



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11581

Hearing Date: November 5, 2020
Decision Issued: March 24, 2021

PROCEDURAL HISTORY

On July 8, 2020, Grievant was issued a Group II Written Notice of disciplinary action with a two workday suspension for unsatisfactory performance and failure to follow instructions. On July 13, 2020, Grievant was issued a Group II Written Notice of disciplinary action with removal for failure to obtain approval to work overtime.

Grievant timely filed grievances challenging the Agency's actions. The matter advanced to hearing. On August 10, 2020, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 5, 2020, a hearing was held by remote conference.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Representative
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notices?
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 Time Computation Specialist at one of its Facilities. He had been working for the Agency for approximately five years. No evidence of prior active disciplinary action was introduced during the hearing.

The Unit received letters from inmate family members asking for calculation of an inmate's estimated release date (ERD). The Unit tracked these requests using an electronic tracking system called CRM. Requests made within three months of the ERD were called "hot cases" or "hot files." Grievant was one of several employees responsible for responding to letter requests in a timely manner. When the Unit received letters, the letters were placed in a cabinet. Letters placed in the second drawer of the cabinet were assigned to Grievant. Once a letter was assigned to Grievant, he had 30 days to respond. Grievant was responsible for computing time updates for these files. This date was typically generated using the VACORIS system.

On April 8, 2019, Grievant received a Notice of Improvement Needed/Substandard Performance. Grievant was instructed:

You will be responsible for responding to time comp related emails and portal cases daily.

Failure to show improvement will result in the issuance of a Group II Written Notice for Unsatisfactory Work Performance and for Failure to Follow Policy/Supervisor's Instructions.

On August 15, 2019, Grievant sent the Unit Manager an email stating, "[u]nloading these old cases with these old dates looks odd, but at the time they were put aside, that was the practice because they were deemed non-essential due to being duplicates, releases, or resolved through course. Many months ago, I told you I was pulling these non-essential letters aside to upload in the future when things were back on track"¹

On August 25, 2019, the Unit Manager sent Grievant an email, "we've been fully staffed since late April and have been progressing steadily; so there should be no cases lingering that far out. *** I am finding cases that you created in July and did not resolve when the offender was released in May. Those cases should have been resolved in July when you created the case."²

On March 24, 2020, the Unit Manager sent an email to staff including Grievant stating:

During this period of flexible scheduling and telework, no overtime hours are being authorized. If you have already completed overtime hours for this week, no further time is authorized after this point; and previous authorizations for this week are rescinded.³

On March 16, 2020, Grievant fell ill. Grievant returned to work on March 30, 2020. Other employees performed Grievant's work while he was out of work.

Grievant began telecommuting April 1, 2020.

On April 8, 2020 at 9:42 a.m., the Unit Manager sent Grievant an email stating:

Looking at the cases that are in your name, there are 107 cases as of right now. *** I realize that you were out for 2 weeks, but I should not be seeing cases with dates that were due prior to you being out. Please get these cleaned up ASAP.⁴

¹ Agency Exhibit p. 5.

² Agency Exhibit p. 6.

³ Agency Exhibit p. 69.

⁴ Agency Exhibit p. 10.

At 11:15 a.m., the Unit Manager added:

I am also aware that a couple of those cases that have due dates in September were created and uploaded in January – well before you went out on March 16. *** That is why it is important to look at your assigned cases daily. *** You admitted during that staff meeting that you were delving back into “research” of the Not DOC and other cases. Let me remind you that that is not your function. Leave research to the Court and Legal and focus on the task at hand.⁵

On April 9, 2020 at 11:22 a.m., the Unit Manager sent Grievant an email:

In the meantime, go thru your past dues, respond to and resolve the ones you can, even if you need to re-print the scanned letter. If we find the original letter, it will just go in the box as a duplicate/resolved case.⁶

The volume of mail received by the Unit in April 2020 tripled because the Governor granted the Agency the authority to release inmates in response to the COVID19 pandemic. Inmates who were within a year of being released could become eligible for immediate release.

The Unit Manager typically audited case files on a quarterly basis.

Grievant created a case for Offender L on September 29, 2019. He did not assign the case. Offender L was released on December 16, 2019. The case was closed on June 9, 2020.

Grievant created a case for Offender W on December 27, 2019. He did not assign the case. Offender W was released on January 3, 2020. The case remained open as of June 20, 2020.

