



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11382

Hearing Date: October 3, 2019
Decision Issued: December 16, 2019

PROCEDURAL HISTORY

On March 29, 2019, Grievant was issued a Group III Written Notice of disciplinary action with a five workday suspension for unsatisfactory performance.

On April 26, 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 she requested a hearing. On July 1, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 3, 2019, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency 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. 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 Virginia Community College System employs Grievant as an Accountant at one of its Colleges. She began working for the College in March 2015. The purpose of Grievant's position was:

To ensure that all accounting records and financial statements meet required accounting standards. To meet all reporting requirements of local, state, and federal agencies. To manage student financial accounts to include financial aid programs, third party contracts and receivables.¹

Grievant had prior active disciplinary action. Grievant received a Group II Written Notice on July 26, 2017 for unsatisfactory performance and failure to follow policy or instructions. Grievant received a Group II Written Notice on July 13, 2018 for unsatisfactory performance and failure to follow policy or instructions.

The Manager performed Grievant's duties until January 2015 when she became a Manager. The duties for Grievant's position were reduced prior to Grievant taking her position. The Manager trained Grievant regarding Grievant's duties.

¹ Agency Exhibit 3H.

On October 15, 2015, Grievant received a Probationary Progress Review. She was advised:

- Business Manager is available for training on a daily basis. If something is questionable, please come and ask for guidance.
- We will work on the financial aid accounts reconciliation that needs to be completed monthly.²

On August 17, 2018, the Manager sent Grievant an email:

What is the status of the bank reconciliations for July and August? Both months should have been completed by now.
Also what is the status of the G5/AIS/SIS reconciliation for the financial aid accounts? Those need to be completed by the 24th.³

The financial aid office disburses federal loans to nursing students. Grievant was responsible for sending invoices for nursing student loans. If the process was completed properly, a nurse would receive a bill each month. The College needed to monitor the student loan default rate. It was important that the rate not exceed 5 percent. In August 2018, the default rate was 7.73 percent.

In aid year 2018, the College did not timely return \$8,542 of unearned Title IV funds. By conducting timely monthly reconciliations, the College could have determined whether it was obligated to return money to the Federal government. The bank statements reflected a date reviewed and the reviewer's initials, but there was no formal reconciliation documentation between G5, the bank statement, and the College's accounting system. Grievant was the person responsible for ensuring that the reconciliations were completed timely. Grievant failed to accomplish this task.

On December 19, 2018, the Manager sent Grievant an email:

Please make sure the [Set Off Debt Collection] claims are on before January 1st and I still have not seen bank reconciliations for several months. You need to get your work caught up.
Financial Aid auditors will be here mid-February also.⁴

Grievant did not timely complete the set off debt collection claims.

On March 7, 2019, the Manager sent Grievant an email:

² Agency Exhibit 3F.

³ Agency Exhibit 3J.

⁴ Agency Exhibit 3J.

Where are you on the bank reconciliations? It has been months since I have seen them and they are supposed to be done monthly. Also where are you on the AIS/G5/SIS reconciliation?

Grievant did not present any witnesses or testimony. She submitted documents only.

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.”⁵ 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.”

[U]nsatisfactory work performance” is a Group I offense.⁶ In order to prove unsatisfactory work 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 expected to reconcile bank statements on a monthly basis. She did not reconcile bank statements for local and federal funds after September 2018. Grievant did not timely complete the G5/SIS/AIS reconciliation. Grievant failed to follow-up on nursing student loans. Grievant’s work performance was unsatisfactory to the Agency. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.

An agency may elevate a Group I offense to a Group II Written Notice if the offense is repeated. Grievant has a prior written notice for unsatisfactory performance and, thus, the Group I Written Notice may be elevated to a Group II Written Notice. Upon the issuance of a Group II with a prior active Group II offense, an agency may remove or suspend an employee for up to 30 workdays. Accordingly, the Agency’s decision to suspend Grievant for five workdays must be upheld.

An agency may not elevate a Group II offense to a Group III Written Notice based on a repeat of the same offense. The HR Director testified that Grievant’s behavior would have constituted a Group I or a Group II offense if Grievant had no prior written notices. Because Grievant had prior Group II Written Notices for the same offense, the Agency elevated the discipline to a Group III Written Notice. Since a Group

⁵ The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

⁶ See Attachment A, DHRM Policy 1.60.

It cannot be elevated to a Group III Written Notice because of a repeated Group II offense, the Group III Written Notice given to Grievant cannot be sustained at a Group III level.

Grievant argued she did not receive adequate training to perform her work duties. The evidence showed that Grievant received adequate training. Grievant was disciplined for failing to timely perform bank reconciliations. Better training may have affected the quality of her work performance, but the quality of Grievant's bank reconciliations were not at issue.

Grievant asserted that the Agency had created a hostile work environment. No credible or persuasive evidence was presented to support this allegation.

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"⁷ 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.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action is **reduced** to a Group II Written Notice. Grievant's five workday suspension is **upheld**.

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:

⁷ Va. Code § 2.2-3005.

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.