

DECISION OF HEARING OFFICER
IN RE:

CASE NO. 11565
HEARING DATE: JANUARY 5, 2021
DECISION ISSUED: JANUARY 26, 2021

PROCEDURAL HISTORY

On May 4, 2020, a Written Notice¹ was issued for matters occurring on March 13, 2020, March 16, 2020, March 23, 2020, and April 24, 2020. The second step resolution was on June 10, 2020². A Hearing Officer was appointed July 13, 2020. The prehearing conference was conducted on July 21, 2020. The hearing was set for August 27, 2020, which was continued to September 22, 2020, and continued again to October 27, 2020, which was also continued. A second prehearing phone conference was conducted November 5, 2020 and the hearing date was set and completed on January 5, 2021.

APPEARANCES

Agency Representative
Agency Advocate
Two (2) Agency Witnesses
Grievant as Witness
Two (2) Grievant Witnesses

ISSUES

1. Whether Grievant violated Agency policy 13 for failure to follow instructions and/or policy.
2. Whether Grievant missed deadline dates on March 13, March 16, March 23, and April 24 of 2020.
3. Whether mitigating factors were considered.
4. Whether a Group II discipline was appropriate.

BURDEN OF PROOF

In disciplinary actions, the burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary actions against the Grievant were warranted and appropriate under the circumstances. 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. Grievant has the burden of proving any affirmative defenses raised by Grievant. GPM §5.8.

¹ Agency Exhibit 12

² Grievant Exhibit 1

APPLICABLE POLICY

This hearing is held in compliance with Virginia Code § 2.2-3000 et seq the Rules for Conducting Grievances effective July 1, 2012 and the Grievance Procedure Manual (GPM) effective July 1, 2020.

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “includes acts of minor misconduct that require formal disciplinary action.” Group II offenses “include acts of misconduct of a more serious and/or repeat nature that requires formal disciplinary action.” Group III offenses “include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.” More than one (1) active Group II offense may be combined to warrant termination³.

FINDING OF FACTS

After reviewing the evidence presented and observing the demeanor of each witness the Hearing Officer makes the following findings of fact:

Grievant is a 20-year state employee and has worked for this Agency the last of those 6 years to present. Grievant has no previous history of any disciplinary actions. Her most current evaluations were satisfactory⁴.

In November of 2019, the Assistant Vice President of the Agency requested staff to produce a Supervisors Training program. The initial deadline for having the content portion completed was March 1, 2020⁵. The deadline was changed more than once. On March 6, 2020 Grievant’s supervisor sent an email regarding deadlines⁶. One deadline for a draft of content was March 13, 2020. On March 13th employees were advised of the “Stay-At-Home” Order. Employees began work from home on March 16th. On March 13th Grievant requested an extension to March 16. Although Grievant did submit the information at 8:44 am on March 16th, Grievant’s supervisor felt it was not received early enough in the day⁷. Additional deadlines for completion of the project were extended. As late as April 29, 2020 there was ongoing discussion about the Supervisors Training and its components but no admonishment that Grievant had missed deadline dates. Grievant continued to work on the project⁸ but as of the Written Notice date the requested information in the form expected was not produced by Grievant.

Another task was to advise various Department Heads that they would be dealing with employee tax information. Grievant was to train those involved and to also obtain a Memorandum of Understanding (MOU) signed by the Department Head that the information to which they would be privy was confidential. The MOU was to be sent out by March 23, 2020. Grievant did make this distribution on March 23rd⁹. However, the MOU had “tracking” information (notes of proposed changes) left on the document.

³ Agency Exhibit 13; *Standards of Conduct, Policy 1.60*

⁴ Grievant Exhibit 4

⁵ Testimony of Agency Witness

⁶ Agency Exhibit 6

⁷ Agency Exhibit 7

⁸ Agency Exhibit 9

⁹ Agency Exhibit 9

Grievant's supervisor advised Grievant to resend it without the notes¹⁰. Grievant responded she believed there were other material changes to be made. There was no response from supervisor. Grievant again sent an email on April 5th¹¹. The supervisor responded it was okay and grievant was directed to proceed to resend. Then on April 6 Supervisor said she would make further review. There is no evidence Grievant received any further directions after that time. Therefore, Grievant did not do additional work. On May 8, 2020 Supervisor mailed the MOU's.

OPINION

The evidence presented in this case is difficult to follow. What work was expected and on what particular date was not well communicated. Priorities were sometimes but not always discussed. Side conversations regarding other projects occurred.

The March 13 deadline for Supervisor Training draft was effectively met on March 16.

It does appear that Grievant did not meet the March 16, 2020 deadline to submit a Communication plan. March 16 was the first work at home day. It appears from emails that deadlines were extended although it is difficult from the evidence to know the change dates. Agency did state, however, that as of the Written Notice (May 4, 2020) the communication plan was not submitted.

In regard to the I-9 project, Grievant did send out the necessary form (MOU) by March 23. However, the form was apparently sent in draft form with "tracking" (notes for changes) still on the document. On March 23rd Grievant's supervisor asked Grievant to re-mail the document without the "tracking". On March 23rd Grievant responded there were still other changes to be made. Supervisor did not respond. On April 5th Supervisor told Grievant it was okay and to re-mail the MOU. On April 6th Supervisor told Grievant that supervisor would do additional review before mailing. Grievant was never given any further direction from her supervisor and therefore did not do additional work without instruction. Supervisor mailed the MOU herself on May 8th.

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

¹⁰ Agency Exhibit 5

¹¹ Agency Exhibit 7

¹² Va. Code §2.2-3005

disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive.

More specifically, the *Rules* provide that in disciplinary grievances, if the hearing officer finds that:

- (i) the employee engaged in the behavior described in the Written Notice,
- (ii) the behavior constituted misconduct, and
- (iii) the agency's discipline was consistent with law and policy, the agency's discipline must be upheld and may not be mitigated, unless under the record evidence, the discipline exceeds the limits of reasonableness.¹³

Grievant submitted evidence of her past good performance record. Grievant submitted a favorable letter from a former employer. Deadlines had been set prior to the Governor's Stay-At-Home Order.

It is notable that Agency did not consider mitigation in the Written Notice. Agency also did not discuss mitigation consideration in oral testimony. It would be difficult to uphold Agency's position on mitigation if they presented none.

In summary, Grievant did not conform to deadline instructions as expected in regard to aspects of the Supervisor Training Project. Grievant did appropriately await direction regarding the I-9 project which direction Grievant did not receive, and, therefore, should not be held accountable. Grievant's good past record is given consideration as Agency failed to make any notice of it.

DECISION

For the above reasons, the Group II disciplinary action is **REDUCED** to a Group I effective back to the date of May 4, 2020.

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.

¹³ *Rules for Conducting Grievance Hearings* § VI(B)(1)

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].



Sondra K. Alan, Hearing Officer

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