



COMMONWEALTH OF VIRGINIA

Department Of Human Resource Management

Office of Employment Dispute Resolution

DECISION OF HEARING OFFICER

In re:

Case number: 12012

Hearing Date: November 1, 2023

Decision Issued: January 10, 2024

PROCEDURAL HISTORY

On August 10, 2023, Grievant was issued a Group II Written Notice with termination for unsatisfactory work performance and failure to follow instructions and/or policy. The Written Notice described the offense as

[Grievant] has continued to perform unsatisfactorily between 06/06/2023 – 08/04/2023 and has repeatedly failed to follow policy and/or instructions after being issued a 60 day [Performance Improvement Plan] on 06/06/2023. Since the PIP was issued, she continues to fail to follow [Office] policy and procedures when working cases in PP03 work state. For example, documenting “will continue” (or some variation) on accounts and never continuing to work the account(s). Due to her failure to follow work procedures, her work then falls on her co-workers for completion. She also continues to fail at submitting time in Cardinal by close of business the day she returns to work and fails at entering time correctly with repeated emails from her [Team Leader].¹

On September 4, 2023, Grievant timely filed a grievance to challenge the Agency’s action. The matter advanced to hearing. On September 18, 2023, the Office of Employment Dispute Resolution assigned this matter to the Hearing Officer. On November 1, 2023, a hearing was held at a Department of Taxation facility in Richmond, Virginia.

¹ Agency Ex. 17.

APPEARANCES

Grievant
Agency's Counsel
Agency Party Designee
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Group II 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:

Prior to her dismissal from employment, Grievant was a Senior Legal Collector with the Agency. Grievant worked for the Agency for more than 13 years.

Grievant worked for an Office in the Agency that was responsible for collecting debts on behalf of the Commonwealth's courts. The Office included a C-Team and a P-Team. In October 2022, the Agency transferred Grievant from the C-Team to the P-Team. This was a lateral transfer with no change in pay to Grievant.

The primary difference between the C-Team and the P-Team was that the collectors on the C-Team primarily communicated with the clerks of the courts regarding the debts that needed collecting whereas the collectors on the P-Team primarily communicated with the debtors who owed the courts. Manager described the work on C-Team and P-Team as being very similar in nature with many of the same procedures, but

that the P-Team required stricter adherence to procedures and working of accounts identified as PP03.²

As a senior legal collector on the P-Team, Grievant was responsible for working accounts, answering questions from other collectors on the team, handling escalated calls and reviewing and working on "PP03 accounts." PP03 (or Payment Plan 03) refers to the identifier in the data management system used by the Office for accounts in the defaulted work state.³

An account goes into a defaulted work state when a debtor misses a payment or pays less than the agreed upon amount of a payment arrangement or wage assignment. Accounts that go into the defaulted work state or PP03 must then be reviewed by a senior legal collector to determine why the account was routed by the system into PP03. When the senior legal collector has completed work on the account, it should be routed out of PP03 and into another status in the account data management system.⁴ If work is not completed on an account in the PP03 queue, then the account stays in the PP03 queue until work on the account is completed and it is routed out of PP03.

Grievant was expected to work on approximately 12-15 accounts per hour that she was working. Those accounts would be a combination of accounts pulled from a work list and accounts worked pursuant to incoming phone calls.⁵ The expectation was that Grievant was to work the accounts completely, including conducting name searches, verifying balance or wages, and adding any account specific documentation prior to closing out of the account.⁶ Collectors were advised that they could document "will continue" on an account if they were unable to complete work on an account at that moment because they were at the end of their shift or waiting for information from someone else, but they were expected to come back to the account and complete work on it when they returned to work or received the information.

Agency witnesses testified that the problem created by a collector documenting "will continue" (or a similar notation) on an account in PP03 and then not following up to complete their work on the account, was that until the work on the account was completed and the account was re-routed, it would remain in the PP03 queue and come up for review by another senior collector.⁷

The productivity of the collectors, including Grievant, was reviewed through a weekly report that captured any account on which a collector had taken any activity. Thus, Grievant would be credited in the report for working any account that she had "touched" even if she had not completed work on the account.⁸

Team Lead supervised Grievant when she joined the P-Team. Team Lead worked with the Agency's trainer to arrange for Grievant to receive training when Grievant first

² Hearing Recording at 2:38:40-2:39:14.

³ Hearing Recording at 22:32-23:10.

⁴ Hearing Recording at 23:10-23:45.

⁵ Hearing Recording at 29:24-30:00.

⁶ Hearing Recording at 28:46-29:23.

⁷ Hearing Recording at 31:00-32:20, 1:12:20-1:14:16, 2:39:10-2:40:08.

⁸ Hearing Recording at 30:08-30:59.

joined the P-Team. Team Lead testified that the training included training on working accounts in PP03 as well as the appropriate use of noting "will continue" on an account.⁹ Grievant described the training as refresher training that lasted a couple of hours on a single day.

Team Lead started noticing issues with Grievant's performance in November 2022. Team Lead began observing that Grievant was not properly reporting leave that was taken in the Agency's time and leave system. Team Lead also began observing that Grievant was not completing work on accounts as expected.

The Agency uses a time and leave management system referred to as Cardinal. Agency employees are expected to enter leave and over-time worked into Cardinal for review and approval.

Team Lead kept a spreadsheet of all time for P-Team staff members and then reviewed her staff's Cardinal time sheets weekly to confirm that leave was being entered accurately. Team Lead began noticing that Grievant was taking leave but not entering that leave into Cardinal. Initially Team Lead would send email reminders to Grievant that she needed to enter her leave into Cardinal in a timely fashion, but the behavior continued.

The Agency issued to Grievant a written counseling memo regarding her leave management.¹⁰ Director testified that he and Manager met with Grievant to discuss the memo.¹¹ The counseling memo was dated November 15, 2022 and advised Grievant that "[o]n August 22, 2022 you were out of the office for 8 work hours; on October 20, 2022 you were out of the office for 8 work hours; and on October 21, 2022 you were out of the office for 8 work hours for a total of 24 work hours. Your current Vacation and Personal Leave balances total 21.89 hours. The result is that you will be in Leave Without Pay (LWOP) for 2.11 hours." The memo went on to note that "[o]n several occasions, both verbally and in writing, you have been requested to update your time by your Team Lead, Manager and Director" and that Grievant "[had] not fully complied with those requests."

The November 15, 2022 counseling memo directed Grievant to

- Notify your Team Lead or Manager of any upcoming appointments with as much advance notice as possible;
- You must enter your time into the time system (Cardinal) weekly and no later than close of business each Tuesday;
- You must enter your time into the time system (Cardinal) for any unplanned absence no later than close of business on the day of your return to work.¹²

Manager issued a counseling memorandum to Grievant dated December 9, 2022, regarding "Non adherence to Taxation and Court Debt Collections policies and procedures." Manager testified that she and Director met with Grievant regarding the

⁹ Hearing Recording at 33:48-34:40.

¹⁰ Agency Ex. 3.

¹¹ Hearing Recording at 1:19:09-1:19:48.

¹² Agency Ex. 3.

memorandum, but that Grievant did not want to sign the memorandum.¹³ The memorandum included information about Grievant's leave without pay status and the following information regarding "PP03 Workstate":

The 1st week of November your Team Lead noticed a few cases noted as (will continue) ... but the work was never completed. Emails were sent [to] you on 11/3 (2 cases), 11/4 (2 cases), 11/7 (3 cases) and 11/9 (1 case) requesting the cases be completed. In our staff meeting all collectors were advised they could only write (will continue) on a case if it was 15 minutes before going home or you are waiting on information from someone else. After the guidelines were given you still noted cases as (will continue) on 12/1/22 (4 cases) and 12/7 10 and the case work has not been completed.¹⁴

The December 9, 2022 memorandum also set forth the Agency's expectation going forward as follows:

Perform all assigned duties and responsibilities following guidelines and procedures. Follow instructions from management and guidance from Human Resources. Respond to all emails within 24 hours or the next day if you are absent. Complete timesheets by close of business on Mondays or the next day if you are absent. Resolve work-related issues through established business processes written by [Office] guidelines. Advise your Team Lead when you are unable to work your schedule or want to work later than the hours you are scheduled. Turn in leave when you do not work a 40 hour work week. Failure to follow guidelines, procedures or instructions from management is unacceptable and may result in disciplinary actions. If you have questions about any of the policies or guidelines, please notify your manager so you can receive clarification as needed.¹⁵

On January 30, 2023, the Agency issued a Group II written notice of disciplinary action to Grievant for unsatisfactory performance and failure to follow instruction and/or policy. The written notice described the offense as:

[Grievant] has repeatedly failed to ... follow policy and/or instruction and unsatisfactorily performed on several occasions between 12/12/22 – 1/06/23. ... During this time period, [Grievant] failed to submit leave in a timely manner after requests from her Team Leader and was not in adherence to the [Office] leave submission procedures. [Grievant] has also failed to respond to her TL's requests for updates on issues with Finesse in which she did not follow protocol to report these issues. As a core responsibility of her job, she has also failed to log into Finesse on numerous occasions to take calls and had to be instructed by her TL to do so. To date, [Grievant] has not responded to a request from her TL on 1/04/23, to discuss a customer complaint.¹⁶

¹³ Hearing recording at 2:47:23-2:48:30; 2:48:59-2:49:06.

