, however, showed that Offender D was listed in an attachment to the email the Supervisor sent Grievant about completing reviews and that Grievant did not complete the review for Offender D because he “just missed it.” There exists sufficient evidence for the Hearing Officer to conclude that Grievant knew he was supposed to complete the Annual Review of Offender D and that he failed to do so.

Grievant argued that the Agency unnecessarily delayed issuing the disciplinary action. Any delay in issuing disciplinary action in this case was not excessive and does not affect the outcome of this case.

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”⁹ 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

⁶ Virginia Department of Corrections Operating Procedure 135.1(V)(C).

⁷ Virginia Department of Corrections Operating Procedure 135.1(V)(D).

⁸ Virginia Department of Corrections Operating Procedure 135.1(V)(B)(4).

⁹ Va. Code § 2.2-3005.

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.

Grievant argued that the Agency inconsistently disciplined its employees. He points to another counselor in Unit 3B who was out of compliance with respect to one Annual Review. The Supervisor counseled the other counselor without taking disciplinary action. Grievant and the other counselor are not similarly situated. Both Grievant and the other counselor were given additional time to complete their reviews. The other counselor completed the annual review. Grievant, however, failed to complete Offender D's review. In light of the standard set forth in the Rules, 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 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.¹⁰

[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

¹⁰ Agencies must request and receive prior approval from EDR before filing a notice of appeal.