COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11423

Hearing Date: December 12, 2019
Decision Issued: December 30, 2019

PROCEDURAL HISTORY

On June 11, 2019, Grievant was issued a Group III written Notice of disciplinary action with demotion, disciplinary pay reduction, and transfer for violating Operating Procedure 110.2, Operating Procedure 135.1, and Operating Procedure 135.3.

On July 4, 2019, 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 he requested a hearing. On September 16, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 12, 2019, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's Counsel
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 employed Grievant as a Building and Grounds Superintendent at one of its Facilities. He has been employed by the Agency for approximately 18 years. He became Superintendent in 2013 or 2014. The purpose of his Position was:

> To ensure that the physical plant operation (to include Water Treatment, Motor Pool, and general building and grounds) are in compliance with all Federal, State, and local codes, as well as DOC standards.

Grievant's overall work performance was satisfactory to the Agency. He had saved the Facility many thousands of dollars after seeking a review of the Facility's electric bill. No evidence of prior active disciplinary action was introduced during the hearing.

As a result of the disciplinary action, Grievant was demoted to a Trades Tech IV with a lower pay band and an 8.5% disciplinary pay reduction. He was transferred to another facility.

After employees working in the Building and Grounds Unit finished their shifts, they sometime had to return to the Facility on their "off days" to make repairs or perform duties that could not wait until they resumed their regular shifts. Employees were designated as "on call" and had to respond to these "call backs" to the Facility. After working a call back, an employee would submit a time sheet showing the amount of

time of the call back. Most employees listed calls backs as four hours even if they worked fewer than four hours. Employees would submit their time sheets to Ms. G for review. She would then submit the time sheets to Grievant for his review and approval. Grievant never questioned or disallowed employee claims for four hour call backs.

On the October 15, 2014, the Human Resource Officer sent Grievant a memorandum written by the Agency's Human Resource Director. The Human Resource Officer asked Grievant to share the document with his staff. The memo provided, in part:

> The Department does have procedure's covering Emergency Call Back at Work Related Phone Calls after Hours for non-exempt personnel. Any time a non-exempt employee has been called in on their off time, they will be compensated for a minimum of 2 hours before the actual amount of time they worked whichever is more. Additionally, any time a non-exempt staff spent on work related phone calls during their off hours discount as work time.[1]

Grievant shared the memorandum with his twelve staff. He told his staff there was a two hour minimum and for "anything over 2 hours, put down [the] actual time you were here."[2] Grievant assumed the Agency's policy was reflected in the HR Director's memorandum. That memorandum did not mention how to handle employee travel which was addressed in Operating Procedure 110.2.

Grievant told his staff when they were off duty and called to come to the Facility to work, their work time began when they received the telephone call to come to the Facility and ended when they returned home. This instruction was contrary to Operating Procedure 110.2, effective 2012. Prior to 2012, the informal practice was for employees to claim four hours instead of two hours as a minimum call back time.

On February 7, 2019, Grievant asked the Human Resource Officer about the on-call policy and how many hours the Unit staff were to be paid for being called into work. Grievant "said something about a 4 hour minimum for coming into work in that he thought their work time started once the phone call was made."

The Agency began an investigation and assigned an Investigator to interview staff. Mr. C said the four hour minimum was the unit practice and that Grievant never questioned his time sheets seeking reimbursement for four hours of work. Mr. D said he did not remember who told him about the four hour minimum, but it was either Grievant or a former supervisor. Mr. B said there has always been a four minimum. He said he was not sure who said the minimum was four hours. He said he always wrote down four hours "no matter what." He said that Grievant never questioned his time sheets. Mr. M said Grievant told him to report a four hour minimum time. He said Grievant never questioned any of his time sheets. Mr. L said there was a four hour minimum for call

[1] Agency Exhibit 9.

[2] Agency Exhibit 15.

outs. He said Grievant told him of the four hour minimum. Mr. G said that within the past two years, if the work was less than two hours, he would report two hours worked. Prior to that time, he reported four hours a minimum of four hours worked. He said Grievant gave him verbal instructions. Mr. Br said he did not remember being told to put down four hours. He said that usually his jobs with travel were over four hours. Mr. W said he reported four hours "no matter how much he worked because that was the common practice …."[3] He said Grievant never questioned his time sheets. Mr. C said he always reported four hours. He said he received verbal instructions from Grievant to always report a four hour minimum. Ms. G said she checked the time computations for each employee time sheet. After she reviewed the time sheets, she took them to the Human Resource Unit for them to enter the information into the Facility's payroll system. Grievant said he told employees that time starts when the employee receives the call to come to work and ends when the employee returns home. Grievant claimed he never told his employees about a four hour minimum.

