



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 12121

Hearing Date: May 21, 2024

Decision Issued: May 22, 2024

PROCEDURAL HISTORY

On March 25, 2024, Grievant was issued a Group II Written Notice of disciplinary action with removal for failure to report to work without notice and excessive tardiness.

On April 3, 2024, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On April 22, 2024, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 21, 2024, a hearing was held by remote conference. Grievant was notified of the hearing date and time but did not appear.

APPEARANCES

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 Virginia Employment Commission employed Grievant as a Customer Relations Analyst. She had been employed by the Agency since January 2012.

Grievant had prior active disciplinary action. On December 7, 2023, Grievant received a Group I Written Notice for excessive tardiness. On January 11, 2024, Grievant received a Group II Written Notice for excessive tardiness. On March 4, 2024, Grievant received a Group II Written Notice for excessive tardiness.

Grievant was expected to report to work at 8 a.m. If she was unable to report to work or would be late, she was expected to notify the Supervisor prior to the beginning of her shift.

On March 13, 2024, Grievant was scheduled to work. She did not report to work. She did not notify the Supervisor before her shift began or have permission to be absent.

On March 20, 2024, Grievant did not report to work at 8 a.m. as scheduled. At 8:35 a.m., the Supervisor noticed that Grievant had not reported to work. The Supervisor called Grievant's telephone number but Grievant did not answer. At 8:43 a.m., Grievant called the Supervisor and said that she overslept. Grievant reported to work at 9:45 a.m. The

Agency concluded oversleeping was not a sufficient reason to mitigate Grievant's tardiness.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "generally have a minor impact on agency business operations but still require intervention."¹ Group II offenses include, "acts of misconduct, violations of policy, or performance of a more serious nature that significantly impact the agency's services and operations." Group III offenses include, "acts of misconduct, violations of policy, or performance that is of a most serious nature and significantly impacts agency operations."

Failure to report to work without proper notice is a Group II offense. Tardiness is a Group I offense that can be elevated to a Group II offense if repeated.² On March 13, 2024, Grievant did not report to work and did not notify her Supervisor that she would be absent from work. On March 20, 2024, Grievant did not report to work at 8 a.m. She did not notify her Supervisor that she would be tardy. Grievant had prior disciplinary action for tardiness. 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 "[d]ischarge" an employee. Grievant has accumulated one Group I Written Notice and three Group II Written Notices. Accordingly, the Agency's decision to remove Grievant from employment must be upheld.

Grievant did not appear at the hearing and did not present any defenses.

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"³ 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.

¹ DHRM Policy 1.60, Attachment A.

² DHRM Policy 1.60, Attachment A.

³ *Va. Code § 2.2-3005.*

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].

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

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer