

DECISION OF HEARING OFFICER

IN RE: CASE NO. 12025

HEARING DATE: 2-28-2024

DECISION ISSUED: 03-27-24

PROCEDURAL HISTORY

Grievant was charged with an offense date of “2023 and ongoing”. On September 6, 2023, Grievant was given notice of Agency’s concerns about Grievant’s work ethic and that disciplinary action would take place on September 7, 2023. Grievant responded to the concerns at the September 6th meeting.¹ Grievant received two (2) Written Notices, a Group II for tardiness and a Group II for unsatisfactory performance.² Grievant filed an appeal and a Hearing Officer was appointed October 23, 2023. A pre-hearing conference was scheduled for November 8, 2023. A virtual hearing was scheduled for November 27, 2023. The hearing was rescheduled several times while the parties attempted settlement. The hearing was scheduled for January 26, 2024; however, the hearing time was used to instruct the parties regarding the process involved in having a hearing. The matter was heard virtually February 28, 2024.

APPEARANCES

Agency Advocate

Agency Representative as Witness

Four other Agency Witnesses

Grievant pro se

Grievant as Witness

ISSUES

- 1) Whether grievant violated Policy Codes 01 and 11.
- 2) Whether grievance actions meet the definition of Policy 01 and 11.³
- 3) Whether Group II and Group III disciplines with termination were appropriate disciplines.
- 4) Whether there were mitigating circumstances.

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 16

² Agency Exhibit 10 and 11

³ Agency Exhibit 01 – Excessive Tardiness and Agency Exhibit 11 - Unsatisfactory Performance

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, 2017

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 termination.⁴

FINDING OF FACTS

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

Grievant had previously worked for the Agency. Her latest term of employment was from January 3, 2022, until her discharge on September 7, 2023. Grievant had no negative disciplinary actions during her employment prior to the present disciplinary action. During the time that Grievant was employed, her father became seriously ill. On April 27, 2023, Grievant filed a request for intermittent FMLA. It was granted on May 10, 2023.⁵ From May 10th to August 7, 2023, Grievant had 106 hours of FMLA leave.

About July of 2022 Grievant’s attendance at work appeared more sporadic than when first employed.⁶ There were two group emails regarding attendance reminders sent during this time.⁷ As Grievant was absent from work, Grievant’s work piled up, no doubt making it more difficult to stay on task. There was no party filled in while Grievant was absent as it would have been impossible to hire a part-time and intermittent employee who would also be well versed in Grievant’s tasks.

Grievant had several job assignments of which she was aware as shown in Exhibit 15. Some additional tasks may have been added. From March 2023 through July 2023 there were e-mail conversations sent to Grievant regarding work needing to be done.⁸ There was a group of emails on March 6, 2023, July 12th, and 13th 2023, and August 25, 2023, to and from Grievant regarding work not completed. Grievant was made aware there were problems with her production level.

Witnesses stated some refunds to students had been up to six months late. It was stated by witnesses that being out of compliance with government deadlines like Pell Grants could have some serious effects on the college’s financial concerns.⁹ It appears Grievant either did not know how to properly process requests or was too overwhelmed with her workload to pay attention to deadlines. The Agency did not see the situation getting better. Grievant’s superior offered to place Grievant in another position but

⁴ Agency Exhibit 11

⁵ Agency Exhibit 17

⁶ Agency Exhibit 19

⁷ Agency Exhibit 1 and 2

⁸ Agency Exhibit 3, 4, 6, 7 and 8

⁹ Agency Exhibit 6, 7 and 9

management in that division denied a position for Grievant.¹⁰ Grievant was terminated on September 7, 2023, for unsatisfactory performance and excessive tardiness.¹¹

DISCUSSION

Grievant showed great concern that she had not been given more warning that her performance was jeopardizing her position. Grievant felt she should have had more assistance and counsel. Grievant expressed that she believed she could and should be rehired by the Agency. Grievant believed that a Group III discipline stayed on her personnel record for four years. She believed that meant that the agency would rehire her after four years. The Agency could have rehired Grievant two weeks after she was terminated or never offered her a job. A four-year discipline on a personnel file has no relevance as to a terminated employee, nor does it imply the Agency would or would not consider rehiring.

Grievant received several memos about time sensitive refunds that were not processed on time. Grievant was aware she was to follow the agency's policy on attendance. Grievant's absences were those in excess of her FMLA leave. The FMLA leave time was not counted against her being otherwise tardy.

OPINION

A Hearing Officer is a neutral person who is expected to listen in an unbiased manner to both parties' opinions. While the Hearing Officer may agree that a matter feels unfair to the Grievant, the Hearing Officer is bound by the rules governing the Hearing Officer's decision. The Agency is given deference to be able to manage its operations and employees.

Hearing Officers may order appropriate remedies but may not grant relief that is inconsistent with law, policy, or the grievance procedure.

In hearings contesting formal discipline, if the Hearing Officer finds that (i) the employee engages 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 Agency's discipline exceeds the limits of reasonableness.¹²

Further, a Hearing Officer is not a "super-personnel officer." Therefore, in providing any remedy, the Hearing Officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy.¹³

Grievant's testimony was not supported by facts. Grievant produced no witnesses and submitted no evidence. It was in large an emotional argument. While the Agency could have offered counseling and given reduced discipline, the Agency had no obligation to do so. Grievant produced no documentary evidence that the Agency was under a requirement to act in a way other than they chose to do. Grievant's record did show significant times she was not at work other than those protected by FMLA leaves.

¹⁰ Agency Exhibit 13

¹¹ Agency Exhibit 10 and 11

¹² Grievance Procedural Manual § 5.9, revised 7/2020

¹³ Rules for Conducting Grievance Hearings, VI A, revised 7/2020

Grievant's record did show there were significant problems with completing work in a timely fashion. Agency needs only show their actions by a preponderance of the evidence.

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 the rules established by the Department of Human Resource Management..." 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 recorded 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:

- 1) whether an employee had notice of the rule, how the Agency interprets the rule, and/or the possible consequences of not complying with the rule.
- 2) whether the disciplinary is consistent with the Agency's treatment of other similarly situated employees or
- 3) whether the penalty otherwise exceeds the limits of reasonableness under all the relevant circumstances.¹⁴

While Grievant's earlier performance showed no problems with her employment, Grievant was only employed from January 2022 to September 2023. There was no evidence of significant mitigating factors. The Agency did attempt to provide Grievant with another position before termination.

DECISION

For the reasons stated above this Hearing Officer does find Grievant failed to meet job expectations and had excessive tardiness. Termination with a Group II and Group III are consistent with termination. The Group II and III disciplines with termination are UPHELD.

Sondra K. Alan
Hearing Officer

¹⁴ Rules for Conducting Grievance Hearings, IV B 2, page 17, revised 7/2020

APPEAL RIGHTS

You may request an administrative review by EDR within **fifteen calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EDR within fifteen 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 EEDR before filing a notice of appeal.