



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11491

Hearing Date: April 22, 2020
Decision Issued: May 11, 2020

PROCEDURAL HISTORY

On August 1, 2019, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory performance. Grievant received a Disciplinary Transfer within the Same Payband.

On August 13, 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 February 3, 2020, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 22, 2019, a hearing was held by audio conference.

APPEARANCES

Grievant
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 for Aging and Rehabilitative Services employs Grievant as a Procurement Officer. Grievant was in the Grants and Contracts section for approximately nine months. She was moved to the General Accounting section for approximately three months. She was then moved to the Procurement section. No evidence of prior active disciplinary action was introduced during the hearing.

In March 2019, the Agency moved Grievant to General Accounting. She and Agency managers signed an Employee Work Profile (EWP) on March 14, 2019. The EWP showed her position number ending in seven.

On August 1, 2019, the Agency imposed a disciplinary transfer within the same payband. The Agency moved Grievant to a different position within a different unit to perform new duties. The Agency did not speak with Grievant about the proposed transfer before transferring Grievant. The Agency asserted it did not change her salary as a result of any change in position.

On February 25, 2020, the Agency notified the Hearing Officer:

The agency has decided to rescind the Written Notice that was issued to the grievant, [Grievant], on August 1, 2019, and will delete the document from her official personnel records on file with the DARS Human Resources office. As stated in the attached Qualification Ruling, "*the grievance qualifies for a hearing to the extent that it challenges the basis of the Written Notice and the appropriateness of the disciplinary transfer*". It is the agency's belief and understanding that with the rescission of the formal disciplinary action issued to [Grievant], this grievance no longer qualifies for hearing. Therefore, we respectfully request a dismissal and/or conclusion of this grievance hearing.

During the hearing, the Agency asserted it had offered to rescind the Written Notice but since Grievant refused the settlement offer, it would proceed with evidence to support the disciplinary action. The Agency presented evidence to support its conclusion that Grievant's work performance was unsatisfactory. The Agency did not present any evidence that would justify a disciplinary transfer.

The Agency drafted an EWP for Grievant's current position as a Procurement Officer I. The EWP was not signed by the Agency. Her position number ended in zero. Grievant sought to have the Agency sign the EWP after gaining her approval. The Agency believed Grievant would be able to succeed as a Procurement Officer I.

CONCLUSIONS OF POLICY

On February 25, 2020, the Agency withdrew the Group I Written Notice and moved for dismissal of the grievance hearing because the Agency believed the matter no longer qualified for hearing. Once an agency withdraws a Written Notice without condition, that withdrawal cannot be undone. Although the Agency asserted at the hearing that its withdrawal was contingent on Grievant settling the grievance prior to hearing, the Agency made no such representation on February 25, 2020. Indeed, it appears the Agency sought dismissal of the grievance by the Hearing Officer because Grievant was not willing to withdraw the grievance. Thus, the Agency's removal of the Written Notice was unilateral and irreversible.

The Agency imposed a disciplinary transfer pursuant to a Group I Written Notice. Grievant had no prior disciplinary action. Even if the Group I Written Notice was upheld, the Agency would not be authorized by the Standards of Conduct to transfer Grievant. The Disciplinary Transfer imposed effective August 1, 2019 must be reversed. Grievant must be restored to the position and duties she held immediately prior to the issuance of the Group I Written Notice.

The Agency asserted that it had discretion to change Grievant's duties pursuant to a reassignment within a payband. The Agency is correct that it has the authority under policy to reassign an employee within a payband and that such authority would allow the Agency to move Grievant to a new position with different work duties. The Agency,

however, did not transfer Grievant on August 1, 2019 pursuant to a reassignment within a payband. The Agency transferred Grievant pursuant to a Group I Written Notice and that transfer was not authorized by policy. Grievant must be reinstated to her position and duties prior to issuance of the Group I Written Notice. Once this occurs, the Agency may reassign Grievant but only in accordance with State Policy and not pursuant to the Group I Written Notice.

Grievant asserted that the Agency failed to provide her with adequate training to perform her work duties. Had she been given proper training, she could have properly performed her duties and avoided the disciplinary action. Now that the Written Notice has been rescinded, Grievant's argument is moot.

Grievant asserted that the Agency failed to sign the EWP for her current position. She wanted a new EWP. Grievant's EWP for her position before the Group I Written Notice was issued was signed by the Agency and Grievant on March 14, 2019. She is being restored to that position.

DHRM Policy 1.40 provides:

Supervisors develop employees' performance plans according to instructions on the Employee Work Profile (EWP) form (or agency form). The plans are signed by the supervisor and then forwarded to the reviewer for approval. Reviewers should ensure that performance plans are appropriate before signing the forms.

Following the reviewer's approval, performance plans are presented to employees for their signatures.

DHRM Policy 1.40 requires agencies to sign EWPs and present them to employees. Nothing in policy permits employees to veto the duties required by agencies by refusing to sign EWPs.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action is **rescinded**. The Agency's disciplinary transfer is **rescinded**. The Agency is **ordered** to restore Grievant to her position and duties immediately prior to the issuance of the Group I Written Notice.

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.