



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11608

Hearing Date: February 2, 2021
Decision Issued: February 3, 2021

PROCEDURAL HISTORY

On August 25, 2020, Grievant was issued a Group II Written Notice of disciplinary action with removal for refusing to work overtime as required.

On September 24, 2020, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On October 19, 2020, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 2, 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 employed Grievant as a Corrections Officer at one of its facilities. Grievant had prior active disciplinary action. On November 15, 2019, Grievant was issued a Group II Written Notice for refusal to work overtime as required. On July 15, 2020, Grievant received a Group II Written Notice with a five workday suspension for refusal to work overtime as required.

On June 8, 2020, the Captain notified Grievant that she was being drafted to work on June 10, 2020, a day she was not originally scheduled to work.

On June 10, 2020, Grievant called the Lieutenant at the Facility and told the Lieutenant she would not be reporting to work as scheduled because she was sick. Grievant told the Lieutenant she had documentation to bring in to work.

When Grievant returned to work, she did not provide the Agency with any documentation justifying her absence on June 10, 2020. She was asked during the disciplinary fact finding process to provide documentation of her absence but did not provide the Agency with any documents during the fact finding process. She did not provide any documents during the hearing process.

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

Operating Procedure 110.2 governs Hours of Work and Leaves of Absence. Section(IV)(A) provides, “[a]ll employees are required to work overtime as needed.” Section IV(F) authorizes the Organizational Unit Head (Warden) to require documentation from a medical provider to allow sick leave.

On June 8, 2020, Grievant was notified of her obligation to work overtime on June 10, 2020. On June 10, 2020, Grievant did not report to work. She failed to provide documents from a medical provider confirming her absence due to illness. The Agency construed Grievant’s claim of being sick to be unsubstantiated. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for refusing to work overtime as needed. Upon the issuance of two active Group II Written Notices, an agency may remove an employee. Grievant has accumulated three active Group II Written Notices thereby justifying the Agency’s decision to remove her from employment.

Grievant asserted the Agency did not provide her with a properly dated and signed Written Notice. She disputed the validity of prior active disciplinary action. She claimed her needed documentation had been destroyed.

The evidence showed that the Agency notified Grievant of her removal and the basis for the disciplinary action by issuance of a Written Notice. Grievant was adequately informed of the allegations against her. Grievant’s prior disciplinary action was not a matter that could be litigated before this Hearing Officer. Grievant filed to file grievances challenging the prior written notices when she had the opportunity to do so. Grievant did not present any testimony or documents during the hearing and there is no basis for the Hearing Officer to conclude Grievant had documentation from a medical provider explaining her absence on June 10, 2020 as being due to illness.

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 ...”² Under the *Rules for Conducting Grievance Hearings*, “[a] hearing officer must give

¹ See, Virginia Department of Corrections Operating Procedure 135.1.

² Va. Code § 2.2-3005.

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**.

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.