

Issue: Group III Written Notice with Termination (falsifying records and failure to follow policy);  
Hearing Date: 03/19/18; Decision Issued: 09/04/18; Agency: VDH; AHO: James  
Mansfield, Esq; Case No. 11145; Outcome: Partial Relief; **Administrative Review Request  
received 09/17/18; EDR Ruling No. 2019-4781 issued 10/26/18; Outcome: AHO's  
decision affirmed.**

**COMMONWEALTH OF VIRGINIA**  
**DEPARTMENT OF HUMAN RESOURCE MANAGEMENT**  
**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

In the matter of: Grievance Case No. 11145

Hearing Date: March 19, 2018

Decision Issued: September 4, 2018

**PROCEDURAL HISTORY**

Grievant was an HIV/STD Health Counselor for the Virginia Department of Health (“Agency”). The Agency alleged that the Grievant falsified mileage reimbursement records resulting in overpayments and that Grievant improperly used a Facebook account, disclosing client and patient personal and confidential medical information in violation of Agency Policy and statutory law. On November 2, 2017 Grievant was charged with a Group III Written Notice for alleged violations and Grievant’s employment with the Agency was terminated effective the same date.

In response to the Notice Grievant denied the allegations of falsification of mileage reimbursement records and asserted permission was granted by Supervisors to use Facebook to locate patients and their at-risk social contacts.

A pre-hearing conference was held on January 29, 2018 between Grievant’s Counsel, an Agency Representative, and the Hearing Officer. A Hearing in the matter was scheduled for March 5, 2018. Subsequently, however, the Hearing Officer was notified that the Agency had secured representation of counsel who requested a continuance of the Hearing. On February 20, 2018 another telephone conference was held with both Counsel to address the Agency’s continuance request. The request was granted and the Hearing rescheduled to March 19, 2018. Thereafter, a number of Witness Subpoenas were issued on behalf of Grievant, and the Agency motioned for a Protective Order pertaining to certain confidential documents. A third telephone conference between the Parties was scheduled and held on March 16, 2018 to address the motion and other procedural matters.

**ISSUES**

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constitutes misconduct?
3. Whether the Agency’s discipline was consistent with law and policy, and was properly characterized as a Group III offense subject of termination?

4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action?

### **BURDEN OF PROOF**

The burden of proof is on the Agency to show by a preponderance of the evidence that its action against Grievant was warranted and appropriate under the circumstances. A preponderance of the evidence is evidence which shows that what is intended to be proved is more likely than not; and evidence that is more convincing than the opposing evidence.

Grievant has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to any disciplinary action by the Agency.

### **HEARING**

The following appeared at the Hearing, (with several witnesses appearing by telephone) held at the Agency's facility on March 19, 2018 as scheduled:

Grievant  
Grievant's Counsel  
Witnesses Subpoenaed on behalf of Grievant  
Agency Party Designee  
Agency, District Manager  
Agency Attorney  
Witnesses called on behalf of the Agency  
Hearing Officer

The Parties exhibits were received and admitted into evidence. The Hearing was duly recorded.

### **FINDINGS OF FACT**

After reviewing the evidence presented and observing the demeanor and credibility of each of the witnesses, the Hearing Officer makes the following findings of fact:

1. On November 2, 2017 Grievant was issued a Group III Written Notice for violating Agency Policies (Agency Exhibit No. 6). As a result, Grievant's employment with the Agency was terminated.

2. Grievant testified concerning the alleged discrepancies in the Milage Reimbursement Log (Agency Exhibit No. 7 and Grievant's Exhibit No. 4 [copies of the same document]). Grievant's testimony was credible and adequately explained any apparent discrepancy. Moreover, any over payments reflected in the document were *de minimis*.

3. Grievant testified, acknowledging using a personal Facebook account to reach out to clients with communicable diseases and using the social medium to identify potential at-risk persons who may have had contact with the clients.

4. The Grievant was identified as a Health Counselor on the Facebook account.

5. Grievant "Friended" Agency clients together with Grievant's personal and professional "Friends" all of whom had access to the Grievant's Facebook postings. (Agency Exhibit No. 5).

6. Grievant testified that the Agency's Policy on the use of Social Media was unclear and that Grievant had received conflicting guidance on its use.

7. All other Agency employees who were called as witnesses consistently testified that while they used social media in their work, it was only with platforms approved and established by the Agency. No witness testified that they used their own personal Facebook to contact or "Friend" clients.

8. Agency's Standards of Conduct provide that Employees must "[c]omply with the letter and spirit of all state and agency policies and procedures . . ." (Agency Exhibit No. 1).

9. Agency's Confidentiality Policy specifically provides: "No personal identifiable information or information that could lead to the identification of an individual or facility shall be published or disclosed, unless authorized by the individual or authorized representative or law." (Agency Exhibit No. 4).

10. Agency's Policy on Internet and Social Media Usage similarly provides: "Confidential or proprietary information about the [Agency] is not to be shared under any circumstances, including during personal internet use. This includes patient information and any other items listed in the OCOM 1.01 [Agency] Confidentiality Policy." It also goes on to provide that the Agency "strongly discourages 'friending' of patients or clients on social media websites (Facebook, etc.). Staff in patient care or client service roles should not initiate or accept friend requests except in unusual circumstances such as the situation where an in-person friendship pre-dates the treatment relationship." (Agency Exhibit No. 3).

11. Evidence introduced by the Agency showed that it considered mitigating the disciplinary action including: Grievant's length of service, levels and style of oversight, and the inherent challenges of the position, but due to the severity of the violations, concluded termination was warranted. (Agency Exhibit No. 6).

### **CONCLUSIONS OF POLICY**

Pursuant to the Agency's Policy Resolution 1.60: 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.” 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.”

### **DECISION**

For the reasons stated above, based upon consideration of all the evidence presented in this cause, the testimony of the witnesses and the Exhibits received into evidence, the Hearing Officer finds that the Agency’s issuance to the Grievant of a Group III Written Notice of disciplinary action and termination is **UPHELD** as to Grievant’s violations of Agency’s Confidentiality Policy and the Agency’s Policy on Internet and Social Media Usage. Further, the Hearing officer finds that the Agency did not meet it’s burden of proof as to the allegation that Grievant falsified mileage reimbursement records.

### **APPEAL RIGHTS**

You may file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

1. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director  
Department of Human Resource Management  
101 North 14<sup>th</sup> Street, 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by fax to (804) 371-7401, or by e-mail [dhm@dhrm.virginia.gov](mailto:dhm@dhrm.virginia.gov).

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

Office of Employment Dispute Resolution  
Department of Human Resource Management  
101 North 14<sup>th</sup> Street, 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto:EDR@dhrm.virginia.gov), or by fax to (804) 786-1606.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15 calendar days period has expired, or when requests for administrative review have been decided.

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.

[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/ James M. Mansfield  
James M. Mansfield