Offender H was released on December 19, 2019. Grievant created a case for Offender H on January 24, 2020 which was after the offender had been released. The case remained open as of June 10, 2020.

The mother of Offender Hi sent an email which was received on April 9, 2020 and was assigned to Grievant on April 13, 2020. Grievant was supposed to respond to the email by May 13, 2020, but he did not respond at all.

Offender G was released on April 16, 2020. Grievant created a case for Offender G on May 26, 2020 which was after the offender had been released.

⁵ Agency Exhibit p. 11.

⁶ Agency Exhibit p. 13.

Offender J was released on April 16, 2020. Grievant created a case for Offender J on May 6, 2020 which was after the offender had been released.

On May 3, 2020, the Unit Manager sent staff including Grievant an email stating, “[i]f the offender is only requesting to be released because of the virus, no case needs to be created.”⁷

On May 12, 2020, the Agency received a request that Offender P be released early due to COVID19. Grievant created a case for Offender P on May 26, 2020.

On April 24, 2020, the Agency received a request that Offender B be released early due to COVID19. Grievant created a case for Offender B on May 6, 2020.

Grievant is a non-exempt employee under the Fair Labor Standards Act and must be paid for working overtime.

On July 6, 2020, Grievant met with the Unit Manager and HR Officer as part of the due process for the Group II Written Notice later issued on July 8, 2020. Grievant said he had worked 19 hours over the holiday weekend from July 3, 2020 to July 5, 2020. Grievant processed cases. Grievant did not obtain permission from a supervisor to work overtime hours. If Grievant had asked to work overtime, his request would have been denied because the Agency was operating with a “budget freeze.”

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.”⁸

“Failure to follow a supervisor’s instructions, perform assigned work, or otherwise comply with applicable established written policy” is a Group II offense.⁹

Group II Written Notice

The Unit Manager instructed Grievant:

⁷ Agency Exhibit p. 53.

⁸ See, Virginia Department of Corrections Operating Procedure 135.1.

⁹ See, Virginia Department of Corrections Operating Procedure 135.1.

- There should be no cases lingering.
- Those cases should have been resolved in July when you created the case.
- Please get these cleaned up ASAP.
- Go thru your past dues, respond to and resolve the ones you can.
- If the offender is only requesting to be released because of the virus, no case needs to be created.

Grievant repeatedly disregarded the Unit Manager's instructions. Grievant created but did not immediately resolve cases for offenders who had already been released. Grievant had cases that remained open without a reason. Grievant created cases for offenders who were only asking to be released early because of COVID19. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow a supervisor's instructions.

Grievant argued that he complied with the Unit Manager's instructions and his work performance was not more than unsatisfactory performance, a Group I offense. Although each of Grievant's mistakes was unsatisfactory performance, the Unit Manager identified those type of mistakes and instructed Grievant not to repeat them. The Agency has presented sufficient evidence to show that Grievant failed to follow a supervisor's instructions.

Grievant argued the Unit's mail volume tripled in April 2020 thereby affecting his work performance. The evidence showed that some of Grievant's poor performance occurred prior to April 2020. His overall performance reflected a lack of attention to detail not an overwhelming workload that caused delays.

Group II Written Notice

Operating Procedure 110.2 governs Overtime and Schedule Adjustments. Section IV(C) provides:

Non-exempt employees must have prior authorization from their supervisors to work overtime.

Grievant worked 19 overtime hours from July 3, 2020 through July 5, 2020. Grievant did not have the permission of a supervisor to work more hours than required by his regular shift.

Grievant argued he was volunteering his time and did not intend to violate the Agency's policy. Grievant admitted he was working to complete his work assignments. His admissions showed he was not volunteering his time. The Agency was obligated to pay Grievant for his work performed regardless of whether Grievant claimed to have "volunteered" his services.

Accumulation of Disciplinary Action

Upon the accumulation of two Group II Written Notices, an agency may remove an employee. Grievant has accumulated two Group II Written Notices. The Agency's decision to remove Grievant from employment must be upheld.

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"¹⁰ 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 for failure to follow a supervisor's instructions is **upheld**. The Agency's issuance to the Grievant of a Group II Written Notice for failure to follow policy 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

¹⁰ Va. Code § 2.2-3005.

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].

Carl Wilson Schmidt, Esq.
Hearing Officer

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