



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11410

Hearing Date: November 6, 2019
Decision Issued: November 26, 2019

PROCEDURAL HISTORY

On May 7, 2019, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory performance.

On May 14, 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 August 19, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 6, 2019, 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. 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 Rehabilitation Counselor at one of its facilities. No evidence of prior active disciplinary action was presented.

On October 17, 2017, Ms. H, a supervisor, sent Grievant an email stating, "[i]n a review of the files in [Unit], I found the following deficits; these areas are to be corrected by COB October 23"¹ Ms. H listed the items missing for nine residents. Grievant did not complete Ms. H's instruction.

Grievant took leave and remained away from the Facility until July 15, 2018 when he resumed working.

On August 6, 2018, Ms. H met with Grievant and issued him a Notice of Improvement Needed/Substandard Performance. The Notice stated, in part:

On 10/17/17, [Grievant] was presented with an email regarding a file review conducted by [CM H] of his transfer files. He was provided with a list of deficits and a deadline to be completed which was 10/23/17. Many of the noted deficits were major missing items such as progress reports,

¹ Agency Exhibit E.

outdated CRCP's and no running records. Approximately 90 days after the original review another file review was completed to assist in the transition of supervision and many of the same deficits were found with the addition of more deficits being found due to non-compliance with file management. To date, [Grievant] has not had any previous disciplinary actions taken due to his non-compliance of file management, but he has been provided with numerous reminders, guidance, and training regarding the importance of file management. Furthermore, [Grievant] has not contacted [CM H] or [CC B] regarding any difficulties he was having with maintaining his files over this period of time. Today, [Grievant] currently has 8 progress reports out of compliance, 5 CRCP's, no running records lodged in BADGE for any of his assigned residence for the time period of January 2017 – present, and missing orientation paperwork on 5 files. ***

Grievant submitted some but not all of the missing files and before he took leave on September 2, 2018. Of those files submitted, most required extensive revision. Grievant could have completed the work within a few days.

Grievant was scheduled to report for training on August 16, 2018. He arrived 23 minutes late. He was wearing jeans even though he had been notified not to wear jeans to the training. The instructor prohibited Grievant from participating in the hearing because he was late and was wearing the wrong type of clothing.

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.”

“[U]nsatisfactory work performance” is a Group I offense.³ 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's work performance was unsatisfactory to the Agency. He was assigned responsibility to complete resident files but failed to complete them as expected. He reported late to schedule training wearing the wrong clothing. He was not permitted to

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.

take the required training. The Agency is presented sufficient evidence to support the issuance of a Group I Written Notice.

Grievant asserted that he completed the progress notes by July 27, 2018 and turned them in to Ms. H. Even if the Hearing Officer assumes this is true, the notes contained errors and lacked some necessary information. The Agency's evidence is sufficient to support issuance of the Group I Written Notice.

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. 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 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.

⁴ Va. Code § 2.2-3005.

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.