

Issue: Group III Written Notice (falsification of records); Hearing Date: 01/03/06;
Decision Issued: 01/05/06; Agency: DMHMRSAS; AHO: Carl Wilson Schmidt, Esq.;
Case No. 8226; Outcome: Agency upheld in full



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8226

Hearing Date: January 3, 2006
Decision Issued: January 5, 2006

PROCEDURAL HISTORY

On September 23, 2005, Grievant was issued a Group III Written Notice of disciplinary action for falsification of state records. On October 21, 2005, 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 December 1, 2005, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 3, 2006, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
Witnesses

ISSUE

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. 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 Mental Health Mental Retardation and Substance Abuse Services employs Grievant as a Direct Service Associate at one of its Facilities. She has been employed at that Facility for approximately 16 years. Prior to taking disciplinary action, the Agency viewed Grievant's work performance as satisfactory. No evidence of prior active disciplinary action was presented during the hearing.

When Agency staff provide medical services, scheduled activities as part of patient care, or other significant services, a notation is supposed to be made in the Interdisciplinary Notes for the resident receiving services. Interdisciplinary Notes represent a continuing diary and record of the services received by a resident at the Facility. Medical staff, including direct care employees working on subsequent shifts, review and rely on the accuracy of the Interdisciplinary Notes to determine appropriate resident treatment.

Grievant and a Direct Care Aide were providing direct care to eight residents living in a residential cottage at the Facility. After the residents finished their dinner, a security officer came to the cottage and told Grievant that a trip for the residents had been scheduled. Grievant was not aware that a trip had been scheduled. The security officer handed Grievant a key to a State vehicle and Grievant signed a document acknowledging her receipt of the key. She attempted to determine whether money had

been obtained from the Facility's funds in order to pay for expenses of the trip. No money had been set aside for the trip. Grievant attempted to contact another employee who she believed may have access to money. That employee was away from her telephone. Grievant decided to take the State vehicle, leave the Facility and obtain snacks and ice cream for the residents. She did not take the residents on the trip with her. She purchased snacks and ice cream for the residents by writing a check on her personal checking account. She returned to the Facility and gave them to the residents. She returned the State vehicle.

Residents were in their beds at approximately 9 p.m. or 9:30 p.m. Once the residents were in bed, Grievant began her other duties including updating the Interdisciplinary Notes for each resident. Grievant obtained the Interdisciplinary Note record for each of the eight residents. She wrote in each record, the date, the location and "Enjoyed trip to get ice cream – [Grievant's signature]."

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force." DHRM § 1.60(V)(B).¹ Group II offenses "include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal." DHRM § 1.60(V)(B)(2). Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal." DHRM § 1.60(V)(B)(3).

"Falsifying any records, including, but not limited to, vouchers, reports, insurance claims, time records, leave records, or other official state documents" constitutes a Group III offense. DHRM § 1.60(V)(B)(3)(b).² "Falsifying" is not defined by DHRM § 1.60(V)(B)(3)(b), but the Hearing Officer interprets this provision to require proof of an intent to falsify by the employee in order for the falsification to rise to the level justifying termination. This interpretation is less rigorous but is consistent with the definition of "Falsify" found in Blacks Law Dictionary (6th Edition) as follows:

Falsify. To counterfeit or forge; to make something false; to give a false appearance to anything. To make false by mutilation, alteration, or addition; to tamper with, as to falsify a record or document. ***

The Hearing Officer's interpretation is also consistent with the New Webster's Dictionary and Thesaurus which defines "falsify" as:

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

² The Hearing Officer construes this language to include the circumstances where an employee creates a false document and then submits it to an agency where that document becomes a record of the agency.

to alter with intent to defraud, *to falsify accounts* || to misrepresent, *to falsify an issue* || to pervert, *to falsify the course of justice*.

Grievant wrote that each of the eight residents enjoyed a trip to get ice cream. At the time Grievant wrote this, she knew that none of the residents had been on a trip. Grievant intentionally made a false entry into the Interdisciplinary Notes of eight residents. Interdisciplinary notes are official records of the Agency and are used by Agency employees when rendering services to residents. Grievant falsified a portion of the Interdisciplinary Notes for eight residents. The Agency has presented sufficient evidence to support its issuance of a Group III Written Notice.

Grievant contends the disciplinary action should be mitigated because she had to assume additional duties and address difficult client behavior that night. She argues that although she made a mistake, the disciplinary action is too severe. She believes the Agency has inconsistently disciplined its employees.

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 Employment Dispute Resolution....”³ Under the EDR Director’s *Rules for Conducting Grievance Hearings*, the Hearing Officer may mitigate based on considerations including 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, and (3) the disciplinary action was free of improper motive. The *Rules* further require the Hearing Officer to “consider management’s right to exercise its good faith business judgement in employee matters. The agency’s right to manage its operations should be given due consideration when the contested management action is consistent with law and policy.”

Grievant’s argument that she was influenced by unusual stress is not supported by the evidence. Grievant wrote Interdisciplinary Notes after the residents had gone to bed. She wrote the same words on eight separate forms. Grievant had sufficient time to recognize her error and correct the entries.

Grievant’s argument that the disciplinary action is too severe fails because the Hearing Officer lacks the authority to reverse disciplinary action simply because the Hearing Officer would have imposed a different level of discipline. The Hearing Officer is not a super-personnel officer. If an agency presents facts sufficient to support the level of disciplinary action it has chosen, the Hearing Officer must give deference to that selection. In this case, falsification of records is a Group III offense under DHRM Policy 1.60 and the Agency has presented sufficient facts to support its selection of the level of disciplinary action.

³ *Va. Code § 2.2-3005.*

Grievant contends the Agency has inconsistently disciplined employees because in October 2005 another employee wrote an Interdisciplinary Note saying residents had attended a Halloween function yet none of the residents had attended the function. Grievant's argument fails because the Agency investigated the allegations first presented by Grievant as part of her grievance and concluded that the employee who made the Interdisciplinary Note was writing what the employee had been told to write. The employee did not know at the time the entries were made that the entries were false. Grievant, in contrast, knew at the time of her entries that the residents had not been on a trip.

There is no basis for the Hearing Officer to mitigate the Agency's disciplinary action.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action is **upheld**.

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 have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. 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 14th St., 12th Floor
Richmond, VA 23219

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to 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:

Director
Department of Employment Dispute Resolution

830 East Main St. STE 400
Richmond, VA 23219

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 give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for 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.⁴

[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].

Carl Wilson Schmidt, Esq.
Hearing Officer

⁴ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.