COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11661

Hearing Date: May 27, 2021
Decision Issued: July 9, 2021

PROCEDURAL HISTORY

On January 28, 2021, Grievant was issued a Group III Written Notice of disciplinary action with removal for unsatisfactory performance, failure to follow policy, and gross negligence.

On February 4, 2021, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On February 22, 2021, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 27, 2021, a hearing was held by remote conference.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's Counsel
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 employed Grievant as a Probation Officer at one of its locations. She began working for the Agency in October 2018. The organizational objective of her position was:

> To enhance public safety in the Commonwealth by investigating, controlling, and supervising adult offenders in a humane cost-efficient manner consistent with sound community correctional principles and constitutional standards.[1]

No evidence of prior active disciplinary action was introduced during the hearing.

The Agency classified probationers as High, Medium, or Low depending on the level of supervision required by Probation Officers. Level High probationers were the most likely to recidivate.

[1] Agency Exhibit p. 30.

Grievant received training regarding how to perform her duties including the Agency's expectation that Grievant comply with Operating Procedures 920.1 and 920.6. She attended a two-day training session for probation officers in February 2020. This training included the topics of processing Level High probationers and initiating waivers.

On September 4, 2019, Grievant received a Notice of Improvement Needed/Substandard Performance.[2] Out of 18 of Grievant's cases reviewed by the Agency, 12 needed further action. Grievant was given 90 days to bring her cases into compliance.

Grievant was assigned initially to serve as a Probation Officer with duties requiring her to go to Court. In order to reduce Grievant's workload, the Agency removed her Court duties in May 2020. Grievant remained a Probation Officer with case management duties but in a different locality. The type of Probationers on her caseload changed. She began supervising Level High Probationers for the first time. Approximately a quarter of her caseload consisted of Level High Probationers. The Chief and Deputy Chief believed that reducing Grievant's duties would enable her to be successful in reaching her performance expectations.

Grievant reported to Mr. J from May 4, 2020 to June 10, 2020 when she began reporting to Ms. H. Mr. J observed Grievant "struggling" with her caseload and believed she would benefit from a change in her work duties.

On May 28, 2020, Grievant received an Interim Employee Evaluation. Grievant was informed that out of 111 case reviews, 59 cases required further action due to missing log note entries, a failure to promptly follow-up on technical violations and/or other forms of case management deficiencies. Grievant was advised to continue her evidence based training and to stay abreast of new VADOC policies and procedures.

Because of the COVID19 pandemic, Probation Officers were not required to have in-person meetings with offenders. From March 16, 2020, all cases were placed in "waiver status." Grievant worked remotely and reported to the office only one or two days per week. On July 15, 2020, that restriction was removed and Probation Officers were expected to resume meeting in-person with Level High Probationers. During monthly staff meetings, the Chief Probation Officer stressed the importance of meeting with probationers.

Grievant began supervising Offender PP on May 4, 2020. Grievant spoke with Offender PP by telephone on May 13, 2020 and June 17, 2020. She was unable to reach Officer PP by telephone on July 30, 2020. Grievant contacted the Offender PP by telephone on August 18, 2020 and September 1, 2020. Grievant did not have personal contact with Offender PP in July, August, October, November, and December 2020 as required for a Level High offender. Offender PP had an active misdemeanor warrant in August 2020 and Grievant addressed the warrant when she spoke with him on September

[2] The Hearing Officer overrules Grievant's objection to this document. It is relevant to the matter in dispute.

1, 2020. She met with Offender PP in person on September 15, 2020 but did not follow-up to determine if the warrant remained active. Grievant could have had Offender PP arrested on September 15, 2020 if the warrant remained active.

On September 22, 2020, Offender PP reported a change of address to a New Location. Grievant requested a transfer of Offender PP to the Agency's office handling probationers in the New Location. On September 28, 2020, Mr. W from the New Location attempted to contact Offender PP, but was unable to do so. Mr. W attempted to contact Offender PP again on November 17, 2020, but was unable to reach.

Grievant completed a CSR for Offender PP on November 19, 2020[3], but she did so without meeting with him.[4]

Grievant was on vacation from November 25, 2020 through December 2, 2020 and had to quarantine for 14 days when she returned to Virginia.

Offender PP was served with a warrant on approximately December 17, 2020 for an offense date of July 9, 2020.

On December 27, 2020, Offender PP kidnapped and abducted a mother and her 12 year old child. On December 27, 2020, Grievant submitted a Probation and Parole After Incident Review in response.

On January 7, 2021, the Agency conducted a review of Grievant's remaining 18 Level High probationer cases. The review showed Grievant failed to meet with Level High probationers monthly or request a waiver. She had no personal contact with approximately 16 of 18 Level High Probationers on one or more months during 2020. Grievant failed to complete a Case Supervision Review (CSR)[5] following a new arrest or pending charges for five probationers. Grievant failed to submit a Major Violation Report for three probationers as required by Operating Procedure 920.6.

CONCLUSIONS OF POLICY

[3] Grievant argued that she was no longer obligated to meet with Offender PP in-person once she initiated transfer of Offender PP to the New Location in September 2020. This assertion is undermined by the fact that Grievant completed a CSR for Offender PP in November 2020. If Grievant believed she was no longer responsible for Offender PP, she would not have attempted to complete a CSR for that probationer. The transfer request was not denied until December 28, 2020.

[4] The Agency alleged Grievant falsified the CSR. The Written Notice does not mention falsification of records as a basis for disciplinary action. Grievant did not have adequate notice of the Agency's additional basis for disciplinary action. Grievant's alleged falsification of the CSR cannot form a basis for disciplinary action.

[5] A CSR can be used to increase a probationer's level of supervision.

