

Issue: Group III Written Notice with Suspension (falsifying records); Hearing Date: 10/18/17; Decision Issued: 10/25/17; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 11086; 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: 11086

Hearing Date: October 18, 2017

Decision Issued: October 25, 2017

PROCEDURAL HISTORY

On May 11, 2017, Grievant was issued a Group III Written Notice of disciplinary action with a five workday suspension for falsifying records.

On June 9, 2017, 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 she requested a hearing. On September 5, 2017, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On October 18, 2017, 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 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 Corrections Officer at one of its facilities. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant was scheduled to work on Saturday February 11, 2017. Grievant called the Facility to indicate that she was sick and would not be reporting to work. The Facility supervisor asked Grievant to provide a note from her doctor excusing her absence.

On February 21, 2017, Grievant presented the HR Officer with a document from Provider V with a date of January 11, 2017. The HR Officer observed that the date did not match the date of her absence and informed Grievant that another note was needed. Grievant provided a second note from Provider V on February 22, 2017. The second note was identical to the first note except that the date was changed to February 11, 2017. The HR Officer was suspicious of the note because Provider V was not open for business on February 11, 2017 and the second note appeared to be an altered version of the first note. The HR Officer again asked Grievant to verify her absence on February 11, 2017. Grievant presented a third note on March 7, 2017. This note was from Provider H and did not indicate that she received treatment from Provider H on February 11, 2017.

During the fact finding process, Grievant admitted:

On 2/11/2017 I did not go to the doctor. The note I turned in was not correct. It was altered.¹

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

Group III offenses include “[f]alsifying any records ...” When Grievant presented notes from her providers to the Agency, those notes became official State documents. Grievant did not visit a medical provider on February 11, 2017, but she submitted notes falsely indicating such received treatment from a medical provider on February 11, 2017. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for falsifying records. Upon the issuance of a Group III Written Notice, an agency may remove an employee. In lieu of removal, an agency may suspend an employee for up to 30 workdays. Accordingly, Grievant’s five workday suspension must be upheld.

Grievant claimed she did not falsify anything. Grievant felt that the offense was not seriousness enough to justify a Group III. The evidence showed that Grievant falsely claimed she had visited a medical provider on February 11, 2017. Her behavior rose to the level of a Group III offense and the Agency has presented sufficient evidence to support its decision to suspend Grievant.

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”⁵ Under the *Rules for Conducting Grievance Hearings*, “[a] hearing officer must give deference to the agency’s consideration and assessment of any

¹ Agency Exhibit 9.

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 Va. Code § 2.2-3005.

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 a five workday suspension 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 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.