



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11757

Hearing Date: February 28, 2022
Decision Issued: March 16, 2022

PROCEDURAL HISTORY

On October 20, 2021, Grievant was issued a Group II Written Notice of disciplinary action with removal for attendance/excessive tardiness, failure to follow instructions and/or policy, and insubordination.

On October 21, 2021, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On November 8, 2021, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 28, 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 University'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:

Norfolk State University employed Grievant as an Education Specialist II. Grievant was responsible for ensuring "the integrity of the testing environment, security of testing materials and compliance with certification requirements of test vendors"¹

Grievant had prior active disciplinary action. On January 21, 2021, Grievant received a Group I Written Notice for excessive absences. On March 15, 2021, Grievant received a Group II Written Notice for excessive absences and failure to follow policy and/or instructions.

On August 2, 2021, the Supervisor sent Grievant an email stating, "[y]ou are also required to call your immediate supervisor, as far in advance as possible, if you are running late or have an unplanned absence, to ensure adequate staff coverage."²

Grievant was scheduled to report to work at 8 a.m. on September 23, 2021. Grievant did not arrive at work until 8:23 a.m. Grievant did not contact the Supervisor or

¹ University Exhibit L.6.

² University Exhibit F.24.

Manager to indicate that she would be arriving late. The University considered Grievant's behavior to be an unexcused tardy.

One of Grievant's duties involved completing an Inventory and Tracking Data sheet. The University had amended the sheet several times. Grievant preferred to use the older versions of the sheet.

On September 13, 2021, the Manager sent Grievant an email stating:

The attached worksheet was initially sent to you in an email on 8/23/2021 (see below). You are required to use the attached worksheet for updating the inventory and tracking data by close of business today. Let me know if you require my guidance on updating the worksheet.³

Grievant disregarded the Manager's instruction and continued to use an outdated version of the Inventory and Tracking Data sheet.

On September 22, 2021, the Supervisor reminded Grievant to use the correct Inventory Request and Tracking Data sheet which was developed to ensure that necessary supplies were ordered for the Unit's operations. Grievant refused to use the correct form and continued to use an alternate form.

When visitors came to the Unit to complete academic testing, they were required to complete a wellness check form to disclose personal information relating to COVID19. The Manager instructed Grievant to have visitors to complete, sign, and date the forms and then submit the completed forms to the Manager for her to store in her files. The University's objective was to help with mitigation of COVID19 on campus. The University did not want any visitors to the Unit to spread COVID19 to other visitors.

On September 20, 2021, the Manager sent Grievant an email:

This counseling memorandum serves as a corrective measure regarding your continued failure to follow supervisor's directives with regard to obtaining wellness check forms from all test candidates prior to admission to the Testing Center. This is required as part of the COVID-19 mitigation strategy for Testing Services. Once again today, you failed to follow established departmental protocol for collecting the forms and submitting them to the Director of Testing Services. You were previously sent a counseling memorandum regarding this matter on 8-23-21 and follow up reminder emails on 9/8/21 and 9/17/21. Your continued failure to obtain the wellness check form prior to admitting test candidates will result in future disciplinary action.⁴

³ University Exhibit G.4.

⁴ University Exhibit H.2.

On September 29, 2021, Grievant was told to provide the Manager with all COVID19 wellness check forms that were collected for exams administered during the week. Grievant failed to comply with this request.

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.”⁵ 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 instructions is a Group II offense.⁶ Grievant was instructed to notify her supervisor if she was going to be late. On September 23, 2021, Grievant reported to work late but did not notify her supervisor in advance. Grievant was instructed to use the current Inventory and Data Tracking sheet. She refused to do so. Grievant was instructed to collect wellness check forms from visitors to the Unit and present them to the Manager. Grievant failed to do so. The University has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow instructions.

Upon the accumulation of two active Group II Written Notice, an agency may remove an employee. Grievant has accumulated two active Group II Written Notices. Accordingly, the University’s decision to remove Grievant must be upheld.

Grievant argued that her late arrival on September 23, 2021 was an isolated incident and that she called the office to inform others that she would be late. The evidence showed Grievant had a history of poor attendance and that she was instructed to contact her immediate supervisor when she might be tardy but failed to do so.

Grievant argued that she sought clarity regarding the new Inventory and Data Tracking sheet but did not receive any response so she continued to use the old tracking sheet. Grievant has not established this defense or explained what additional clarity was necessary such that she was not able to use the new tracking sheet. The evidence showed Grievant could have used the new tracking sheet but chose not to do so.

Grievant argued using the wellness forms to collect information about visitors was a violation of their privacy and contrary to University policy. Grievant claimed she stopped presenting the forms to visitors as advised by the University’s COVID19 task force.

⁵ The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

⁶ See, Attachment A, DHRM Policy 1.60.

Grievant argued she had the right to disregard the Manager's instruction since it was contrary to policy and guidance from the task force. Grievant did not present sufficient evidence to support this assertion. In any event, the decision to disregard using the wellness form would be made by the Manager and not by Grievant.

Grievant argued the University alleged she had engaged in fraternization and that such allegation was untrue. The evidence showed the University made an error when it wrote the wrong offense code on the Written Notice. The University intended to write the code for "insubordination." Without considering the offense code, the Written Notice adequately describes the offenses for which the University alleged Grievant should be disciplined. Although the University did not establish that Grievant was insubordinate, it did establish that Grievant failed to follow a supervisor's instructions thereby justifying the issuance of a Group II Written Notice.

Grievant presented evidence challenging the prior active disciplinary actions. Those notices are no longer open for adjudication and they have not been assigned to the Hearing Officer to determine the merits of those written notices.

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 II Written Notice of disciplinary action with removal is **upheld**.

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.