COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11516

Hearing Date: October 21, 2020
Decision Issued: March 9, 2021

PROCEDURAL HISTORY

On December 10, 2019, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory work performance.

On January 9, 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 she requested a hearing. On May 11, 2020, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 21, 2020, 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 Psychology Associate Senior at one of its facilities. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant suffers from a disease that periodically prevents her from working. It caused her to lose over 40 pounds from December 2017 to April 2018. Grievant did not ask the Supervisor or the Manager for an accommodation. Although Agency managers were aware of Grievant's disease, it is unclear to what extent Agency managers were aware how her disease impacted her work other than she was sometimes absent from work.

Grievant was expected to keep a case load of between 14 and 18 inmates. She was to draft a "progress note" after meeting with each inmate individually or in a group setting. Grievant was to complete a Treatment Discharge Summary for inmates who were discharged.

On May 6, 2019, Grievant received a Notice of Needs Improvement/Substandard Performance to address issues related to documentation.[1] The memorandum informed Grievant that she should document each health care encounter with an inmate by the end of her shift. She was to complete a Treatment Discharge Summary when an active participant was discharged from the program for any reason. She was to complete a Treatment Discharge Summary form "30-45 days prior to the offender's release."[2]

The Supervisor typically met with Grievant on a weekly basis to discuss Grievant's cases and work product. The Supervisor kept notes of the content of their meetings.

On September 4, 2019, the Supervisor notified Grievant that the Supervisor had reviewed Grievant's files and observed that Grievant had met with inmates but not placed some notes of the meetings in the inmates' files. For example, the Supervisor informed Grievant that Offender JD was seen during the week of August 26, 2019 but the most recent note for Offender JD was dated July 23, 2019.

During a meeting with the Supervisor on October 3, 2019, Grievant said that her case documentation was up-to-date.

The Supervisor conducted a review of Grievant's case files on November 26, 2019. The Supervisor's review showed that Grievant's case files had missing documents.

On November 22, 2019, Grievant told the Supervisor she had not completed seven progress notes from November 2019. Grievant said she had not completed five Interdisciplinary Team Reassessments.

The Supervisor's November 26, 2019 review showed eleven missing progress notes and twelve missing Interdisciplinary Team Reassessments. For example, Offender JD's progress notes had not been updated since July 23, 2019.

On November 22, 2019, the Supervisor notified Grievant that Offender JJ was to be released on December 4, 2019. Grievant said she had forgotten that Offender JJ's date had changed from December 24, 2019 and that his discharge summary was not completed. During the Supervisor's review of treatment team notes on November 26, 2019, the Supervisor reviewed the August treatment team notes for Offender JJ. Grievant had changed Offender JJ's release date to December 4, 2019 and was aware of the change. Grievant submitted a Treatment Discharge Summary for Offender JJ on November 25, 2019 which was due November 4, 2019.

[1] Grievant contested the accuracy of the facts underlying the Notice of Needs Improvement/Substandard Performance. She filed a grievance challenging the counseling on June 3, 2019. At the First Step, the Supervisor acknowledged that Grievant was not responsible for some of the notes but other notes of Grievant remained missing. Whether the Notice was justified by the facts is not significant. The Notice is significant only to the extent it notified Grievant of the Agency's expectations going forward.
[2] Agency Exhibit p. 65.

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."[3]

"[I]nadequate or unsatisfactory job performance" is a Group I offense.[4] 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.

Operating Procedure 730.1 (V)(16(e) and (g) provide:

> Individual Progress Notes should be completed [b]y the end of the workday of an offender being seen by a Psychology Associate or member of the Treatment Team.
>
> A group note should be completed for each offender as soon as possible after the conclusion of the group and prior to the end of the workday.

Operating Procedure 735.2 requires a Psychology Associate to prepare a Treatment Discharge Summary when an offender completed a residential treatment program. The summary was to be completed between 30 and 45 days prior to the release date.

Operating Procedure 701.3 (IV)(A)(6) provides, "[a]ll staff members are required to complete their documentation during their shifts."

The Supervisor's review on November 26, 2019 showed that Grievant had not timely written notes for several offenders within her case load. For example, Grievant met with Offender JD on August 26, 2019 but the last progress note in Offender JD's file was for July 23, 2019. Grievant did not timely issue a Treatment Discharge Summary for Offender JJ. Offender JJ was released on December 4, 2019. Grievant wrote Offender JJ's Treatment Discharge Summary on November 25, 2019 which was not at least 30 to 45 days prior to Offender JJ's release date. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.

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

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

Grievant argued her Unit was short-staffed. Although the Unit lacked sufficient staff at various times, it does not appear that the Unit was short-staffed during the time period for which Grievant was not able to complete all of her work duties. For example, on June 28, 2019, Dr. M wrote that the Unit was "currently fully staffed."

Grievant argued she was not allowed sufficient time to catch up her work. It is difficult to quantify how much time is necessary to complete work. Grievant complained to the Supervisor that her workload was excessive. She also informed Dr. M on June 28, 2019 of her concerns about workload. The Agency modified Grievant's duties in September 2019. The Supervisor testified that she used to perform duties similar to Grievant's duties and was able to perform those duties within required time restrictions. When Grievant was absent for work, she did not have any group sessions and did not have to generate any new work. The Supervisor met with Grievant nearly every week to discuss Grievant's case load and work status. These meetings forced Grievant to be aware of her case load and establish a path to ensure her work was completely within the Agency's expectations. Grievant did not work hours in addition to her regular shift or request permission to perform overtime work. These are all factors to be weighed to determine whether Grievant's workload was excessive. Grievant has not established that her workload was so excessive that she not able to complete her duties on time.

Grievant argued she was not given sufficient time to respond to the Agency's proposed disciplinary action. The Agency provided Grievant with an opportunity to respond although she did not believe the amount of time was sufficient. To the extent Grievant was not given an adequate opportunity to respond, this defect is cured by the hearing process. Grievant had an adequate opportunity to present any documents and testimony during the hearing process.

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 …."[5] 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 claimed the disciplinary action should be mitigated. Grievant argued she was assigned additional duties including having to train two new employees. Grievant stated that the Supervisor "may not have verbally directed me to train the new staff

[5] Va. Code § 2.2-3005.

members." Grievant assumed those duties because she desired to help her co-workers. Although her desire to help her team is admirable, it is not a mitigating circumstance under the Rules for Conducting Grievance Hearings.

Grievant asserted that her illness affected her work performance. Grievant did not seek an accommodation from the Agency regarding her illness. It is not clear that Grievant fully explained to the Supervisor that she had any limitations affecting her work performance. On November 22, 2019, Grievant told the Supervisor she fell behind due to being out sick. The Supervisor asked Grievant to cancel her sessions for November 25, 2019 and focus solely on the discharge summary until it was complete. Grievant did not present the opinion of any medical professional that she was unable timely complete her work duties due to a medical illness. The evidence is not sufficient for the Hearing Officer to conclude that Grievant's illness was a mitigating circumstance.

Grievant argued that the Agency inconsistently applied disciplinary action. Grievant presented evidence showing that other Psychology Associate IIs had difficulty completing their duties on time. Grievant presented evidence of an employee who did not always have her Treatment Discharge Summaries filed timely yet the employee was not disciplined. The Supervisor testified that the other employees were more efficient and timely than Grievant. Grievant received a written counseling and then failed to materially improve her work performance. Grievant did not establish that the other employees were also counseled and then failed to improve their work performance. The Hearing Officer cannot conclude that Grievant was singled out for disciplinary action. 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 I Written Notice of disciplinary action 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.