



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11677

Hearing Date: November 8, 2021
Decision Issued: November 29, 2021

PROCEDURAL HISTORY

On January 21, 2021, Grievant was issued a Group II Written Notice of disciplinary action with demotion, transfer, and disciplinary pay reduction for failure to follow policy.

On January 22, 2021, 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 April 12, 2021, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 8, 2021, a hearing was held by remote conference.

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 Corrections employs Grievant as a Corrections Officer at one of its facilities. She had been employed by the Agency as a Corrections Sergeant until her demotion to Corrections Officer. She had been working for the Agency since February 23, 2017.

Grievant had prior active disciplinary action. On December 10, 2020, Grievant received a Group II Written Notice for failure to report to work without notice.

On July 8, 2020, Grievant received a Virginia Uniform Summons for following too closely while operating a motor vehicle. On August 4, 2020, Grievant was found Guilty in Absentia and fined \$30 plus court costs.

As of January 5, 2021, Grievant had not informed the Agency that she received a Virginia Uniform Summons or that she was convicted. The Agency initiated disciplinary action.

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.” 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.” Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”¹

Operating Procedure 040.1 governs Litigation. Section IV(A) provides:

1. Employees must notify their Organizational Unit Head immediately upon any of the following:
 - a. Receipt of a charge or conviction of a criminal offense or a moving traffic violation; notification to be documented on a Criminal Offense/Moving Traffic Violation Notification.

Grievant received a Virginia Uniform Summons on July 8, 2020 and was convicted of a moving violation on August 4, 2020. Grievant did not report these events to the Superintendent, the Organization Unit Head when Grievant reported to work on October 28, 2020 after having been out of work on short-term disability. Grievant violated Operating Procedure 040.1.

“Failure to follow a supervisor’s instructions, perform assigned work, or otherwise comply with applicable established written policy” is a Group II offense.² Grievant failed to comply with Operating Procedure 040.1 thereby justifying the issuance of a Group II Written Notice. With this disciplinary action, Grievant had accumulated two Group II Written Notices. Upon the accumulation of two Group II Written Notices, an agency may remove an employee or in lieu of removal, demote, transfer, and impose a disciplinary pay reduction. Accordingly, the Agency’s decision in this case to demote, transfer, and impose a disciplinary pay reduction must be upheld.

Grievant argued that she was “only human” and forgot to report receipt of the Virginia Uniform Summons. It is not necessary for the Agency to show that Grievant intended to violate the policy. It is only necessary for the Agency to show Grievant violated its policy and the Agency has done so.

Grievant argued she reported the matter to a Lieutenant. The evidence showed that Grievant mentioned to the Lieutenant that she was involved in an accident but not that she had received a Virginia Uniform Summons and had been convicted of a moving traffic violation.

¹ See, Virginia Department of Corrections Operating Procedure 135.1.

² See, Virginia Department of Corrections Operating Procedure 135.1.

Grievant argued that the disciplinary action was too harsh. Although the Agency could have issued lesser disciplinary action, its disciplinary decision in this case is consistent with the Standards of Conduct.

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 ...”³ 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 II Written Notice of disciplinary action with demotion, transfer, and disciplinary pay reduction 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.

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.

³ Va. Code § 2.2-3005.

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.