

**COMMONWEALTH OF VIRGINIA
Department of Human Resource Management**

Office of Employment Dispute Resolution

DECISION OF HEARING OFFICER

In re:

Case Number: 11421 and 11425

Hearing Date: December 5, 2019
Decision Issued: December 11, 2019

PROCEDURAL HISTORY

Case Number 11421: On July 10, 2019, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow instructions and/or policy and abuse of state time. Grievant was suspended from his employment for a period of ten days.

Grievant timely filed a grievance to challenge the Agency's action. The Hearing Officer in this matter was appointed effective September 17, 2019 and set a hearing date of November 12, 2019. Due to an emergency, the hearing date was rescheduled to December 5, 2019.

Case Number 11425: On September 26, 2019, Grievant was issued a Group III Written Notice of disciplinary action for failure to follow instructions and/or policy and unsatisfactory performance. In addition, on September 26, 2019, Grievant was issued a Group III Written Notice of disciplinary action for threats or coercion. Each of the Group III Written Notices resulted in termination of employment.

Grievant timely filed a grievance to challenge the Agency's actions.

Upon being notified by the Department of Human Resource Management by letter dated November 19, 2019 that case numbers 11421 and 11425 were consolidated for a single hearing, the Hearing Officer conducted a telephone conference with the Grievant and the Agency Advocate during which it was agreed that the consolidated hearing would occur on December 5, 2019. The hearing was conducted on December 5, 2019 as set out in the letter notice from the Hearing Officer to the parties dated November 26, 2019.

APPEARANCES

Grievant

Agency Party Designee
Agency's Representative

ISSUES

1. Whether Grievant engaged in the behavior described in each Written Notice?
2. Whether the behavior in each case constituted misconduct?
3. Whether the Agency's discipline in each case was consistent with law and policy?
4. Whether there were mitigating circumstances justifying a reduction or removal of any 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 Grievant 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) section 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM section 9.

EXHIBITS

The Agency Exhibits admitted into evidence are contained in two notebooks with the following contents:

Notebook with cover date of November 12, 2019 with the following tabs:

1. Grievance Form A and attachments
2. Written Notice Group II dated 7/10/19
3. Documents relating to incident of 5/8/19
4. Grievance academic year-end appraisal dated 4/2/19
5. Various notes and logs from 2019

6. Written Notice Group II dated 2/22/19
7. Communication: Notify supervisors
8. Written Notice Group I dated 7/3/18
Predetermination notes 6/21/18
Notes from 6/1/18
9. Notes and logs from 2018
10. Written letter of counseling 2/17/17
Notes and logs from 2017
11. Facilities Management-verbal counseling 9/2/16
Notes and logs from 2016
12. Standards of Conduct
13. Cleaning Quality and Efficiency

Notebook with cover date December 5, 2019 with the following tabs:

1. Grievance Form A and attachments
2. Written Notice Group III offense date 9/9-9/12/19
3. Photos from 9/9/12
4. Photos from 9/12/19
5. Garage cleaning schedule
6. Written Notice Group III offense date 9/12/19-THREATS
7. Email 9/12/19
Threatening occurrence notes
Diagram of garage
8. Pre-determination meeting 9/16/19
Notes dated 9/16/19
No trespass letter 9/16/19
List of training
9. Police department's summary
Protective order
10. Policy 2.35 "civility in the Workplace"
11. HRM-028 "preventing and Addressing Threats of Violence"

The Grievant did not provide any exhibits.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

Case No. 11421:

The Agency employed Grievant as a housekeeper (custodial services worker 4) at the stage four level of the Housekeeper Career Path. Housekeepers are expected to have increased efficiency and thoroughness in maintaining their assigned areas in a clean and orderly condition. A Housekeeper at the stage four level is expected to be especially diligent in areas visited by Agency patrons and customers. The Grievant had been employed by the Agency for fifteen years. Grievant had two prior Written Notices, a Group I issued July 3, 2018 for unsatisfactory performance and failure to follow instructions and/or policy and a Group II issued February 29, 2019 for unsatisfactory performance and failure to follow instructions and/or policy.

