



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11614

Hearing Date: January 27, 2021
Decision Issued: February 16, 2021

PROCEDURAL HISTORY

On September 9, 2020, Grievant was issued a Group II Written Notice of disciplinary action with removal for failure to follow a supervisor's instructions.

On October 7, 2020, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On October 26, 2020, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 27, 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 an Employee Ombudsman at one of its locations. She had been employed by the Agency for approximately three years. Grievant had prior active disciplinary action. On May 27, 2020, Grievant received a Group I Written Notice for violating DHRM Policy 1.05. On August 28, 2020, Grievant received a Group II Written Notice for abuse of State time.

The COVID-19 pandemic affected Grievant's job duties. In April 2020, Grievant could no longer complete job site visits and the number of grievances she administered decreased. The Supervisor asked Grievant to review the grievance files to determine which files should be retained and which files should be destroyed in accordance with the Library of Virginia's Record Retention and Disposition Schedule. The Supervisor asked Grievant to scan the retained documents into an employee grievance subfolder of the Agency's computer system.

On June 15, 2020, the Supervisor sent Grievant an email asking Grievant to:

Review last year's grievances and assess whether or not there are any trends.¹

¹ Agency Exhibit p. 49.

Grievant was not working while on short-term disability leave from June 30, 2020 to July 24, 2020.

The Supervisor observed in Grievant's office several opened box files containing grievances. Grievant had transferred files into three "banker's box" storage boxes and prepared them for destruction. She scanned approximately 116 files onto the computer drive. Grievant should have been able to accomplish this work within two weeks.

On August 3, 2020, the Supervisor sent Grievant an email asking for the status of her assignment. The Supervisor noted, "[t]here are still several boxes in your office that we've discussed on more than one occasion."²

Grievant replied, "[i]t's completed, just have to wait for the shredder truck. [Ms. B] at [Facility D] advised that she is hoping one will be here in the near future but that she would let me know when it's scheduled."³

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."⁴

"[I]nadequate or unsatisfactory job performance" is a Group I offense.⁵ 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. Grievant was instructed to determine which grievance files should be retained and which files should be destroyed. Grievant was also instructed to scan the retained documents into the Agency's computer system. Grievant separated files and scanned files but did not do so in a timely manner or in a preferred format. Grievant was ready to destroy files but did not do so in a timely manner. She did not have to rely on another employee at Facility D to shred the documents timely. Her behavior rose to the level of a Group I offense.

² Agency Exhibit p. 52.

³ Agency Exhibit p. 54.

⁴ See, Virginia Department of Corrections Operating Procedure 135.1.

⁵ Virginia Department of Corrections Operating Procedure 135.1(V)(B)(4).

“Failure to follow a supervisor’s instructions, perform assigned work, or otherwise comply with applicable established written policy” is a Group II offense.⁶ The Supervisor instructed Grievant to review last year’s grievances and assess whether or not there were any trends. Grievant did not make any effort to accomplish this task thereby acting contrary to the Supervisor’s instruction. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice. Upon the accumulation of two Group II Written Notices, an agency may remove an employee. Grievant has accumulated two Group II Written Notices. Accordingly, the Agency’s decision to remove Grievant must be upheld.

Grievant disputed the Agency’s allegations but did not present any testimony or other evidence to refute those allegations. The Agency has presented sufficient evidence to support its disciplinary action.

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**.

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.

⁶ See, Virginia Department of Corrections Operating Procedure 135.1.

⁷ Va. Code § 2.2-3005.

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.