



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11372

Hearing Date: September 12, 2019

Decision Issued: October 2, 2019

PROCEDURAL HISTORY

On March 8, 2019, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow instructions.

On April 5, 2019, 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 17, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 12, 2019, 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. 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 Juvenile Justice employs Grievant as a Community Manager at one of its facilities. He has been working for the Agency for approximately 21 years. His work performance was viewed favorably by the Agency. He received an overall rating of "Major Contributor" on a recent annual performance evaluation. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant was responsible for completing timesheets for Counselor S. He was to review and approve each timesheet submitted by Counselor S. The process to approve a timesheet included entering an approval in the Time Attendance and Leave (TAL) reporting online system. Grievant was familiar with the process for reviewing and approving employee timesheets.

Counselor S submitted weekly timesheets to Grievant for the time period of April 2, 2018 and July 21, 2018. Counselor S had worked more than 30 hours of overtime and wanted to be paid for her overtime work. She could not be paid for the additional work unless her timesheets were approved by Grievant. Each time Counselor S submitted a timesheet, the TAL system notified Grievant that a timesheet had been submitted for his review. Grievant did not process the timesheets.

Beginning in October 2018, the Supervisor told Grievant two or three times that he needed to review and approve Counselor S's timesheets. Grievant did not comply with the Supervisor's instruction.

On December 5, 2018, the Supervisor sent Grievant an email stating:

Please review [Counselor S's] TAL she still has time sheets starting from April that have not been approved, most of these time sheets appear to cover the time when [employee name] was out on leave and prior to [employee name] being moved to that unit.¹

Grievant did not comply with the Supervisor's email instruction.

In January 2019, Counselor S spoke to the Supervisor to complain that her timesheets had not been approved. The Supervisor realized that Grievant had not complied with her instructions. On January 30, 2019, the Supervisor entered the TAL system and approved Counselor S's timesheets. The Supervisor devoted approximately 15 to 20 minutes to review and approve all of the timesheets.

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."² 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."

Failure to follow a supervisor's instructions is a Group II offense.³ Beginning in October 2018, the Supervisor told Grievant to review and approve the timesheets of Counselor S. Grievant failed to follow those verbal instructions. On December 5, 2018, the Supervisor instructed Grievant by email to review and approve Counselor S's timesheets. Grievant disregarded the Supervisor's written instruction. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow instructions.

Grievant argued that the Agency's disciplinary action was excessive and that the Agency should have sat down with him to have a conversation about his work performance instead of taking disciplinary action. Grievant is addressing the issue of

¹ Agency Exhibit I.

² The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

³ See, Attachment A, DHRM Policy 1.60.

whether the Agency used progressive disciplinary action. The Standards of Conduct does not require agencies to engage in progressive disciplinary action. The Agency did not violate policy by issuing a Group II Written Notice instead of taking lesser 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 ...”⁴ 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.

Grievant argued that the Agency inconsistently applied disciplinary action. Grievant presented Ms. J as an example of an employee who received a Group I instead of a Group II Written Notice. Ms. J, however, received a Group I Written Notice for failing “to determine if schedule adjustments are needed to manage overtime.” Grievant was not disciplined for failing to manage overtime.

Grievant presented evidence that he was responsible for supervising five units. At one point he had at least four vacant positions under him while the Agency failed to respond to his requests for assistance. Grievant had to perform the duties of the unfilled positions. He felt overwhelmed and overworked during that time period. Grievant also experienced health concerns relating to his health and the health of an important family member. Although Grievant’s work duties and health concerns were significant and certainly could explain some delay, they were not so extreme as to justify failing to comply with two or three verbal instructions and one written instruction over a several-month time period.

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 II Written Notice of disciplinary action is **upheld**.

⁴ *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.