Regarding the Group II Written Notice issued July 10, 2019, the Grievant's supervisor testified that on May 8, 2019, he found the Grievant on an unauthorized break, in uniform in an area viewed by the public. The Grievant's regular work schedule was 5:00 a.m. to 1:30 p.m. with regularly scheduled breaks at 9:00 a.m. and 11:00 a.m. The Agency policy is that an employee must contact the employee's supervisor before taking an authorized break. The Grievant did not contact his supervisor prior to taking an unauthorized break at 7:18 a.m. The Agency evidence indicated the Grievant was aware of the policy.

The offense on May 8, 2019 occurred at a time when two prior Written Notices existed, and after an event on March 6, 2019 when Grievant's supervisor found him on an unauthorized break at 7:45 a.m., in uniform and in an area where he could be viewed by the public.

Regarding the May 8, 2019 offense, a pre-determination meeting was conducted on May 10, 2019 at which time the Grievant explained he had a medical condition which required him to eat frequently throughout the day, but provided no information to explain why he could not first gain authorization from his supervisor. The Agency delayed issuing the written notice until July 10, 2019 to allow the Grievant to provide documentation from his physician, which he provided and which was reviewed by the Agency before issuing the Written Notice.

The Agency determined that the accumulative effect of the Grievant's disciplinary record would normally result in termination of employment. However the Agency determined that due to the Grievant's fifteen years of service and the nature of this specific incident mitigation was appropriate and issued a ten-day unpaid suspension rather than termination of employment.

Case No. 11425:

Two Group III Written Notices were issued on September 26, 2019 each resulting in termination.

The first Written Notice for offense date September 9, 2019 through September 12, 2019 had to do with the Grievant's failure to properly clean a garage. Testimony by the Grievant's

supervisor, combined with the exhibits introduced by Agency, demonstrated that the Grievant was not following his instructions and policy, resulting in unsatisfactory performance of his assigned tasks. Particularly convincing was documentation of specific conditions which existed in the garage on September 9, 2019 and continued to exist when inspected again on September 12, 2019, despite the fact that the Grievant had the duty of cleaning the garage on a daily basis. Agency evidence demonstrated Grievant was aware of his duties.

The Agency terminated the Grievant's employment because of the offenses from September 9, 2019 to September 12, 2019, combined with his disciplinary record, including two prior Group II Written Notices for unsatisfactory performance and failure to follow instructions, a letter of counseling issued February 17, 2017 and numerous verbal counseling sessions, including most recently February 8, 2019, February 13, 2019, March 6, 2019 and March 29, 2019.

The second Group III Written Notice issued on September 26, 2019, resulting in termination, was for threats or coercion.

Grievant's supervisor testified that on the morning of September 12, 2019, while the supervisor was inspecting the garage, the Grievant approached him in a confrontational manner, demanding to know why the supervisor was inspecting the garage. While the supervisor was showing the Grievant the deficiencies so that the Grievant could work on them, the supervisor testified that the Grievant became increasingly agitated and asked the supervisor if he would face possible disciplinary action. After the supervisor told the Grievant that he does not make the determination on his own, the Grievant told the supervisor that he wanted to ask him how to clean something on the other side of the garage. The supervisor testified that when they reached the middle of the garage the Grievant said "Are you scared of what I could do to you here in the middle of the garage with no people around?" When the supervisor told the Grievant that he was not scared of the Grievant, the Grievant responded "Of course you're not because we are on campus." When the supervisor mentioned that they have seen each other outside the campus at Walmart, the Grievant said in a threatening voice "Yes with your beautiful wife." The Grievant added that his wife delivers mail to the supervisor's house.

Following the encounter between the supervisor and the Grievant, the supervisor immediately reported the matter to T.M., the Housekeeping Manager. In addition, the superintendent reported the matter to the police and gained a temporary protective order against the Grievant.

The Grievant testified and denied that he threatened his supervisor or acted in a threatening manner. However, T.M., the Housekeeping Manager, testified that the Grievant has a history of trying to intimidate people with his size and demeanor.

