



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11594

Hearing Date: January 13, 2021
Decision Issued: February 2, 2021

PROCEDURAL HISTORY

On July 1, 2020, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow policy. The Third Step Respondent reduced the level of discipline to a Group I Written Notice.

On July 22, 2020, 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 he requested a hearing. On September 28, 2020, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 13, 2021, a hearing was held by remote conference.

APPEARANCES

Grievant
Agency Party Designee
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 Corrections employs Grievant as a Surveillance Officer at one of its facilities. He has been employed by the Agency for approximately nine years. No evidence of prior active disciplinary action was introduced during the hearing.

The Offender was required to wear a bracelet so the Agency could monitor his location by GPS at all times. If the Offender tampered with his bracelet, the bracelet sent a signal to the Agency's Monitoring Center. The Offender was a High Level risk who had been returned to the court twice for supervision violations.

Grievant was the On-Call Officer on June 16, 2020. This meant he was to carry an Agency cell phone referred to as the duty phone and respond to any text messages sent to the telephone. Verizon was the service provider for the duty phone. Grievant was required to respond to an alert within one hour. Officer B was the backup officer. Grievant was supposed to contact Officer B if he was unable to perform his duties as the On-Call Officer. Officer B had asked the Supervisor to cover for her. Thus, if Grievant called Officer B to have Officer B cover for Grievant, Officer B would have told him to contact the Supervisor to have the Supervisor cover for Grievant.

Grievant was not feeling well on June 16, 2020 so he notified his supervisor and was allowed to leave work early. He went home at approximately 11 a.m. and took medication that made him feel sleepy. He slept for a little while. At 4:45 p.m., the Supervisor sent Grievant a text message asking if he was doing okay. Grievant replied he was feeling better.

Grievant left his house to travel to the Church which was an approximately 20 minute drive from his home. He arrived at the Church at approximately 6 p.m. Grievant fell asleep while in his vehicle waiting for a couple to arrive.

On June 16, 2020 at 6:56 p.m., the Monitoring Center learned that the Offender may have tampered with his bracelet. The Monitoring Center sent an alert to the duty telephone indicating that the Offender had incurred a bracelet strap tamper.

Grievant was asleep when the text message was received by the duty phone at 6:56 p.m. He was awoken by the couple knocking on his vehicle. He and the couple went inside the Church and met for approximately one hour.

At 7:01 p.m., the Supervisor contacted the Offender and instructed him to report to the Office. The Supervisor also called Grievant's cell phone and duty phone but Grievant did not answer.

At 7:20 p.m., the Chief used an application to determine that the duty phone was located at a Church.

At 7:23 p.m., an employee at the Monitoring Center called Grievant but Grievant did not answer so the employee left a voice message for Grievant.

At approximately 7:55 p.m., the Supervisor arrived at the Office and met with the Offender. The Chief also met with the Offender. The Supervisor indicated that there was no evidence of a bracelet tamper but the bracelet was replaced. At 7:57 p.m., the Chief entered a note in the monitoring system indicating that the alert had been resolved.

At approximately 8:20 p.m. or 8:30 p.m., the Chief checked the location of the duty phone and it was still at the Church.

Grievant did not notice the text alert until 8:16 p.m. He began calling the Monitoring Center and other employees to determine if the alert had cleared. At approximately 8:20 p.m. he called the Monitoring Center and asked if the alert had cleared. He was told the alert cleared so he asked that the alert be marked "resolved." At approximately 8:24 p.m., Grievant called the Supervisor and left a voice message. At approximately 8:34 p.m., Grievant sent the Supervisor a text message.

CONCLUSIONS OF POLICY

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.”¹

“[I]nadequate or unsatisfactory job performance” is a Group I offense.² In order to prove inadequate or unsatisfactory job 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.

On June 16, 2020, Grievant was the On-Call Officer and in possession of the duty phone. The duty phone received a text alert at 6:56 p.m. Grievant was supposed to respond to the alert within one hour. Grievant did not respond to the alert until 8:16 p.m. which was more than an hour after the text alert was sent to the duty phone. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.

