

Issues: Group II Written Notice (failure to follow policy) and Suspension; Hearing Date: 10/06/08; Decision Issued: 10/10/08; Agency: DOC; AHO: William S. Davidson, Esq.; Case No. 8873; Outcome: No Relief – Agency Upheld in Full.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 8873

Hearing Date: October 6, 2008
Decision Issued: October 10, 2008

PROCEDURAL HISTORY

The Grievant received a Group II Written Notice on March 11, 2008 for:

Failure to follow supervisor's instructions, comply with applicable established written process and falsifying inmate records.

Pursuant to the Group II Written Notice, the Grievant was suspended for five (5) working days. On April 8, 2008, the Grievant timely filed a grievance to challenge the Agency's action. On June 3, 2008, the Department of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. Subsequent to being assigned this case, the Agency requested a continuance in order that the Director of the Agency consider consolidating this case with several other cases from this Agency. Accordingly, on October 6, 2008, a hearing was held at the Agency's location.

APPEARANCES

Grievant
Agency Party
Agency Representative
Witnesses

ISSUE

1. Did the Grievant's actions constitute failure to follow supervisor's instruction and failure to comply with applicable established written process and falsification of an inmate's record.

AUTHORITY OF HEARING OFFICER

Code Section 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code Section 2.2-3005.1 provides that the Hearing Officer may order appropriate remedies including alteration of the

Agency's disciplinary action. Implicit in the Hearing Officer's statutory authority is the ability to independently determine whether the employee's alleged conduct, if otherwise properly before the Hearing Officer, justified termination. The Court of Appeals of Virginia in Tatum v. VA Dept of Agriculture & Consumer Servs., 41VA. App. 110, 123, 582 S.E. 2d 452, 458 (2003) held in part as follows:

While the Hearing Officer is not a "super personnel officer" and should give appropriate deference to actions in Agency management that are consistent with law and policy...the Hearing Officer reviews the facts de novo...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action. Thus the Hearing Officer may make a decision as to the appropriate sanction, independent of the Agency's decision.

BURDEN OF PROOF

Inasmuch as this grievance did not involve a disciplinary action or a dismissal for unsatisfactory performance, the burden of proof is on the Grievant to show by a preponderance of the evidence that the actions taken by the Agency were not warranted or 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 Agency provided the Hearing Officer with a notebook containing nine (9) tabbed sections and that notebook was accepted in its entirety as Agency Exhibit 1. Grievant provided the Hearing Officer with a notebook and that notebook were accepted in its entirety as Grievant's Exhibit 1.

The basic evidence presented to the Hearing Officer was uncontroverted. The Grievant was a nurse at the Agency facility. On the night of February 28, 2008 an inmate presented himself to the Grievant complaining of chest pains. The Grievant examined the patient and made an entry into his medical record.¹ In that record, the Grievant stated certain findings that she made regarding this inmate. When the Grievant testified, she acknowledged that there were several entries that she did not put in the record that should have been entered.

¹ Agency Exhibit 1, Tab 2, Page 1

The Agency introduced the Standard Treatment Guidelines for Cardiac Emergencies (Chest Pains).² It is clear from the notes that the Grievant made in the medical record as well as her testimony that she did not even remotely comply with the guidelines for a cardiac emergency or chest pains. In her testimony, the Grievant testified that she had taken the blood pressure of the inmate on at least one (1) undocumented occasion and that aspirin had been administered to him.

Virginia Department of Corrections Operating Procedure 720.5(IV)(G)(2) states in part that all medications administered to offenders shall be recorded on the MAR.³

Virginia Department of Corrections Operating Procedure 135.1(XI)(B)(1) states in part as follows:

Group II offenses include but are not limited to failure to follow a supervisor's instructions, perform assigned work or otherwise comply with applicable established written policy.⁴

It is clear that the Grievant did not follow written guidelines regarding any inmate who presented to her with chest pains and it is clear that she did not follow written guidelines regarding medication that was prescribed. Because of these violations, the Hearing Officer does not need to go any further in this matter.

MITIGATION

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 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, (3) the disciplinary action was free of improper motive, (4) the length of time that the Grievant has been employed by the Agency, and (5) whether or not the Grievant has been a valued employee during the time of his/her employment at the Agency. The Grievant has an active Group II Written Notice on her record. Accordingly, the Hearing Officer, after considering the above-referenced examples, finds no basis for mitigation in this matter.

² Agency Exhibit 1, Tab 3, Page 1

³ Agency Exhibit 1, Tab 5, Page 5

⁴ Agency Exhibit 1, Tab 8, Page 7

⁵ Va. Code § 2.2-3005

DECISION

For reasons stated herein, the Hearing Officer finds that the Agency acted properly in issuing the Group II Written Notice and suspending the Grievant for five (5) days.

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 Street, 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 Street, Suite 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 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 a review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.⁶

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]

William S. Davidson
Hearing Officer