



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11746

Hearing Date: February 18, 2022
Decision Issued: March 10, 2022

PROCEDURAL HISTORY

On August 25, 2021, Grievant was issued a Group I Written Notice of disciplinary action for failure to follow policy or instruction.

On September 3, 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 October 25, 2021, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 18, 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 employs Grievant as the Director of Social Work at one of its facilities. She began working for the Agency on September 10, 2019. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant was responsible for completing weekly Social Work Documentation Audits. To complete these reports, Grievant had to review other documents and then enter the information in the Audit. Grievant could complete a report in approximately one hour.

On April 12, 2021, Grievant received a Notice of Needs Improvement/Substandard Performance regarding Grievant's "[f]ailure to meet established guidelines, histories, and notes." Grievant was reminded of her obligation to "turn in the Social Work audit weekly by close of business Tuesdays."¹

On July 1, 2021, the Supervisor met with Grievant and, "[w]e reviewed that it is your responsibility to ensure that the weekly Social Work Documentation audits are

¹ Agency Exhibit p. 119.

complete, accurate, and reflect appropriate documentation.”² Grievant was to write information in several sections of the report including a section called General Medical/Hospital Patients.

Grievant did not include information in the General Medical/Hospital Patients section of the Documentation Audits for July 19, 2021 and July 27, 2021. Grievant did not enter the information because, “I simply forgot to add the information to the form.”³

CONCLUSIONS OF POLICY

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.”⁴ 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.”

“[U]nsatisfactory work performance” is a Group I offense.⁵ In order to prove unsatisfactory work performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

Grievant was assigned responsibility to complete Social Work Documentation Audits. Grievant forgot to enter information into the General Medical/Hospital Patients section of the reports for July 19, 2021 and July 27, 2021. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.

Grievant argued the reports were not significant because they were not required by the Center for Medicare and Medicaid Services. Whether the reports were required by regulation did not affect Grievant’s obligation to complete her assigned work.

Grievant argued that the Supervisor was retaliating against her. Grievant asserted the Supervisor displayed “overly excessive targeting, passive-aggressive, predatory behaviors deliberately enacted towards me since April 2021.”⁶ Grievant argued that the Supervisor engaged in workplace harassment and lacked civility in the workplace.

² Agency Exhibit p. 22.

³ Agency Exhibit p. 6.

⁴ The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

⁵ See Attachment A, DHRM Policy 1.60.

⁶ Agency Exhibit p. 30.

Insufficient evidence was presented to support Grievant's assertions. It is clear that Grievant believes the assertions she is making about the Supervisor. When a supervisor believes an employee is not performing adequately, however, it is likely that the supervisor will devote more attention to the poorly performing employee. That employee may feel improperly targeted even though the supervisor believes additional focus on the employee is needed to improve the employee's performance. Grievant asserted that the Supervisor was "passive-aggressive" by requiring lengthy meetings that should have taken significantly less time. The Hearing Officer is not able to determine the appropriate length of meetings. Grievant asked to meet less frequently with the Supervisor. The Manager indicated he recommended they meet every two weeks instead of weekly. The Hearing Officer does not have the authority to determine how often an employee and supervisor must meet.

The Agency adopted some but not all of Grievant's requests regarding her interaction with the Supervisor. Grievant did not want to have face-to-face meetings with the Supervisor. The Manager concluded employees including Grievant must meet with their supervisors. The Hearing Officer has no authority to alter that decision. The Agency allowed a human resource employee to participate in the meetings to ensure civility and respect. The Agency's decision seems appropriate.

Grievant complained of lack of adequate staffing. The Hearing Officer can assume this assertion is true and yet it does not affect the outcome of this case. The Hearing Officer does not have the authority to order an agency to implement adequate staffing.

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. 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 I Written Notice of disciplinary action is **upheld**. Grievant's request for relief are **denied**.

⁷ Va. Code § 2.2-3005.

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.