

Issue: Group III Written Notice with Termination (leaving work without permission);
Hearing Date: 09/11/17; Decision Issued: 09/12/17; Agency: DBHDS; AHO: Carl
Wilson Schmidt, Esq.; Case No. 11053; 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: 11053

Hearing Date: September 11, 2017

Decision Issued: September 12, 2017

PROCEDURAL HISTORY

On May 26, 2017, Grievant was issued a Group III Written Notice of disciplinary action with removal for leaving the worksite without permission.

On June 18, 2017, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On July 10, 2017, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On September 11, 2017, a hearing was held at the Agency's office.

APPEARANCES

Grievant
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 Behavioral Health and Developmental Services employed Grievant as a Registered Nurse at one of its facilities. No evidence of prior active disciplinary action was presented during the hearing.

The Facility had a bag of equipment weighing approximately 22 or 23 lbs. The Charge Nurse was expected to carry the bag to various locations throughout the Facility. Grievant had a lifting restriction prohibiting her from lifting more than 20 lbs. In December 2016, the Agency removed Grievant's duties as Charge Nurse because she could not carry the bag with her as expected of Charge Nurses.

On May 20, 2017, Grievant was scheduled to work from 3 p.m. until 11:30 p.m. She "clocked in" at 3:02 p.m. She was told she would do the duties of a Charge Nurse which included scheduling staff to different locations at the Facility.

At 3:04 p.m., Grievant called the Supervisor and said she was concerned about the competency of the two LPNs who were working on her shift. Grievant did not know the work capabilities of the two LPNs and expressed her concerns to the Supervisor. The Supervisor told Grievant that the two LPNs were competent, had worked well with other nurses, and knew the residents and their treatments.

Grievant also expressed concern about making staff assignments. Grievant said she did not want to assign staff to work in various locations throughout the Facility because the Charge Nurse should make assignments. The Supervisor told Grievant she could and should make staff assignments. The Supervisor told Grievant she was a registered nurse and could make staff assignments.

Grievant was unable to lift the emergency bag because it weighed over 20 lbs. The Supervisor told Grievant to remove some of the duplicate items from the bag so it would weigh less than 20 lbs.

The Supervisor told Grievant she would have the Prior Shift Charge Nurse help Grievant until 7 p.m. The Supervisor asked Grievant to let her speak with the Prior Shift Charge Nurse. The Supervisor told the Prior Shift Charge Nurse to remain at the Facility and provide assistance to Grievant. The Prior Shift Charge Nurse remained after the end of her regular shift to provide treatment assistance to Grievant.

At 3:30 p.m., the Supervisor called Grievant. Grievant said she was too stressed and was not going to make staff assignments. Grievant said she was unable to make assignments and was going to go home. The Supervisor told Grievant that leaving two LPNs on staff was negligent and that Grievant would be abandoning her duties. Another nurse, Nurse G was working and Nurse G agreed to help Grievant do assignments. The telephone call ended.

Grievant “clocked out” at 3:44 p.m. and left the Building.

At 4:06 p.m. Grievant called the Supervisor. Grievant said she had clocked out and could not work anymore. Grievant said she was too emotionally unstable to work. The Supervisor told Grievant that if she left she was abandoning her duties. Grievant refused to accept any of the remedies the Supervisor proposed and Grievant refused to stay at the Facility.

The Supervisor realized she would have to go to work so she got into her vehicle and began driving to the Facility.

At 4:52 p.m., Grievant called the Supervisor. The Supervisor answered the call while in route to the Facility. Grievant said she would return to work to return to work. Grievant asked if she could return to work. The Supervisor asked Grievant if she was emotionally stable. Grievant said she felt better. The Supervisor reminded Grievant that if she returned she would be expected to perform all of her duties. Grievant became argumentative with the Supervisor and the Supervisor told Grievant that the Supervisor could not talk at that time since she was on her way to work.

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.”¹ 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.”

“[L]eaving work without permission” is a Group II offense.² On May 20, 2017, Grievant was scheduled to work from 3 p.m. until 11:30 p.m. She began her shift at 3:02 p.m. and but left the Facility at 3:44 p.m. Grievant did not have permission to leave her work site. The Supervisor advised Grievant that if she left the Facility she would be abandoning her job and being neglectful. The Agency has presented sufficient evidence to show Grievant committed a Group II offense.

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. (For instance, the potential consequences of a security officer leaving a duty post without permission are likely considerably more serious than if a typical office worker leaves the worksite without permission.) In this case, Grievant was the shift supervisor. By leaving the Facility, residents would not have received the same level of services they would have received if Grievant had remained. Grievant was informed that leaving two LPNs to work at the Facility would be negligent. The Agency has presented sufficient evidence to elevate the level of disciplinary action to a Group III Written Notice.

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

Grievant argued that assignment duties of a charge nurse should have been performed by the Prior Shift Charge Nurse. Grievant argued that she should not have been expected to carry the emergency bag because it was too heavy. Grievant argued that she asked to return to the Facility but was prevented from doing so by the Supervisor.

The evidence showed that the Agency did a poor job of informing Grievant that she would be the Charge Nurse on May 20, 2017. Grievant was capable of performing these duties because she had served as Charge Nurse many times prior to December 2016. The Supervisor authorized Grievant to remove some of the duplicate equipment from the emergency bag so that it would weigh less than 20 lbs. In short, there was no

¹ The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

² See, Attachment A, DHRM Policy 1.60.

basis for Grievant to leave the Facility. Grievant's later request to return to the Facility does not undo the fact that she left the Facility for approximately 42 minutes. The circumstances that Grievant believed justified her leaving the Facility only worsened when Grievant left the Facility.

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"³ 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 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.

³ Va. Code § 2.2-3005.

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.