¹⁴ Agency Ex. 4.

¹⁵ Agency Ex. 4.

¹⁶ Agency Ex. 5.

On May 17, 2023, the Agency issued a Group II written notice of disciplinary action to Grievant for unsatisfactory performance and failure to follow instruction and/or policy with a five-day suspension. The written notice described the offenses as:

[Grievant] has continued to perform unsatisfactorily between 2/02/23 – 3/23/23 and has repeatedly failed to follow policy and/or instructions. During this time period, she has failed to follow [Office] policy and procedures when working cases in PP03 workstate. Due to her failure to follow work procedures, her work has had to be completed by her fellow co-workers. She has also failed to submit leave in a timely manner even after prior disciplinary action and repeated requests from her TL, while continuing to be out of compliance with the [Office] leave submission procedures. The following time has not been submitted in March: 3/15 – 1.3 vacation + 6.7 regular hours worked 3/16 – 0.1 hours of leave + 7.9 hours regular hours worked 3/21 – 1.2 hours of leave + 6.8 regular hours worked.¹⁷

When Grievant returned from the five-day suspension, the Agency issued a Performance Improvement Plan dated June 6, 2023, to Grievant.¹⁸ The specific areas for Grievant to improve were identified as “Attendance and Punctuality,” “Collection Production,” and “Facilitate Staff.” With respect to “Attendance and Punctuality” the performance improvement plan required Grievant to submit leave into Cardinal by the close of business on the day Grievant returned to work; call the sick line prior to Grievant’s scheduled start time if Grievant was arriving late or unable to report to work as scheduled; and report to work on time as scheduled.¹⁹

With respect to the area of “Collection Production,” the performance improvement plan required Grievant to complete case work the same day unless the account was worked after 4:45 pm. If the account was worked after 4:45, Grievant was to complete the case the morning Grievant returned. If the account was a PP03 account, Grievant was directed to work it according to PP03 procedures (especially if it’s a matter of resetting/defaulting an arrangement). Grievant also was instructed to work accounts according to policies and procedures: name search, call notes, verified/unverified documentation and generating any correspondence that’s needed (or email to 059G if that’s the court in question) once the call had concluded.²⁰

In order to improve with respect to the area of “Facilitate Staff,” the performance improvement plan directed Grievant to: respond to emails from any Team Lead within 24 hours, report system issues to [business analyst] and Team Lead immediately as they occur; and to notify a member of [Office] leadership/management at the facility of the system issues that were reported to [business analyst] and team before her shift ended.²¹

¹⁷ Agency Ex. 6.

¹⁸ Agency Ex. 7.

¹⁹ Agency Ex. 7.

²⁰ Agency Ex. 7.

²¹ Agency Ex. 7.

The performance improvement plan noted that Grievant would be “re-evaluated in 60 days” and would meet with Team Lead and HR Business Partner every week to follow-up on the action items set forth in the plan.²²

Following the issuance of the Performance Improvement Plan, HR Business Partner and Director, Manager, and/or Team Lead, met weekly with Grievant to review her progress with the Performance Improvement Plan. HR Business Partner prepared a summary of each meeting, including identified areas where Grievant was not meeting expectations. The meeting summary was provided to Grievant after each meeting for Grievant’s review and comment.²³

The first check-in meeting occurred on June 16, 2023. The summary of the meeting noted that Grievant had not followed policies with some of the accounts she had worked. The summary also noted among the action items for Grievant was that she was to “[l]og into Cardinal and enter/submit time by end of the day, June 16th for the following dates ...May 30, ... June 2, ... June 5.”