CONCLUSIONS

Unacceptable behaviors divided into three types of offenses, according to their severity. Group I offenses “include acts of minor misconduct that require formal disciplinary action.” 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.” (Standards of Conduct)

The Commonwealth of Virginia provides certain protections to employees Chapter 30 of Title 2.2 of the Code of Virginia. Among these protections is the right to grieve formal disciplinary action. The Department of Equal Employment and Dispute Resolution has developed Grievance Procedure Manual (GPM). This manual sets forth the applicable standards for this type of proceeding. Section 5.8 of the GPM provides that in disciplinary grievances the Agency has the burden of going forth with the evidence. It also has the burden of proving, by preponderance of the evidence that its actions were warranted and appropriate. The GPM is supplemented by a separate set of standards promulgated by the Department of Employment Dispute Resolution, *Rules For Conducting Grievance Hearings*. These Rules state that on a disciplinary grievance a Hearing Officer shall review the facts *de novo* and determine:

- A. Whether the employee engaged in the behavior described in the written notice;
- B. Whether the behavior constituted misconduct;
- C. Whether the discipline was consistent with law and policy; and
- D. Whether there were mitigating circumstances justifying the reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances.

Case No. 11421:

Failure to follow a supervisor’s instructions is a Group II offense. Likewise, abuse of state time is a Group II offense.

On May 8, 2019 the Grievant was taking an unauthorized break, thus failing to follow policy and abusing state time. While the Agency could have terminated the Grievant’s employment, due to his prior disciplinary record, the Agency considered the Grievant’s fifteen years of service in mitigation and instead of termination issued a ten-day unpaid suspension as discipline.

Virginia Code Section 2.2-3005.1 authorizes Hearing Officer’s 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...”. Under the Rules for Conducting Grievance Hearings “[a] hearing officer must give deference to the agency’s consideration in the 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 the standards set forth in Rules, the Hearing Officer finds no mitigating circumstances which exist to further reduce the disciplinary action imposed by the Agency.

Case No. 11425:

Group III Written Notice issued September 26, 2019 for failure to follow instructions and unsatisfactory performance.

Failure to follow a supervisor’s instructions is a Group II offense. Likewise, unsatisfactory performance is a Group II offense.

The testimony of Grievant’s supervisor, combined with the exhibits introduced by the Agency demonstrating the conditions which were found in the garage, clearly indicated that the Grievant was not following instructions resulting in unsatisfactory performance of his job.

The Agency decision to terminate the Grievant’s employment followed a pre-determination meeting conducted on September 16, 2019 and after considering the Grievant’s disciplinary record which contained two Group II Written Notices for unsatisfactory performance and failure to follow instructions on February 22, 2019 and July 10, 2019, a Group I Written Notice for failure to follow instructions on July 3, 2018, a letter of counseling issued February 17, 2017 and multiple verbal counseling sessions, including most recently on February 8, 2019, February 13, 2019, March 6, 2019 and March 29, 2019. While the Agency did consider Grievant’s fifteen years of service with the Agency, the Grievant’s repeated failure to follow instructions and poor work performance justified termination of employment.

In light of the standards set forth in the Rules, previously cited, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

Group III Written Notice issued September 26, 2019 for threats or coercion:

The Hearing Officer, having listened to the supervisor’s testimony and having observed the supervisor’s demeanor (and having observed the Grievant’s demeanor during the hearing) the Hearing Officer concludes that the Grievant did threaten or attempt to coerce his supervisor.

Policy 2.35 prohibits the following conduct: "...bullying behaviors, and threatening or violent behaviors of employees...in the work place. ..."

In light of the standards set forth in the Rules, previously set out, Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

DECISION

Case No. 11421:

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice with a ten-day unpaid suspension is upheld.

Case No. 11425:

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice with termination for failing to follow instructions and unsatisfactory performance is upheld. Likewise, the Agency's issuance to the Grievant of a Group III Written Notice with termination for threats or coercion is upheld.

APPEAL RIGHTS

You may request an administrative review by EEDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EEDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Equal Employment and Dispute Resolution
Department of Human Resources 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 EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

ENTERED: 12/11/19

Date



John R. Hooe, III
Hearing Officer

[1] Agencies must request and receive prior approval from EEDR before filing a notice of appeal.