The Warden spoke with six Unit employees and all six stated that Grievant told them their work hours started at the on-call time they received the phone call to come to work and ended when they got home. Many said that there had always been a four hour minimum for a call and that had been done that way since they had been working in the Unit. Some of these employees had been at the Facility for approximately 15 to 20 years.

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."[4] 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."[5] Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."[6]

Operating Procedure 110.2 governs Overtime and Schedule Adjustments. This policy became effective on December 1, 2012. Section IV(F)(2) provides:

> Non-exempt employees who (infrequently or sporadically), after their scheduled work hours and without pre-arrangement, are required to respond to a call to perform extra work shall be compensated a minimum of two hours or the actual time worked whichever is longer. Time spent en-

[3] Agency Exhibit 12.

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

[5] Virginia Department of Corrections Operating Procedure 135.1(VI)(C).

[6] Virginia Department of Corrections Operating Procedure 135.1(VI)(D).

route (home to work schedule) is not compensable and mileage reimbursement is not required.

"Failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with applicable established written policy" is a Group II offense.[7] Grievant should have known Operating Procedure 110.2. prohibited reimbursement for time spent en-route. He knew or should have known that the minimum on call time was two hours, not four hours. Grievant instructed his subordinates to include time en-route in their requests for on-call reimbursement. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

In certain extreme circumstances, an offense listed as a Group II Notice may constitute a Group III offense. Agencies may consider any unique impact that a particular offense has on the agency. The Agency took disciplinary action in this case based, in part, "[b]ecause of the serious nature of the charges, the resulting significant loss of funds, the multiple occasions you have allowed and approved wrongful reporting of work time, and your failure to effectively perform your duties as a Manager of the Building and Grounds department, you are being removed from your position and demoted and transferred to Plumber Supervisor at [another facility]." In this case, the Agency has presented sufficient evidence to support the elevation of the Group II Written Notice to a Group III Written Notice. Grievant's action was not merely his failure to comply with policy, but his instruction to his subordinates resulted in approximately a dozen employees also failing to comply with policy by seeking reimbursement for travel time. Grievant's instruction resulted in employees failing to follow policy for several years. Although the exact amount of money overpaid to employees cannot be determined, it is clear that the amount was significant. With respect to the two hour minimum, Grievant reviewed numerous time sheets showing a four hour charge, yet never questioned why so many time sheets showed four hour charges. Grievant informed his employees in 2014 that the minimum call back time was two hours. He should have recognized that employees were using a four hour and not a two hour minimum amount. Grievant was the head of his Unit but neglected to perform his supervisory duties with respect to time keeping. A Group III Written Notice is appropriate in this case.

Upon the issuance of a Group III Written Notice, an agency may (in lieu of removal) discipline an employee with a demotion, disciplinary pay reduction and transfer. Accordingly, Grievant's demotion, disciplinary pay reduction, and transfer is upheld.

The Agency also elevated the disciplinary action because it alleged Grievant engaged in conduct unbecoming an employee of the Commonwealth. Operating Procedure 135.3 governs Standards of Ethics and Conflict of Interest. Section (IV)B)(1) provides:

> Employees of the Department of Corrections shall conduct themselves by the highest standards of ethics so that their actions will not be construed

[7] Virginia Department of Corrections Operating Procedure 135.1(V)(C)(2)(a).

> as a conflict of interest or conduct unbecoming an employee of the Commonwealth.

The Agency's policy does not define conduct unbecoming an employee of the Commonwealth. The Hearing Officer considers the term to refer to a failure of character or lacking of moral values. The Warden testified that he believed Grievant knew his employees were improperly claiming four hours instead of two hours as a minimum call back time and that Grievant knowingly permitted this practice to continue. The evidence does not support this conclusion. Grievant did not know his employees were inaccurately reporting their call back times because he failed to properly oversee the time reporting process. Indeed, Grievant was the one who brought the issue to the Human Resource Officer's attention. If he was complicity in the erroneous time reporting, he likely would not have brought the matter to the Agency's attention.

Grievant argued he did not intend to do anything wrong. It is not necessary for the Agency to show Grievant intended to violate policy in order to support a Group III offense. In this case, Grievant should have known the provisions of Operating Procedure 110.2. His failure to do so supports the Agency's disciplinary action.

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 …."[8] 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 III Written Notice of disciplinary action with demotion, transfer, and disciplinary pay reduction is **upheld**.

[8] Va. Code § 2.2-3005.

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.