

Issue: Group I Written Notice (unsatisfactory performance); Hearing Date: 11/21/16;
Decision Issued: 12/12/16; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case
No. 10881; 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: 10881

Hearing Date: November 21, 2016
Decision Issued: December 12, 2016

PROCEDURAL HISTORY

On June 2, 2016, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory performance.

On June 28, 2016, 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 October 12, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 21, 2016, a hearing was held at the Agency's office.

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. 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 Unit Manager at one of its facilities. He has been employed by the Agency for over ten years. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant supervised Ms. C and Mr. H. Grievant did not supervise Ms. S but he had observed Ms. S's work performance in the past and considered her to be a poor performer.

Ms. S had been working in Building 1. She was moved to Building 4. She did not like being moved.

In April 2016, Grievant was speaking with Ms. C and Mr. H in Building 3. Grievant said, "If I had been given the buildings that I requested which included building 4, I would have been on her like white on rice!" Ms. C perceived Grievant's comment to mean that if he supervised Ms. S, he would be relentless and not let Ms. S get away with anything. Mr. H perceived Grievant's comment as an expression that Grievant wanted to supervise Ms. S because he believed she was "getting away with a lot of things" under another supervisor.

Ms. S learned of Grievant's comment and felt offended. She complained to Agency managers.

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

“[I]nadequate or unsatisfactory job performance” is a Group I offense.⁴ 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 did not supervise Ms. S. Ms. C and Mr. H were Ms. S’s peers and friends. Grievant told Ms. C and Mr. H that if he supervised Ms. S, he would be on her like white on rice. His statement showed that he considered Ms. S to be a poor performer who needed correction through strict oversight. When Ms. S learned of Grievant’s comment, she was offended. Grievant’s work performance was unsatisfactory to the Agency because he discussed the work performance of Ms. S with two employees who were not involved in supervising Ms. S and Grievant unnecessarily upset Ms. S. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.

Grievant argued that his work performance demonstrated pride and professionalism. He denied making the statement about Ms. S. Ms. C and Mr. H heard Grievant’s comment. Both testified credibly. The Agency has presented sufficient evidence to show that Grievant criticized Ms. S while speaking to Ms. C and Mr. H.

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”⁵ 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

¹ Virginia Department of Corrections Operating Procedure 135.1(VI)(B).

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

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

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

⁵ Va. Code § 2.2-3005.

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 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.⁶

[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

⁶ Agencies must request and receive prior approval from EDR before filing a notice of appeal.