

Issue: Group III Written Notice with Termination (failure to obtain certification);
Hearing Date: 12/08/16; Decision Issued: 12/19/16; Agency: VDH; AHO: Carl
Wilson Schmidt, Esq.; Case No. 10889; Outcome: Partial Relief.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10889

Hearing Date: December 8, 2016
Decision Issued: December 19, 2016

PROCEDURAL HISTORY

On September 12, 2016, Grievant was issued a Group III Written Notice of disciplinary action with removal for failing to obtain license or certification for his position.

On October 3, 2016, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On October 17, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 18, 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 Virginia Department of Health employed Grievant as an Environmental Health Specialist Senior at one of its offices. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant was a Shoreline Surveyor until he voluntarily transferred to the position of Shellfish Specialist. His former position was "repurposed" to a different position and the Shoreline Surveyor position no longer existed.

The National Shellfish Sanitation Program (NSSP) sets forth Plant Standardization Procedures. A Shellfish Specialist must inspect a plant to determine if the plant meets the requirements of the NSSP. The Agency has a Plant Program Manager who is the Agency's expert on the NSSP standards and tests employees to determine if they have met the requirements of the NSSP. The test involves successfully completing five plant inspections while being observed by the Plant Program Manager. An employee who meets these requirements is considered "standardized."

In July 2014, the Agency imposed a requirement on its Shellfish Specialist to be standardized. Employees were notified they:

Must have and maintain credentials in ... National Shellfish Sanitation Program (NSSP) State Standardized Inspector.

Maintenance of Credentials: Employees who fail to maintain the required credentials will be issued a Notice of Improvement Needed/Substandard Performance and will have up to 90 days to successfully complete an approved development plan and regain the required credentials. Failure to successfully complete the development plan and regain the required credentials will result in the issuance of a written notification for inability to meet working conditions (Standards of Conduct, H.1) and termination from the agency except in exceptional situations based on mitigating circumstances.¹

On October 2, 2014, Grievant's employee work profile plan set forth learning steps/resources needs:

1. The reading of the NSSP Model Ordinance and other documents provided by the Division of Shellfish Sanitation.
2. Attend the required classes needed for shellfish plant standardization.
3. Training with appropriate personnel to further learn and gain experience on how to conduct shellfish plant inspection.²

On October 31, 2014, the Operations Director extended until December 31, 2015 the deadline for Grievant to become standardized.

In August 2015, Grievant failed the standardization field test.

The Plant Program Manager evaluated Grievant's inspections in November and December 2015. She concluded:

It is my determination based on observations during these standardization inspections that [Grievant] did not demonstrate the knowledge base of the NSSP MO to be standardized to conduct inspections of certified shellfish dealer operations.³

This was Grievant's second attempt at standardization.

On January 28, 2016, Grievant received Notice of Improvement Needed/Substandard Performance advising him that, "[a] major component of your EWP as a Shellfish Specialist Senior, is that you become standardized and qualify to conduct inspections of Shellfish Plants per guidelines established by the USFDA." Grievant received a 90 Day Performance Improvement Plan, "designed to focus your attention on substantially improving your performance in several key areas as it related

¹ Agency Exhibit 4.

² Agency Exhibit 6.

³ Agency Exhibit 5.

to becoming standardized to conduct shellfish dealer inspections.”⁴ The Plan set forth additional training and re-training requirements as well as the requirement to complete standardization by April 28, 2016.

Grievant’s EWP dated March 15, 2016 required that he:

Must be certified as a National Shellfish Sanitation Program (NSSP) State Standardized Inspector within 18 months of date of hire.

In April 2016, Grievant received an extension of time to complete standardization until May 2016. In May 2016, Grievant did not complete the standardization process.

On June 16, 2016, Grievant received a Due Process Memo for his third failure to become standardized. On July 13, 2016, Grievant requested a hearing to appeal the results of his standardization examination. On July 28, 2016, the Division Manager held a hearing during which Grievant presented his reasons that his standardization should be granted. The Plant Program Manager, Ms. S, also appeared and presented evidence showing that he had not met the requirements for standardization. On August 8, 2016, the Division Manager denied Grievant’s appeal and concluded that Grievant “did not meet the minimum requirements for standardization.”⁵

CONCLUSIONS OF POLICY

DHRM Policy 1.60(H) addressed “Removal Due to Circumstances which Prevent Employees from Performing their Jobs.” This policy provides:

An employee unable to meet the working conditions of his or her employment due to circumstances such as those listed below may be removed under this section. Reasons include: *** failure to obtain license or certification required for the job.

The Agency has established a basis for Grievant’s removal under DHRM Policy 1.60(H). The Agency required Grievant to become certified under the National Shellfish Sanitation Program. It was a condition of his employment. Grievant did not meet that requirement after three attempts. The evidence is overwhelming that the Agency took many actions designed to enable Grievant to become standardized. Unfortunately, he was unable to satisfy the Agency’s requirements.

The Agency erred by issuing a Group III Written Notice. DHRM Policy 1.60 (H) provides:

⁴ Agency Exhibit 5.

⁵ Agency Exhibit 7.

Prior to such removal the appointing authority and/or Human Resource Officer shall gather full documentation supporting such action and notify the employee, verbally or in writing, of the reasons for such a removal, giving the employee a reasonable opportunity to respond to the charges. Final notification of removal should be via memorandum or letter, **not by a Written Notice form.** (Emphasis added).

The Agency issued a Group III Written Notice with removal on September 12, 2016. The Group III Written Notice must be reversed.

The Agency argued that it issued a Group III Written Notice along with a memorandum regarding his failure to obtain a license or certification required for the job and that the memorandum meets the Policy 1.60 requirement. This argument is unpersuasive. DHRM Policy 1.60 says the employee's removal due to circumstances which prevent employees from performing their jobs should be via memorandum or letter and not by a Written Notice. The memorandum attached to the Group III Written Notice states, "you are being issued a Group III Written Notice." The memorandum is not a separate memorandum unrelated to the Group III Written Notice.⁶

Grievant argued that the Agency should have returned him to the Shoreline Surveyor position he held in 2013. The evidence showed that Grievant's former position no longer existed. Grievant argued that he should be reinstated and permitted to retire. The Agency has presented sufficient evidence to support Grievant's removal by memorandum or letter.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is **rescinded**. The Agency is **Ordered** to remove the Group III Written Notice from Grievant's employment file. The Agency should amend its electronic records to delete reference to Grievant being removed from employment based on disciplinary action.

The Agency is **Ordered** to send Grievant a memorandum expressing its reasons for removal without reference to the issuance of a Group III Written Notice. The memorandum should show the date of Grievant's removal as September 12, 2016.

Grievant's removal is **upheld**.

⁶ It is possible for an agency to take disciplinary action when an employee fails to achieve a performance objective such as not passing a certification test. If an employee was informed of his or her obligation to achieve a performance standard, that level of discipline would not begin at a Group III level. In this case, the Agency cites the language of DHRM Policy 1.60 (H) ("Removal Due to Circumstances Which Prevent Employees from Performing their Job") but then fails inexplicably to acknowledge the wording "not by a Written Notice form."

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

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

[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