



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11764

Hearing Date: March 9, 2022
Decision Issued: March 22, 2022

PROCEDURAL HISTORY

On June 28, 2021, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory attendance, unsatisfactory performance and failure to follow policy and instructions. On August 5, 2021, Grievant was issued a Group II Written Notice of disciplinary action for unsatisfactory attendance, unsatisfactory performance and failure to follow policy and instructions.

Grievant timely filed grievances to challenge the Agency's actions. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On November 29, 2021, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 9, 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 a Counselor II at one of its facilities. Grievant is an exempt employee under the Fair Labor Standards Act. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant's work schedule was from 8:30 a.m. to 5 p.m. She was expected to "clock in" by entering the time of her arrival at a KRONOS terminal in the building.

Residents at the Facility participated in group therapy. Grievant was responsible for conducting group therapy at 8:30 a.m. She was to set a positive example for the residents by being on time to each group therapy session.

Group sessions were held in the gym. After clocking in, Grievant typically needed between five and ten minutes to comply with security check procedures and then walk to the gym.

The Agency presented evidence of when Grievant “clocked in” to work and also images of when she entered the gym as follows:

March 26, 2021 - Grievant clocked in at 8:29 a.m.
March 31, 2021 - Grievant clocked in at 8:36 a.m.
April 7, 2021 - Grievant clocked in at 8:33 a.m.
April 16, 2021 - Grievant clocked in at 8:38 a.m.
May 3, 2021 - Grievant clocked in at 8:31 a.m.
May 4, 2021 - Grievant clocked in at 8:32 a.m.
May 5, 2021 - Grievant clocked in at 8:34 a.m.
May 6, 2021 - Grievant clocked in at 8:46 a.m.
May 10, 2021 - Grievant clocked in at 8:57 a.m.
May 12, 2021 - Grievant clocked in at 8:30 a.m.
May 13, 2021 - Grievant clocked in at 8:30 a.m.
May 17, 2021 - Grievant clocked in at 8:34 a.m.
May 18, 2021 - Grievant clocked in at 8:34 a.m.
May 20, 2021 - Grievant clocked in at 8:38 a.m.
May 25, 2021 - Grievant clocked in at 8:55 a.m.
May 26, 2021 - Grievant clocked in at 8:45 a.m. and entered the gym at 8:50 a.m.
July 8, 2021 - Grievant clocked in at 8:25 a.m. and entered the gym at 8:36 a.m.
July 13, 2021 - Grievant clocked in at 8:28 a.m. and entered the gym at 8:41 a.m.
July 14, 2021 - Grievant clocked in at 8:25 a.m. and entered the gym at 8:41 a.m.
July 15, 2021 - Grievant clocked in at 8:25 a.m. and entered the gym at 8:39 a.m.
July 21, 2021 - Grievant clocked in at 8:29 a.m. and entered the gym at 8:36 a.m.

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.”¹ 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.”

Poor attendance is a Group I offense.² Facility Policy 4 governs Attendance and provides that, “[r]egular attendance in accordance with established work schedule is a condition of employment.” An “occurrence” is when an employee reports to work more than six minutes late. Unsatisfactory attendance is when an employee has three or more occurrences in a 90 day period. Facility Policy 4 treats late arrivals of six minute or less

¹ The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

² See, Attachment A, DHRM Policy 1.60.

as being tardy. Facility Policy 18 governs Tardiness and provides that being tardy four times in a two consecutive pay-period timeframe is unacceptable.

Group I Written Notice – June 28, 2021

The Agency took disciplinary action against Grievant for two reasons. First, because Grievant repeatedly arrived at work more than six minutes after the beginning of her 8:30 a.m. work shift. Second, because she failed to conduct group sessions in the gym beginning at 8:30 a.m.

The Agency has established that Grievant's attendance was unsatisfactory because she reported to work after 8:36 a.m. on three or more times in a 90 day period. For example, Grievant reported to work more than six minutes late within a 90 day period on: April 16, 2021, May 6, 2021, May 10, 2021, May 20, 2021, May 25, 2021, and May 26, 2021. Grievant accumulated six occurrences in a 90 day period. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice for unsatisfactory attendance.

The Agency did not establish that Grievant knew she could be disciplined if she failed to report to group therapy in the gym by 8:30 a.m. In order to be in the gym by 8:30 a.m., Grievant's start time was at least five to ten minutes before 8:30 a.m. No evidence was presented that the Agency told Grievant she was obligated to report to work by 8:20 a.m. or 8:25 a.m. prior to May 26, 2021³ and June 8, 2021.

Group II Written Notice – August 5, 2021

In the Group I Written Notice dated June 28, 2021, Grievant was advised she "arrived to work after the start time of her core group" and that doing so was unacceptable.

After June 28, 2021, Grievant reported to work before the beginning of her 8:30 a.m. shift on July 8, 2021, July 13, 2021, July 14, 2021, July 15, 2021, and July 21, 2021. Thus, Grievant was on time to work and did not violate Facility Policies 4 and 18.

Although Grievant reported to work on time for those five days, she did not begin her group therapy by 8:30 a.m. Her work performance was unsatisfactory to the Agency thereby justifying the issuance of a Group I Written Notice.

A Group I Written Notice can be elevated to a Group II Written Notice if an employee's behavior is a repeat offense. The Agency elevated the disciplinary action in this case. The Hearing Officer will not elevate the August 5, 2021 Written Notice from a Group I offense to a Group II offense because the underlying behavior was materially different. In the June 28, 2021 Written Notice, Grievant was disciplined for acting contrary to Facility Policy 4 and 18. The Agency did not establish the reason for disciplinary action

³ In addition, the Supervisor met with Grievant on May 26, 2021 and informed Grievant that reporting late to group therapy adversely impacted the Agency.

included being late for group therapy meetings. In the August 5, 2021 Written Notice, Grievant was disciplined for failing to report to the gym by 8:30 a.m. in order to conduct group therapy. The Agency did not show that Grievant violated Facility Policy 4 and 18. Accordingly, the Group II Written Notice issued August 5, 2021 must be reduced to a Group I Written Notice.

Grievant's Defenses

Grievant argued that the Agency's disciplinary actions were excessive and that the Agency failed to provide progressive disciplinary action. Grievant's assertions fail because the Standards of Conduct encourage agencies to engage in progressive disciplinary action but do not require doing so. The Standards of Conduct authorized the Agency to take disciplinary action based on Grievant's behavior.

Grievant asserted she was subject to "burn out." Grievant did not establish that her burn out caused her to be late to the Facility or prevented her from beginning group therapy at 8:30 a.m.

Mitigation

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"⁴ 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 on June 28, 2021 to the Grievant of a Group I Written Notice of disciplinary action is **upheld**. The Agency's issuance on August 5, 2021 to the Grievant of a Group II Written Notice of disciplinary action is **reduced** to a Group I Written Notice.

⁴ *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.