The next check-in meeting occurred on June 23, 2023. The summary noted under “Expectations/Clarifications” that “[Grievant] needs to enter her time correctly; she was provided with an excel spreadsheet on 6/20 to keep track of her time before she updates it to Cardinal and she needs to do that. An email was sent to [Grievant] on 6/20 at 3:40 pm to correct two of her entries and enter days where she worked over 8 hours. As of 9:30 AM on 6/22, those corrections have yet to be made.”²⁴

The summary of the June 30, 2023 Performance Improvement Plan check-in meeting noted that Grievant had not updated Cardinal for the week ending June 23 and included a reminder that the Performance Improvement Plan instructed Grievant to “[s]ubmit leave time in Cardinal by close of business the day you return to work.” The summary also noted that Grievant was continuing to use “will continue” or similar notation inappropriately because Grievant was not going back and finishing work on the accounts as her notation of “will continue” indicated.²⁵ The Agency noted the occasions when Grievant had not completed work after documenting she “will continue” on the account, specifically:

- 6/22: Based on the report, there was an account where [Grievant] documented ‘will continue’/no other accounts’ at 3:36 pm; went back into the account at 5:02 pm and documented ‘still working’ yet she didn’t complete the account the following business day
- 6/23: There was another account where [Grievant] documented ‘still reviewing’ at 1:07 pm and ‘will continue’ at 4:47 pm but never continued working the account.²⁶

The June 30, 2023 meeting summary also included a reminder to Grievant that pursuant to the Performance Improvement Plan, she was to “complete case work the

²² Agency Ex. 7.

²³ Agency Ex. 9-13.

²⁴ Agency Ex. 9.

²⁵ Agency Ex. 10.

²⁶ Agency Ex. 10.

same day unless the account is worked after 4:45.” If the account was worked after 4:45, Grievant was to “complete the case the morning after [she] returned.” If the account was a PP03 account, Grievant was reminded that the account “needs to be worked according to PP03 procedures (especially if it’s a matter of resetting/defaulting an arrangement).”²⁷

The summary of the July 7, 2023 Performance Improvement Plan check-in meeting noted that Grievant had not submitted time in Cardinal for June 21, June 22 and June 27. The summary also noted that Grievant was still noting “will continue” or some variation on accounts and then not going back and completing work on those accounts, “[t]he dates for those incidents are ...: 6/27 (three different accounts); 6/29 (one account).”²⁸

The summary of the July 14, 2023 Performance Improvement Plan check-in meeting, noted that Grievant was still noting “will continue” or some variation on accounts and then not going back and completing work on those accounts.²⁹ The summary noted that accounts Grievant had worked were sent back by the PP03 team for, among other reasons, “will continue noted only” and “documented will continue 07/05 and 07/06.”³⁰ The Agency further noted that on July 6 Grievant had documented that she was “working” on the account but that she had at the time they pulled the data, not yet gone back to finish work on the account.³¹

The summary of the July 24, 2023 Performance Improvement Plan check-in meeting, noted that Grievant had not submitted time in Cardinal for July 10. The summary also noted that Grievant was still using “will continue” incorrectly and noting “will continue” or some variation on accounts and then not going back and completing work on those accounts.³² Specifically, the Agency noted that on July 12, “will continue” was noted on an account at 5:01 pm and the account was finished by another staff member on July 13. Also on July 12, the Agency determined that Grievant documented “will continue” on an account at 1:04 pm and never went back to the account, another staff member worked the account on July 14. The Agency determined that Grievant documented “will continue” on an account at 5:10 pm on July 13 and then had not gone back into the account as of 4:00 pm on July 20.³³

On August 10, 2023, the Agency issued to Grievant a Group II Written Notice with termination for unsatisfactory work performance and failure to follow instructions and/or policy.³⁴

²⁷ Agency Ex. 10.

²⁸ Agency Ex. 11.

²⁹ Agency Ex. 12.

³⁰ Agency Ex. 12.

³¹ Agency Ex. 12.

³² Agency Ex. 13.

³³ Agency Ex. 13.

³⁴ Agency Ex. 17.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action."³⁵ Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

Whether Grievant engaged in the behavior and whether the behavior constituted misconduct

Attendance and Punctuality – Reporting Leave in Cardinal

Grievant was instructed in the November 15, 2022 Counseling Memo that she "must enter [her] time into the time system (Cardinal) weekly and no later than close of business each Tuesday" and she "must enter [her] time into the time system (Cardinal) for any unplanned absence no later than close of business on the day of [her] return to work."³⁶ The December 9, 2022 memorandum instructed Grievant to "[c]omplete timesheets by close of business on Mondays or the next day if you are absent."³⁷ The Performance Improvement Plan also reiterated the Agency's expectations for Grievant to ensure that Grievant's time and leave were appropriately managed. The Performance Improvement Plan instructed Grievant to submit leave into Cardinal by close of business the day she returned to work.³⁸ When Grievant continued to fail to timely and accurately enter her time and leave into Cardinal, the Agency provided Grievant with a spreadsheet to help Grievant keep track of her time before she updated her time into Cardinal.³⁹ Grievant, however, continued to fail to timely and accurately enter her time and leave into Cardinal.

Grievant repeatedly failed to timely enter time and leave into Cardinal and the Agency identified Grievant's continued failure to follow instructions and policy related to Grievant's time and leave submissions during the Performance Improvement Plan check-in meetings as follows:

The June 23, 2023 meeting summary noted that "[Grievant] needs to enter her time correctly; she was provided with an excel spreadsheet on 6/20 to keep track of her time before she updates it to Cardinal and she needs to do that. An email was sent to [Grievant] on 6/20 at 3:40 pm to correct two of her entries and enter days where she worked over 8 hours. As of 9:30 AM on 6/22, those corrections have yet to be made."⁴⁰

³⁵ The Department of Human Resources Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

³⁶ Agency Ex. 3.

³⁷ Agency Ex. 4.

³⁸ Agency Ex. 7.

³⁹ Agency Ex. 9.

⁴⁰ Agency Ex. 9.

The June 30, 2023 meeting summary noted that Grievant had not updated Cardinal for the week ending June 23.⁴¹

The July 7, 2023 meeting summary noted that Grievant had not submitted time and overtime in Cardinal for June 21, June 22 and June 27.⁴²

The July 24, 2023 meeting summary noted that Grievant had not submitted overtime in Cardinal for July 10.⁴³

Grievant asserted, without specificity, that one of the last instances identified by the Agency of Grievant's failure to timely submit time or leave was due to Grievant waiting to have a question answered about the appropriate code to use for that particular time entry. Grievant did not identify the date or incident with specificity or when she had posed the question as to the appropriate code to use. Assuming Grievant is referring to the Agency's assertion in the July 24, 2023 Performance Improvement Plan meeting that Grievant had not submitted time in Cardinal for July 10 and accepting Grievant's assertion as true, one occasion where Grievant's time and leave entry were late for an arguably excusable reason, does not relieve Grievant from the other occasions during the performance improvement period when she repeatedly failed to follow instructions and policy by failing to timely and accurately enter her time and leave into Cardinal.

Working Cases in PP03 Work State – "Will continue"

As early as December 2022, the Agency advised Grievant of its concerns that Grievant was inappropriately noting "will continue" on accounts and then not going back to complete work on those accounts.⁴⁴ The Performance Improvement Plan instructed Grievant to: "Complete case work the same day unless the account is worked after 4:45 pm. If so, complete the case the morning you return. If the account is a PP03 account, it needs to be worked according to PP03 procedures (especially if it's a matter of resetting/defaulting an arrangement).⁴⁵ Grievant also was instructed to "[w]ork accounts according to policies and procedures: name search, call notes, verified/unverified documentation and generating any correspondence that's needed (or email to 059G if that's the court in question)."⁴⁶

Grievant repeatedly failed to complete work on accounts as she had been instructed to do. The Agency identified Grievant's continued failure to follow instructions related to Grievant failing to complete work on accounts where she had indicated "will continue" during the Performance Improvement Plan check-in meetings as follows:

The June 30, 2023 meeting summary noted that Grievant "has been informed numerous times that she is to finish accounts."⁴⁷ The Agency went

⁴¹ Agency Ex. 10.

⁴² Agency Ex. 11.

⁴³ Agency Ex. 13.

⁴⁴ Agency Ex. 4.

⁴⁵ Agency Ex. 7.

⁴⁶ Agency Ex. 7.