Grievant argued that his duty phone did not received the text message at 6:56 p.m. because the Church location did not have cell phone service. Grievant presented evidence of a witness at the Church on June 16, 2020 who testified his Sprint cell phone service was not working at the time the Agency’s text was sent. The Chief testified he drove to the Church in July 2020 and the duty phone received cell phone service at the Church. He drove to a driveway next to the Church and observed a Verizon cell phone tower. He concluded there were not technical difficulties preventing Grievant from receiving the text message at 6:56 p.m. The evidence is sufficient for the Hearing Officer to conclude that Grievant’s duty phone was receiving Verizon cell phone service on June 16, 2020 at 6:56 p.m. If Grievant had looked at the duty phone at that time, he would have observed the text alert from the Monitoring Center.

Removal of On Call Duties

Grievant received a \$1,200 stipend for being assigned on call duties. Grievant’s duties were reassigned “to support a generalize caseload.” Because of the reassignment of duties, Grievant no longer received the stipend. The Agency took this action pursuant to its Written Notice.³ Although the Agency is free to alter an employee’s duties, it may not do so pursuant to a Written Notice. The sanctions for Written Notices by the Standards of Conduct do not include reassignment of duties. Thus, the Agency’s decision to remove

¹ See, Virginia Department of Corrections Operating Procedure 135.1.

² Virginia Department of Corrections Operating Procedure 135.1(V)(B)(4).

³ The Chief wrote on the Written Notice that he did not wish to suspend Grievant but instead would reassign him to different duties.

Grievant's on call duties must be reversed. Grievant must be returned to his on call duty status.

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.

Grievant argued he was asleep when the text message arrived at 6:56 p.m. Although this may explain why Grievant did not respond to the alert, it does not excuse his failure to do so. If Grievant was not feeling well enough to stay awake to receive necessary alerts, he could have asked Officer B or the Supervisor to cover for him. Because he did not do so, he remained responsible for responding to alerts within one hour of the alert.

Grievant argued that another employee missed a text alert and was not disciplined. The evidence showed that this employee did not respond to the text alert because another employee turned off the duty phone volume and failed to restore the full volume prior to handing off the duty phone. The employee was remorseful and apologetic. No evidence was presented showing that the sound on Grievant's duty phone was not working. The Hearing Officer believes the duty phone was working properly with cell phone service when Grievant was supposed to be responding to alerts. There is no reason to believe the Agency singled-out Grievant for disciplinary action.

In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

Retaliation

Grievant alleged the Agency took disciplinary action as a form of retaliation. No credible evidence was presented to support this allegation. The Hearing Officer believes the Agency took disciplinary action against Grievant because he failed to timely respond to the alert sent by the Monitoring Center.

⁴ Va. Code § 2.2-3005.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action is **upheld**. The Agency is **ordered** to restore Grievant's On-Call Officer duties including the stipend he would have otherwise received had his on-call duties not been removed.

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].

^[1] Agencies must request and receive prior approval from EDR before filing a notice of appeal.

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer



COMMONWEALTH of VIRGINIA
Office of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 11594-R

Reconsideration Decision Issued: March 29, 2021

RECONSIDERATION DECISION

On March 26, 2021, the Office of Employment Dispute Resolution issued Ruling 2021-5214 stating:

As such, EDR must remand this matter for the hearing officer to consider whether the reassignment was consistent with policy in accordance with the above discussion.

The Ruling states: “[b]ased on this analysis, EDR is unable to discern from the hearing record a suitable basis to overturn the grievant’s reassignment in this case.”

Although the Hearing Officer does not agree with EDR’s analysis¹, the Hearing Officer will adopt the decision of the Office of Employment Dispute Resolution that the Agency may remove Grievant’s on-call duties and stipend. The Original Hearing Decision is amended to permit the Agency’s reassignment of Grievant to a position with different duties pursuant to a Group I Written Notice.

APPEAL RIGHTS

A hearing officer’s original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

¹ It is clear that the Agency imposed a reassignment to a different position with different duties solely pursuant to the Standards of Conduct and not pursuant to any other policy that might have otherwise authorized such action.

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer