

Issues: Group II Written Notice (refusal to work overtime), Group II Written Notice with suspension (refusal to work overtime), Group II Written Notice with termination due to accumulation) (refusal to work overtime); Hearing Date: 01/16/07; Decision Issued: 01/22/07; Agency: DMHMRSAS; AHO: Carl Wilson Schmidt, Esq.; Case No. 8487/8488/8489; Outcome: Agency upheld in full; **Administrative Review: DHRM Ruling request received 02/08/07; DHRM Ruling issued 05/04/07; Outcome: HO's decision affirmed.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8487 8488 8489

Hearing Date: January 16, 2007
Decision Issued: January 22, 2007

PROCEDURAL HISTORY

On June 27, 2006, Grievant was issued a Group II Written Notice of disciplinary action for refusing to work overtime. On August 8, 2006, Grievant was issued a Group II Written Notice of disciplinary action with a ten workday suspension for refusing to work overtime. On September 11, 2006, Grievant was issued a Group II Written Notice of disciplinary action with removal based on the accumulation of disciplinary action for refusing to work overtime.

Grievant timely filed grievances to challenge the Agency's actions. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On December 11, 2006, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 16, 2007, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee
Agency Advocate

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 employed Grievant as a Registered Nurse at one of its Facilities. The purpose of her position was:

Utilizing knowledge base and experience, provides age-specific quality nursing care to adult psychiatric patients through the nursing process in accordance with hospital policy and procedure and standards of nursing practice. Evaluates, supervises, documents and provides guidance in performance of staff.¹

On June 2, 2006, Grievant's Supervisor informed Grievant that at the end of her 8 hour shift she would have to work overtime. Grievant refused to work overtime.

¹ Agency Exhibit 2.

On July 1, 2, and 8, 2006, Grievant's Supervisor informed Grievant that at the end of her 8 hour shifts she would have to work overtime. Grievant refused to work overtime.

On August 27, 2006 and August 28, 2006, Grievant's Supervisor informed Grievant that at the end of her 8 hour shifts, she would have to work overtime. Grievant refused to work overtime.

Each time Grievant's Supervisor instructed Grievant to work overtime was so that the Facility could maintain adequate staffing levels to provide patient care. For example, if an employee was scheduled to work but unable to do so due to illness, the name of another employee would be selected on a rotating basis to fill in for the absent employee.

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).² 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).

Facility Policy HR-31C governs overtime for direct care staff. Mandatory overtime is defined as "[o]vertime assigned at the direction of management to a specific employee." "The ability to work mandatory overtime is clearly stated as a condition of employment and listed as an essential function on the Employee Work Profile (EWP_ for [Facility] employees assigned to the following Roles that perform functions in client care, safety , and support: ... Registered Nurse II."

Grievant contends she was not a Registered Nurse II and, thus, the policy did not apply to her position. The evidence is insufficient for the Hearing Officer to conclude that Grievant was a Registered Nurse II. Employees at the Facility referred to her position as a Registered Nurse, Clinician A. Her Employee Work Profile dated October 22, 2005 neither lists her Role Title and Code nor her Work Title. Grievant's Employee Work Profile dated July 27, 2004 shows her Role Title and Code as 'Registered Nurse – 49113 "A"' and her Work Title is "Registered Nurse, Staff". During the day shift, Grievant reports to the "Registered Nurse II – 49113" according to the EWP. Grievant's EWP does not list the ability to work mandatory overtime as an essential function.

² The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

Although Grievant's position was not governed by HR-31C, she was obligated to comply with DHRM Policy 1.60(III)(A)(3)(a) which provides, "[e]mployees should work overtime hours as directed by their supervisors or management." Grievant was aware of her obligation to work overtime.

"Failure to follow a supervisor's instructions, ... or otherwise comply with established written policy" is a Group II offense. Grievant was instructed by a supervisor to work overtime. She refused that instruction. By refusing to work overtime as directed by her Supervisor, Grievant failed to comply with DHRM Policy 1.60(III)(A)(3)(a). Each of the Group II Written Notices must be upheld.

Accumulation of a second active Group II Written Notice "normally should result in discharge."³ Grievant has accumulated three Group II Written Notices thereby justifying the Agency's decision to remove Grievant from employment.⁴

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...."⁵ 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 contends the Agency's disciplinary action should be mitigated because her refusal to work overtime was justified under the circumstances. She testified that after working an 8 hour shift, she was often too exhausted to work additional hours and that doing so would present a concern for patient safety. The *Rules* do not list these reasons as a basis to mitigate disciplinary action. In addition, it is within the Agency's right to manage its operations to choose between having exhausted staff work additional hours or no staff at all. Grievant argued other staff were permitted to work 12 hour shifts to meet their overtime obligations. The evidence showed that only a few nurses were permitted to work 12 hour shifts and that was because they began working for the Agency when it permitted its employees to work 12 hour shifts. Grievant began working for the Agency after the Facility had changed to 8 hour shifts. Grievant

³ DHRM § 1.60(VII)(D)(2)(b).