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."[6]

Operating Procedure 920.1 governs Community Case Opening, Supervision, and Transfer. This policy sets forth several definitions:

> Personal Contact -- A face-to-face meeting between a P&P Officer and offender.[7]
>
> Transfer Request -- A request from an assigned P&P District to another P&P District to evaluate an offender for transfer of supervision.
>
> Waiver - A temporary variance to the frequency of a case management task during an offender's supervision.

Section II(B) provides:

> All contact with offenders and others directly related to their supervision must be documented in VACORIS log notes. Staff should select as many contact types as necessary to document accordingly.

Section XII(C) sets forth the Minimum Casework Requirements for Each Supervision Level:

> 1. Level High
>
> a. Personal Contacts
>
> i. The P&P Officer will initiate and document contact (phone, personal) with the offender within two working days upon receiving notification that the offender has been placed on community supervision.
>
> ii. Initial interview within five working days upon receiving notification that the offender has been placed on community supervision.
>
> iii. At least one personal contact each calendar month thereafter. ***

[6] See, Virginia Department of Corrections Operating Procedure 135.1.

[7] Grievant argued that personal contact could be conducted by telephone. Operating Procedure 920.1 shows personal contact is "face-to-face."

d. Home Visits

i. One home visit within the first 30 days of case assignment

ii. One home visit, attempted home visit, or field visit each calendar month thereafter; there must be at least one completed home visit per calendar quarter. ***

h. All contacts must be documented in VACORIS log notes.

The Agency argued Grievant should receive a Group III Written Notice for gross negligence. Operating Procedure 135.1 does not provide a general definition of gross negligence. Under Virginia case law, "gross negligence is a degree of negligence showing indifference to another and an utter disregard or prudence that amounts to a complete neglect of the safety of such other person."[8] The Agency has not established Grievant was grossly negligent under Virginia case law. To the extent the phrase "gross negligence" is defined by the DOC Standards of Conduct, it is defined as a Group III offense:

> Gross negligence on the job that results (or could have resulted) in the escape, death, or serious injury of a ward of the State or the death or serious injury of a State employee.

Grievant's failure to follow policy was not gross negligence that could have resulted in escape, death, or serious injury of a ward of the State or the death or serious injury of a State employee.[9]

"Failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with applicable established written policy" is a Group II offense.[10] Grievant failed to comply with policy because she did not consistently make monthly person-to-person contact with Offender PP and several other probationers.

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. (For instance, the potential consequences of a security officer leaving a duty post without permission are likely considerably more serious than if a typical office worker leaves the worksite without permission.)

In this case, each month Grievant failed to have a person-to-person meeting with a probationer she violated policy thereby constituting a "particular offense." None of those

[8] *Cowan v. Hospice Support Care, Inc.*, 268 Va. 482, 487, 603 S.E.2d 916, 918 (2004).

[9] Offender PP's victims were not State wards or employees.

[10] See, Virginia Department of Corrections Operating Procedure 135.1.

violations was an extreme circumstance that would justify elevating a Group II offense to a Group III offense. The Hearing Officer does not believe that if Grievant had met every month person-to-person with Offender PP as required by policy, Offender PP would not have engaged in kidnapping. The Agency asserted that Grievant could have used her authority under Operating Procedure 920.6 to arrest Offender PP. The Agency did not establish that Grievant abused her discretion by failing to have Offender PP arrested. There is no reason to believe that if Grievant had complied with all of the Agency's policies, Offender PP would have refrained from kidnapping.

In EDR Ruling 2020-5003, EDR upheld the Agency's elevation of a Group II offense to a Group III offense because the Agency considered the Grievant's conduct collectively. EDR wrote:

> The agency took the approach that it would consider the grievant's conduct collectively, resulting in a single disciplinary action. The hearing officer has determined that the Standards of Conduct policy does not authorize this approach. However, the hearing officer is incorrect in his interpretation. While the grievant's behavior could be viewed as individual acts and, therefore, assessed and disciplined separately, nothing in the policy prohibits the agency's approach here. (Citations omitted.)[11]

In this case, the Agency considered Grievant's conduct collectively. Not only did she fail to meet with Offender PP in person on a monthly basis, she failed to meet with other Level High probationers and violated other provisions of policy. The Agency could have issued separate Group II Written Notices for failing to comply policy but it chose to consider Grievant's behavior collectively. When Grievant's behavior is considered collectively, there is sufficient evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, the Agency's decision to remove Grievant must be upheld.

Grievant argued that once she sought to transfer Offender PP's supervision she was no longer obligated to supervise him. The Hearing Officer can assume this argument is true but it does not change the conclusion that Grievant failed to properly supervise Offender PP. Grievant failed to conduct a person-to-person meeting with Offender PP prior to Grievant's attempt to transfer Offender PP's supervision to another locality.

Grievant asserted she lacked adequate training to perform her job duties. This assertion is not supported by the evidence. The Agency provided Grievant with adequate

[11] The Hearing Officer's interpretation differs from EDR's interpretation. The Hearing Officer's interpretation is based on the specific text of the Standards of Conduct. EDR does not cite any portion of the Standards of Conduct to support its interpretation. It is unclear whether a State employee would have adequate notice of the basis for disciplinary action beyond the wording of the Standards of Conduct. DHRM Policy 1.60 provides that an agency wishing to elevate the sanction to termination may either elevate the offense (from a Group II to a Group III) if extreme circumstances exist or elevate the sanction based on two or more Group II Written Notices. Extreme circumstances do not exist in this case. Only one Written Notice was issued to Grievant.

training including on-the-job training. The Agency reviewed Grievant's work and provided her with criticism and instruction to complete required training. Grievant was instructed to review the Agency's policies that defined her job duties.

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 …."[12] 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 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:

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.

[12] 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.