



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11908

Hearing Date: January 27, 2023
Decision Issued: February 16, 2023

PROCEDURAL HISTORY

On September 14, 2022, Grievant was issued a Group III Written Notice of disciplinary action with removal for falsifying records.

On November 2, 2022, Grievant filed an untimely grievance with OEDR to challenge the Agency's action. In Ruling 2023-5482, OEDR found just cause to allow the grievance to proceed. OEDR explained:

Moreover, the admission documentation suggests that the grievant had been exhibiting symptoms of severe psychiatric distress for at least some days before she was admitted. These circumstances are consistent with agency documentation showing that, in the days leading up to the grievant's termination, her coworkers reported concerns for her and others' safety due to her unusual behavior at work. The grievant's apparent response to the agency's disciplinary action could also appear to be consistent with potential mental health concerns at that time. According to the grievant's representative, she has continued to require extensive care following her hospital discharge and therefore was unable to immediately initiate her dismissal grievance.

On December 6, 2022, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 27, 2023, a hearing was held by remote conference.

APPEARANCES

Grievant
Grievant's Representative
Agency's 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 Department of Behavioral Health and Developmental Services employed Grievant as a Psychiatric Technician III at one of its locations. She had been employed by the Agency for approximately four and a half years. Grievant received an overall rating of "Contributor" on her 2021 annual performance evaluation. Grievant had prior active disciplinary action. On April 8, 2022, Grievant received a Group II Written Notice for client

neglect because she documented that a patient was in the restroom when the patient actually was missing from the Facility.

On September 9, 2022, the Nursing Unit Manager wrote an email to a manager:

In the past weeks, multiple incidents have been reported by various staff of [Grievant's] bizarre and unusual behaviors on and off the unit. The reported behaviors/incidents include the following:

1. Argumentative and accusing a peer of killing her grandmother.
2. Accusing a peer of driving around her house at night.
3. Loud outburst stating that someone is inside of her.
4. Unable to log in to the computer with the belief that someone has hacked her password to access her financial account.
5. Unable to talk to the supervisor on the phone with the belief that it wasn't the supervisor and it was someone trying to transmit messages in her brain.
6. Laughing inappropriately, verbally responding to internal stimuli. ***

[Grievant] was strongly encouraged to contact the facility's mental health support number however she refused several times.¹

The Facility requires patient monitoring to ensure patient safety.

On September 11, 2022, Grievant was working in a room with patients. She was seated at a desk in the middle of the room. She was responsible for making Zone Safety Observations. She was to enter the restrooms to verify the safety of patients in the restrooms. The purpose of her observations was, "to identify safety concerns, intervene as necessary, and activate additional resources or follow up when indicated."² She was to complete her observations every five minutes. Grievant was to write her observations on a Zone Safety Observation form.

From approximately 1:30 p.m. until 2:30 p.m., Grievant sat in the chair without going to the men's and women's restrooms to determine how many patients were inside each restroom. She made 12 entries on the Zone Safety Observation form showing that the restrooms were vacant or had one or two patients in each restroom. She wrote her initials with every entry on the form. While seated at the desk, Grievant was not in a position to determine how many patients were inside the restrooms and determine whether they were safe. What she wrote on the form did not reflect what she observed.

On September 11, 2022, an employee sent an email to the Nursing Unit Manager stating:

¹ Agency Exhibit p. 98.

² Agency Exhibit p. 55.

I don't know what could be done ... but at this point we fear for our safety working with [Grievant]. We talked about it at the time .. so on Sunday the girl sat at the table did not mark not 1 round .. she had her eyes rolling to the back of her head and when she was addressed by staff and patients she ignored everyone. To me that's a safety hazard. She watched a patient follow another staff member in the cook chill and did not move when the other tried to get in the nurse's station ... no one wants to work with her. Like I said idk what could be done but that behavior is weird.³

On September 12, 2022, the Assistant Chief Nursing Executive wrote:

With this report and the previous email I sent, I am very concerned for her and the other staff's safety. My recommendation would be to issue the Due Process and put her out of work until we receive a response. Upon receiving the response, determine if we move forward or not with formal disciplinary action. Formal disciplinary action will result in termination due to her previous discipline (DI 201) I believe and with this being a safety concern, that is where I would lean towards.⁴

Grievant testified she had psychosis. Based on Grievant's demeanor during the hearing and observations made by Facility employees, the Hearing Officer concludes that Grievant's assertion is true. Possible symptoms of psychosis include delusions, hallucinations, talking incoherently, and agitation. Grievant displayed several of these symptoms during her testimony.

As part of her appeal, Grievant wrote:

On October 13, I was admitted to [Hospital] and released 20 October; diagnosed with Psychosis and Anxiety, and prescribed Olanzapine, TraZODone, and FLUoxetine. *** Due to a diagnosed condition in which I was not aware of, being placed in a treatment facility (SRM Hospital), medications and not knowing who or where to submit or voice my concern, I was unable to submit grievance within the 30 days of termination.

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."⁵ Group II offenses "include acts of misconduct of a more serious

³ Agency Exhibit p. 9.

⁴ Agency Exhibit p. 9.

⁵ The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

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.”

Falsifying records is a Group III offense. To show falsification, the Agency must show that an employee intentionally or with willful disregard made false or misleading statements, orally or in writing, in connection with any matter of official interest. In this case, the Agency has established that Grievant incorrectly wrote that she had performed checks. The Agency has not established that Grievant knew she was writing false information at the time she made the entries into the log. The Agency has not established that Grievant should have known what she was writing was false. The Agency has not established that Grievant made false statements with willful disregard. Grievant displayed unusual behavior reflecting mental health concerns before September 11, 2022. On September 11, 2022, an employee observed Grievant with “her eyes rolling to the back of her head and when she was addressed by staff and patients she ignored everyone.” The Hearing Officer does not believe Grievant had sufficient ability to understand her actions on September 11, 2022. Without knowing she was reporting something untrue, Grievant cannot be considered to have falsified records.

The Agency’s concerns about Grievant continuing employment with the Agency are understandable. Although the Hearing Officer is reinstating Grievant, it is not clear whether Grievant will be able to perform her work duties. The Hearing Officer recommends that the Agency evaluate whether there are non-disciplinary methods available to ensure Grievant is fit for duty and to ensure the safety of co-workers and patients.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group III Written Notice of disciplinary action is **rescinded**. The Agency is ordered to **reinstate** Grievant to Grievant’s same position prior to removal, or if the position is filled, to an equivalent position. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal. The Agency is directed to provide **back benefits** including health insurance and credit for leave and seniority that the employee did not otherwise accrue.

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.