⁴ Grievant was suspended for ten work days upon the issuance of the Group II Written Notice on August 8, 2006. That suspension is upheld.

⁵ *Va. Code § 2.2-3005.*

presented evidence of a medical reason not to work more than 8 hours per day. As part of progressive discipline, Grievant's Supervisor informed Grievant that she needed to obtain a note from her doctor if she wished to have a medical exemption from working overtime. Grievant went to her doctor but the doctor did not provide such a note. She presented a medical excuse at the hearing that she received only after the issuance of the Written Notices.⁶ The doctor's note did not state that it covered the time period of discipline under the Written Notices. Thus, the doctor's note is not sufficient to excuse Grievant's refusal to work overtime.

In light of the standard set forth in the *Rules*, 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 three Group II Written Notices of disciplinary action is **upheld**. Grievant's removal from employment is upheld based on the accumulation of disciplinary action.

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:

⁶ The doctor's note is dated January 12, 2007.

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 all of your appeals to the other party and to the EDR Director. 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.⁷

[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/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

⁷ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of the
Department of Mental Health Mental Retardation
And Substance Abuse Services
May 4, 2007

The grievant, through her representative, has appealed the hearing officer's decision in Case No. 8487/8488/8489. The grievant is challenging the decision for various reasons, including her belief that the decision is inconsistent with state and agency policies. For the reasons listed below, the Department of Human Resource Management will not disturb the hearing officer's decision. The agency head, Ms. Sara Redding Wilson, has requested that I respond to this appeal.

FACTS

The Department of Mental Health Mental Retardation and Substance Abuse Services employed the grievant as a registered nurse at one of its facilities until she was terminated. On June 27, 2006, the agency issued to her the following disciplinary action: a Group II Written Notice for "Refusal to work overtime hours as required by supervisor/AOD. On June 2, 2006, prior to the conclusion of the night shift, you refused to work overtime after being told by the AOD that you were #1 on the mandated overtime list." On August 8, 2006, the agency issued to her the following disciplinary action: a Group II Written Notice for "Refusal to work overtime hours as required by supervisor/AOD: On July 1, 2, and 8, 2006, you refused to work mandated overtime." In addition, she was given a ten-day suspension. On September 11, 2006, the agency issued to her the following disciplinary action: a Group II Written Notice for "Refusal to work overtime hours as required by supervisor/AOD: On August 27 and 28, 2006, you refused to work mandated overtime." Based on an accumulation of three active Group II Written Notices, she was terminated, effective, September 11, 2006. She filed grievances challenging the disciplinary actions but the hearing officer upheld the agency's disciplinary actions, including the termination.

The relevant policy, the Department of Human Resource Management's Policy #1.60, Standards of Conduct, states that it is the Commonwealth's objective to promote the well-being of its employees in the workplace and to maintain high standards of professional conduct and work performance. This policy also sets forth (1) standards for professional conduct, (2) behavior that is unacceptable, and (3) corrective actions that agencies may impose to address behavior and employment problems. Section V, Unacceptable Standards of Conduct, of that policy sets forth examples of unacceptable behavior for which specific disciplinary action may be warranted. The examples are not all-inclusive.

DISCUSSION

Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. In addition, in cases involving discipline, the hearing officer reviews the facts to determine whether the cited actions constitute misconduct and whether there are mitigating circumstances to justify reduction or removal of the disciplinary action. If misconduct is found but the hearing officer determines that the disciplinary action is too severe, he may reduce the discipline. By statute, this Department has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by this Agency or the agency in which the grievance is filed. The challenges must cite a particular mandate or provision in policy. The Department's authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

In the present case it is indisputable that the grievant's refusal to work overtime, on all three occasions, as directed by her supervisor was a violation of DHRM Policy 1.60, Standards of Conduct. The hearing officer wrote, "Failure to follow a supervisor's instruction, ... or otherwise comply with established written policy" is a Group II offense. Grievant was instructed by a supervisor to work overtime. She refused that instruction. By refusing to work overtime as directed by her Supervisor, Grievant failed to comply with DHRM Policy 1.60(III)(A)(3)(a). Each of the Group II Written Notices must be upheld." In her request for an administrative review to this Agency, the grievant did not present any evidence to support how the hearing officer's decision violated any DHRM or Department of Mental Health Mental Retardation and Substance Abuse Services policies. Rather, it appears that the grievant disagreed with how the hearing officer assessed the evidence and the outcome of the hearing. A hearing officer is authorized to make a finding of fact as to the material issues in the case and to determine the grievance based on the evidence. It was within his authority to decide the case and this Agency will not second-guess his decision. Because we cannot identify any policy violation concerning the hearing officer using his discretion in determining whether the grievant should be granted relief, we have no basis to interfere with this decision.

Ernest G. Spratley, Manager
Employment Equity Services