



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11731

Hearing Date: January 12, 2022
Decision Issued: January 14, 2022

PROCEDURAL HISTORY

On August 3, 2021, Grievant was issued a Group III Written Notice of disciplinary action with removal for unsatisfactory performance and recklessly damaging State property or records.

On August 10, 2021, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On September 7, 2021, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 12, 2022, a hearing was held by remote 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 of Behavioral Health and Developmental Services employed Grievant as a Health Information Management Specialist Senior. She had been employed by the Agency for approximately 15 years. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant's duties included, "assembling closed records and data collection. *** Provide medical record information to authorized persons." She also was responsible for "safeguarding patient records" and following "procedures for archiving inactive records."¹

The Agency used "banker's boxes" to keep business records and patient records.

When the Agency needed to destroy documents, it placed the documents in a bin and then contacted a vendor who came to the Facility to shred the documents.

Grievant worked at a workstation in an office with two interior rooms. Room 105 was for general office operations. Room 105 had a counter with cabinets under the counter. It had a chair and computer where someone could sit and work on top of the

¹ Agency Exhibit I-2.

counter. Room 106 had shelves for storage of boxes. It was a “storage closet.” Room 106 did not have a counter. The Agency used Room 106 to store “active” patient records.

Rooms 105 and 106 were “side by side” in a secured part of the building. When Grievant was at her workstation, she could see the opening of Room 106. If she stood up and walked a few paces down the hallway, she could see Room 105.

Three banker’s boxes were stacked on the floor in Room 106. Inside the boxes were patient records. The Agency was obligated to keep patient records for 50 years. On top of each of the three banker’s boxes in Room 106 were a Library of Virginia Certificate of Records Destruction also known as a “destruction log” to process the records so they could be transported to the Library of Virginia to be stored for several decades. The destruction log showed that the documents had not been reviewed and “signed off” by Agency leadership.

Three banker’s boxes were stacked on the counter in Room 105. Inside the boxes were human resource documents. The boxes were marked with a large “S” on the side of each box.

On July 27, 2021, the Supervisor sent Grievant an email:

Can you please give the driver the media that is on top of the cabinet in the box. It needs to be destroyed. He handles it separately. Also, can you ask him if he can take the 3 boxes in the front room and shred them during this service? They are on the left when you enter the front room on the counter.²

The Driver came to the office and spoke with Grievant. Grievant pointed to the three boxes on the floor in Room 106 and told the Driver to take those boxes and shred the contents. The Driver picked up the three boxes on the floor of Room 106 and took them to a bin. He dumped the contents of the boxes into the bin and the documents were shredded. The Driver took the three empty boxes back to Grievant and placed them next to Grievant’s office.

The Supervisor walked to Grievant’s area and noticed that three banker’s boxes remained on the counter in room 105. She asked Grievant what boxes were given to the Driver. Grievant pointed to the three boxes next to her. The Supervisor observed Library of Virginia forms on each box. The Supervisor realized the contents of the wrong boxes were shredded.

Grievant apologized to the Supervisor. She indicated she did not intend to have the contents of the wrong boxes shredded.

CONCLUSIONS OF POLICY

² Agency Exhibit C.

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.”³ 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.”

Failure to follow a supervisor’s instruction is a Group II offense.⁴ On July 27, 2021, the Supervisor instructed Grievant to ask the Driver to shred three boxes located on a counter in the front room. Grievant failed to comply with Supervisor’s instruction by asking the Driver to shred three boxes on the floor of the storage room. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow a supervisor’s instruction.

In certain extreme circumstances, an offense listed as a Group II Notice may constitute a Group III offense. Agencies may consider any unique impact that a particular offense has on the agency.

The boxes Grievant asked the Driver to shred contained patient records for which the Agency was obligated to retain for 50 years, a time period significantly greater than the time requirement for most government records. The Agency’s patient records could be subject to subpoena at any time. If patient records were subpoenaed and the Agency was unable to produce the records, it could face liability as well as criticism. The Agency has presented sufficient evidence to elevate the Group II offense to a Group III offense because of the unique impact Grievant’s behavior had on the Agency.

Grievant argued that she made a mistake and would never intentionally take action to destroy patient records. There is little doubt that Grievant did not intend to improperly destroy patient records or harm the Agency. The Agency could have corrected Grievant’s behavior with lesser disciplinary action. The Standards of Conduct, however, allow the Agency to discipline an employee for failing to follow a supervisor’s instruction even if the employee did not intend to disregard the instruction.⁵

Grievant argued she did not know which boxes the Supervisor was referring to because the “front room” was the room in front of her workstation and that room was Room 106. In hindsight the Supervisor’s instruction could have been clearer. She could have mentioned the room number and that the boxes had an “S” written on them.

³ The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

⁴ See, Attachment A, DHRM Policy 1.60.

⁵ Nevertheless, the Agency alleged that Grievant recklessly destroyed State records. To meet the standard of recklessness, the Agency would need to present evidence beyond Grievant merely making a mistake as she did in this case. Thus, Grievant did not recklessly destroy State records.

Nevertheless, the Supervisor's instruction was sufficiently clear that Grievant should have been able to identify the appropriate boxes to give to the Driver. The Supervisor's instruction referred to three boxes "on the left" and "on the counter." The three boxes in Room 106 were on the floor. Room 106 did not have a counter. Grievant did not ask for clarification from the Supervisor. Grievant did not look at the boxes and observe the Library of Virginia forms.

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"⁶ 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.

The Agency could have mitigated the disciplinary action based on Grievant's 15 years of service and because she did not intend to disregard the Supervisor's instruction. In addition, if the Supervisor had listed the room numbers in her email, Grievant's error likely would not have occurred. Although these are factors the Agency could have utilized to mitigate the disciplinary action, they are not factors the Hearing Officer can use to reduce the disciplinary action under the Rules for Conducting Grievance Hearings. 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 to the Grievant of a Group III Written Notice of disciplinary action with removal 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:

⁶ Va. Code § 2.2-3005.

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.