COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11485 / 11486

Hearing Date: April 14, 2020
Decision Issued: April 23, 2020

PROCEDURAL HISTORY

On August 13, 2019, Grievant was issued a Group II Written Notice of disciplinary action for refusal to work overtime as required. On November 15, 2019, Grievant was issued a second Group II Written Notice with a 40 hour suspension for refusal to work overtime as required.

Grievant timely filed grievances to challenge the Agency's actions. The outcome of the Third Resolution Steps was not satisfactory to the Grievant and she requested a hearing. On January 6, 2020, the Office of Employment Dispute Resolution issued Ruling No. 2020-5035 consolidating the two grievances for a single hearing. On January 27, 2020, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 14, 2020, a hearing was held by telephone conference.

APPEARANCES

Grievant
Grievant's Representative
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 Corrections employs Grievant as a Corrections Officer at one of its facilities. She has been employed by the Agency for over two years. Except for the facts giving rise to these disciplinary actions, Grievant's work performance was satisfactory to the Agency.

A condition of Grievant's employment was that she work overtime as needed by the Agency. The Agency maintained a list of employees who could be drafted to work overtime. The list was available to employees so that they could anticipate when they might be drafted. Grievant was informed on February 28, 2018 that, "Failing to work the Mandatory Draft … will be treated as a violation of Operating Procedure 135.1, Standards of Conduct."[1]

[1] Grievant Exhibit page 58.

The Agency tells its employees to schedule their medical appointments on their days off so as to avoid missing work.

July 10, 2019 was one of Grievant's rest days. She was not scheduled initially to work on that day.

In July, Grievant's name was towards the top of the Agency's draft list. On July 9, 2019, Captain C told Grievant to report to work on July 10, 2019 to participate in a facility search. Grievant did not report to work on July 10, 2019.

Grievant presented a note dated July 10, 2020 from a medical doctor stating, "Please excuse the patient on the following days due to a medical issue or office visit: 7/10/19."

On July 23, 2019, Captain C notified Grievant she was drafted to work late beyond her shift. She did not work the mandatory draft. Grievant had recently returned from vacation and was too tired to work overtime.

On September 12, 2019, Grievant told the Chief of Security that she did not report to work on July 10, 2019 because her child had a prescheduled doctor's appointment. The Chief of Security asked Grievant if she gave the Shift Commander a copy of the appointment and Grievant said "no." The Chief of Security asked Grievant to bring him a copy of the prescheduled appointment document and Grievant said "no." She told him she was not able to get the document because the doctor did not write one.

Grievant was not scheduled initially to work on September 4, 2019.

On September 2, 2019 or September 3, 2019, Lieutenant C told Grievant she was being drafted to work a shakedown at the Facility scheduled for September 4, 2019. This meant Grievant was to return to work on September 4, 2019 to participate in the shakedown procedure. Grievant told Lieutenant C she could not report to work on September 4, 2019 because she had a medical appointment.[2] Grievant was presented with a Confidentiality Statement which Grievant refused to sign. Grievant did not contact the medical provider to determine if she could reschedule the appointment or determine if there would be an impact on her health if she rescheduled the appointment. Grievant did not report to work on September 4, 2019.

On September 5, 2019, Grievant presented to the Agency a note from her medical provider stating:

To whom it may concern:

[2] Grievant did not present evidence regarding the nature of the medical appointment. It is not clear whether Grievant's appointment was for a routine medical matter or for a serious health condition.

> This letter certifies that [Grievant] was seen for care in the above office on 9/4/19 and may return to work or school on 9/5/19.

On September 5, 2019, the Captain spoke to Grievant about her paperwork. Grievant said the Human Resources staff had her paperwork. The Captain advised Grievant that her paperwork had to show that her appointment was pre-scheduled prior to the report date of work. Prior to the issuance of the Group II Written Notice, Grievant did not provide the Agency with any documents showing her appointment on September 4, 2019 was scheduled prior to September 4, 2019.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three groups, according to the severity of the behavior. Group I offenses "include types of behavior less severe in nature, but [which] require correction in the interest of maintaining a productive and well-managed work force."[3] Group II offenses "include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal."[4] Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."[5]

Operating Procedure 110.2 governs Overtime and Schedule Adjustments. Section IV(A) provides, "All employees are required to work overtime as needed." Section IV(B) provides, "Failure to work overtime as directed/instructed/needed may result in disciplinary action in accordance with Operating Procedure 135.1 Standards of Conduct."

