

Issues: Group III Written Notice (falsifying records), Group III Written Notice (sleeping during work hours), and Termination; Hearing Date: 04/19/18; Decision Issued: 04/20/18; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 11176; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11176

Hearing Date: April 19, 2018
Decision Issued: April 20, 2018

PROCEDURAL HISTORY

On January 24, 2018, Grievant was issued a Group III Written Notice of disciplinary action for falsifying records. On January 24, 2018, Grievant was issued a Group III Written Notice for sleeping during work hours. Grievant was removed from employment.

On February 9, 2018, Grievant timely filed a grievance to challenge the Agency's actions. The matter proceeded to hearing. On March 5, 2018, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On April 19, 2018, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notices?
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 Corrections Officer at one of its facilities. No evidence of prior active disciplinary action was introduced during the hearing.

The Hospital used preprinted forms to prescribe medication. The forms contained the Hospital's name and the names of several providers associated with the Hospital.

Grievant obtained a "blank" preprinted Hospital prescription form. He took a picture of the note and sent it to another person by text with the caption "Just me got my note lol".

On December 18, 2017, an anonymous person sent the picture of Grievant with the blank Hospital note to the Major at the Facility. The Agency began an investigation.

Grievant was absent from work on December 15, 2016. He submitted a note to the Agency to excuse his absence. The note was preprinted with a Hospital's name and listed the names of several medical professions and a signature line. It was the same preprinted form that Grievant had taken a picture of and sent by text to someone else. In addition, the note contained the following handwritten statement:

Please excuse [Grievant] from work 12/15/2016.¹

The note was signed by someone purporting to be a medical provider.

The Agency contacted the Hospital and asked if Grievant had been a patient at the Hospital on December 15, 2016. The Agency sent a copy of the note to the Hospital's medical provider. The Agency was unable to establish that Grievant was a patient at the Hospital on that date. The Agency gave Grievant several opportunities to confirm that he was at the Hospital on December 15, 2016. Grievant declined to do so. Grievant was asked to provide another note.

On October 17, 2017, Grievant provided the Agency with a second note on a different preprinted form with the Hospital's name on it. The note contained handwritten words asking Grievant be excused "due to his mother at the hospital." The Agency attempted to confirm the second note by calling the Hospital and asking that the Hospital verify that either Grievant or his mother were patients at the Hospital. The evidence showed that the Hospital employees searched to determine if Grievant or his mother had been patients at the Hospital since 2016 and concluded they were not patients at the Hospital.

The Agency concluded Grievant used a blank note from the Hospital and entered false information. During a fact finding conference, the Warden met with Grievant and offered to have them call the Hospital and clear up the matter. Grievant declined the Warden's offer.

Grievant was working a shift from 6 p.m. on August 31, 2017 to 6 a.m. on September 1, 2017. Grievant and Officer C were supervising an Offender at the Hospital. Grievant and Officer C carried weapons. The Offender was asleep on his Hospital bed. Grievant sat in a chair in the room. Grievant leaned back in the chair far enough to be in a horizontal position. He covered himself with a coat or blanket. He "nodded off". He was not alert and remained in that position for several minutes.

Officer C observed Grievant sleeping. He took a picture of Grievant sleeping and sent it to another employee. Another person sent the picture to the Major and the Agency began an investigation. As part of the investigation, the Major showed the picture to Grievant. Grievant admitted to the Major that the picture was of him and that he was asleep.

¹ Agency Exhibit 5. The word "excuse" was misspelled as "excuse".

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.”² 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.”³ Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”⁴

“Falsifying any records ...” is a Group III offense.⁵ Grievant submitted a first note to the Facility to excuse his absence on December 15, 2016. The note purported to be from a medical provider at the Hospital. The Hospital medical provider had not written the note. Grievant knew the first note was false at the time he submitted it. Grievant was asked to submit a second note. The second note could not be confirmed by the Agency. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for falsifying records.

“Sleeping during working hours” is a Group III offense. During his shift beginning on August 31, 2017, Grievant was responsible for supervising an Offender. He leaned back in his chair, covered himself, and fell asleep for a few minutes. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for sleeping during working hours.

Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, the Agency’s decision to remove Grievant must be upheld.

Grievant alleged that someone had hacked his social media account. The evidence showed that Grievant admitted to the Agency that he had the preprinted Hospital note.

Grievant asserted that information about the notes was withheld by the Hospital. The evidence showed that Hospital employees assisted the Agency by trying to determine whether Grievant and his mother were patients at the Hospital.

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

² Virginia Department of Corrections Operating Procedure 135.1(VI)(B).

³ Virginia Department of Corrections Operating Procedure 135.1(VI)(C).

⁴ Virginia Department of Corrections Operating Procedure 135.1(VI)(D).

⁵ DOC Operating Procedure 135.1(V)(D)(2)(b).

Management”⁶ 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 for falsifying records is **upheld**. The Agency’s issuance of a Group III Written Notice of disciplinary action for sleeping during working hours is **upheld**. Grievant’s removal is **upheld**.

APPEAL RIGHTS

You may request an administrative review by EEDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EEDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Equal Employment and 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

⁶ Va. Code § 2.2-3005.

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 EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

^[1] Agencies must request and receive prior approval from EEDR before filing a notice of appeal.