⁴⁷ Agency Ex. 10.

on to note the occasions when Grievant had not done so after documenting she “will continue” on the account, specifically:

- 6/22: Based on the report, there was an account where [Grievant] documented ‘will continue’/‘no other accounts’ at 3:36 pm; went back into the account at 5:02 pm and documented ‘still working’ yet she didn’t complete the account the following business day
- 6/23: There was another account where [Grievant] documented ‘still reviewing’ at 1:07 pm and ‘will continue’ at 4:47 pm but never continued working the account.⁴⁸

The July 7, 2023 meeting summary noted that “[a]ccounts are still being documented ‘will continue’ (or some variation) and not completed. The dates for those incidents are ...: 6/27 (three different accounts); 6/29 (one account).”⁴⁹

The July 14, 2023 meeting summary included an admonition from the Agency that Grievant needed to stop documenting on accounts “will continue” if there was no intent to continue working on the account. The Agency also noted that accounts Grievant had worked were sent back by the PP03 team for, among other reasons, “will continue noted only” and “documented will continue 07/05 and 07/06.”⁵⁰ The Agency further noted that on July 6 Grievant had documented that she was “working” on the account but that she had at the time they pulled the data, not yet gone back to finish work on the account.⁵¹

On July 24, 2023, the Agency continued to document Grievant’s failure to follow instructions with respect to Grievant’s notation of “will continue” on an account and then never completing her work on the account.⁵² Specifically, the Agency noted that on July 12, “will continue” was noted on an account at 5:01 pm and the account was finished by another staff member on July 13. Also on July 12, the Agency determined that Grievant documented “will continue” on an account at 1:04 pm and never went back to the account, another staff member worked the account on July 14. The Agency determined that Grievant documented “will continue” on an account at 5:10 pm on July 13 and then had not gone back into the account as of 4:00 pm on July 20.⁵³

Grievant argued that she was moved into a new position in October 2022 and then started receiving counseling in November 2022 when she only had been in the new position for a short period of time and with limited training. Arguably, Grievant’s recent move to the P-Team may have been an initial contributing factor to the issues related to her work on accounts that resulted in her receiving the counseling memorandum in December 2022. It does not, however, excuse Grievant’s continued failure to follow

⁴⁸ Agency Ex. 10.

⁴⁹ Agency Ex. 11.

⁵⁰ Agency Ex. 12.

⁵¹ Agency Ex. 12.

⁵² Agency Ex. 13.

⁵³ Agency Ex. 13.

instruction and policy after she received the counseling, written notice and performance improvement plan that followed.

Grievant asserted that she experienced significant problems with her computer beginning as early as 2017 or 2018 and continuing through the period at issue in this case. Grievant argued that her computer problems impacted her ability to perform her work and caused her to have significant information security concerns related to the Agency's computer network and Agency operations. Although Grievant's computer problems would have been frustrating, Grievant has not demonstrated that her computer problems caused her to repeatedly fail to enter her time and leave in Cardinal as instructed. Grievant also has not demonstrated that the computer problems she experienced over an extended period of time caused her to repeatedly use the "will continue" notation on accounts and fail to later follow up and complete work on those accounts as she had been repeatedly instructed to do.

Grievant argued that the six-week period provided for improvement by the Performance Improvement Plan was insufficient to allow time for her to actually improve her performance. Grievant's argument is not persuasive. Grievant had been advised at least five months before the Performance Improvement Plan (as early as November 15, 2022 and December 9, 2022) and on multiple occasions thereafter, of the Agency's expectations that Grievant follow policies and instructions for time and leave management as well as for the appropriate use of the "will continue" notation on an account and completing work on the account.

The Agency has met its burden of proving by a preponderance of the evidence that Grievant failed to follow instructions and/or policy when she (i) repeatedly failed to timely enter time and leave into Cardinal and (ii) repeatedly continued to note "will continue" on accounts and then failed to complete work on those accounts.

Whether the Agency's discipline was consistent with law and policy

Failure to follow instructions and/or policy is a Group II offense. An accumulation of two active Group II written notices will normally warrant termination.

Grievant had two active prior Group II written notices for similar conduct. In addition to these written notices, Grievant had been given counseling and a Performance Improvement Plan advising her that she needed to follow the Agency's policies for time and leave entry. Grievant also had been given counseling, a written notice and a Performance Improvement Plan instructing her to follow instructions for working accounts in the PP03 work state and specifically to only document "will continue" on an account under certain circumstances and then only if she would then go back and finish working on the account. Unfortunately, Grievant continued to repeatedly fail to follow the instructions she was given.

The Agency's discipline was consistent with law and policy. The Agency has met its burden.

Mitigation

Virginia 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....”⁵⁴ 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 Grievant of a Group II Written Notice with termination for unsatisfactory work performance and failure to follow instructions and/or policy 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.

⁵⁴ Va. Code § 2.2-3005.

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.⁵⁵

Angela Jenkins

Angela L. Jenkins, Esq.
Hearing Officer

⁵⁵ 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.