Operating Procedure 110.1 Hours of Work and Leaves of Absences provides:

> Use of sick leave (not covered as a qualifying condition under Family and Medical Leave Act (FMLA) is granted at the discretion of management/supervisor.

Refusal to work overtime as required" is a Group II offense.[6]

Group II Written Notice Issued August 13, 2019

Grievant was instructed to work overtime on July 10, 2019 and July 24, 2019. Grievant failed to do so. The Agency has presented sufficient evidence to support the

[3] Virginia Department of Corrections Operating Procedure 135.1(VI)(B).

[4] Virginia Department of Corrections Operating Procedure 135.1(VI)(C).

[5] Virginia Department of Corrections Operating Procedure 135.1(VI)(D).

[6] See, DOC Operating Procedure 135.1 (V)(D)(2)(g).

issuance of a Group II Written Notice for failure to work overtime on July 10, 2019 and July 24, 2019.

Group II Written Notice with Suspension Issued November 15, 2019

Grievant was instructed to work overtime on September 4, 2019. Grievant failed to follow that instruction thereby justifying the Agency's issuance of a Group II Written Notice for refusal to work overtime. Upon the issuance of a Group II Written Notice, an agency may suspend an employee for up to ten workdays. Accordingly, Grievant's 40 hour suspension must be upheld.

Grievant's Defenses

Grievant argued that she had been told to schedule medical appointments on her rests days and complied with that instruction. Grievant was also advised that as a condition of employment she would be expected to work overtime as needed. Grievant was notified of her obligation to work overtime and failed to do so.

Grievant argued that she presented medical provider notes to excuse two of her absences. The Agency is prohibited from taking disciplinary action against an employee if an employee's medical absence is protected under the Family and Medical Leave Act. Grievant did not testify regarding the nature of her absences. It does not appear that Grievant's absences were protected under the Family and Medical Leave Act, and, thus, the Agency could take disciplinary action against Grievant.

The Agency's practice was to mitigate disciplinary action for refusal to work overtime if an employee could show the medical appointment was pre-scheduled. Grievant was given several opportunities prior to the issuance of disciplinary action to show that her medical appointments were pre-scheduled, but she failed to produce such documentation. Thus, the Agency chose not to mitigate the disciplinary action. The Agency had the discretion to make such a determination.

Grievant argued that the Agency's mitigation practice is not written in policy. The Agency was not obligated to have its mitigation practice written in policy in order to enforce it. The Agency's policies showed that an employee could be disciplined for refusal to work overtime as needed. Thus, the Agency could issue disciplinary action against an employee who refused to work overtime.

Grievant presented an email sent August 16, 2019 from the provider she visited on September 4, 2019. The email showed that Grievant's September 4, 2019 was pre-scheduled. Grievant offered no reason why she did not provide this document to the Agency especially since Agency managers had repeatedly asked for such documentation. Under prior EDR Rulings, the Hearing Officer cannot consider documents that were not available to Agency managers at the time the Agency took disciplinary action.

Mitigation

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.

Grievant argued that she was too tired to work on July 24, 2019. Although this may be true, the Agency chose not to mitigate the disciplinary action. The Hearing Officer does not have the authority to mitigate the disciplinary action because the Agency's disciplinary action was authorized by policy and did not exceed the limits of reasonableness. 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 on August 13, 2019 to the Grievant of a Group II Written Notice of disciplinary action issued is **upheld**. The Agency's issuance to Grievant on November 15, 2019 of a Group II Written Notice with 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:

Office of Employment Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

[7] Va. Code § 2.2-3005.

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.