

Issues: Group III Written Notice (engaging in conflict of interest) and Termination;
Hearing Date: 07/15/09; Decision Issued: 07/17/09; Agency: DSS; AHO: Carl
Wilson Schmidt, Esq.; Case No. 9125; Outcome: No Relief – Agency Upheld in Full;
Judicial Review: Appealed to Circuit Court in Newport News on 08/14/09;
Outcome pending.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9125

Hearing Date: July 15, 2009
Decision Issued: July 17, 2009

PROCEDURAL HISTORY

On March 9, 2009, Grievant was issued a Group III Written Notice of disciplinary action with removal for engaging in a conflict of interest.

On March 23, 2009, 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 June 16, 2009, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 15, 2009, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Advocate
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?
5. Whether the Agency discriminated against Grievant?

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 Virginia Department of Social Services employed Grievant as a Licensing Inspector – Adult Programs at one of its offices. She had been employed by the Agency since 2001 until her removal effective March 6, 2009. The purpose of her position was:

To reduce risks to aged, infirm and disabled individuals in adult care facilities through enforcement of state licensing laws and regulations and evaluation of standards of practices.

Grievant's work performance was otherwise satisfactory to the Agency. She received an overall rating of Contributor on her 2008 performance evaluations. Her Supervisor wrote:

[Grievant] has attempted to be conscientious in her approach to work, aided others in the office and has worked on enhancing her own organization. Her efforts are much appreciated for their positive impact on the office operations and colleagues.

No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

Grievant had been responsible for inspecting Facility SB and its operations since May 2004. Grievant had broad authority over Facility SB. If she observed that Facility SB was in violation of Agency regulations, she was obligated to issue the appropriate sanction to Facility SB. Sanctions could include monetary penalties up to and including shutting down the Facility if certain regulations were violated.

From February 5, 2007 through August 1, 2008, Grievant worked both her full time job with the Agency and also worked as a volunteer Assistant Administrator at Facility SB.¹ On Fridays, Saturdays, and Sundays, Grievant usually worked for Facility SB. She would sometimes go to Facility SB to perform her duties as volunteer Assistant Administrator and sometimes would remain at her home and be “on call” to answer questions of staff needing guidance. Grievant reported to Ms. HJ who was the Executive Director and Licensed Assisted Living Administrator.

On December 1, 2008, Grievant submitted an application for licensure to the Board of Long-Term Care Administrators of the Department of Health Professions in order to become an Assisted Living Facility Administrator. Her objective was to enhance her knowledge of managing Assisted Living Facilities so that she could better regulate those facilities. To establish that she had sufficient experience in order to be licensed, Grievant attached a letter from Ms. HJ written on the letterhead of Facility SB which stated:

[Grievant] has been acting as a volunteer Assistant Administrator for [Facility SB] for a period of 18 months, spanning from February 5, 2007 through August 1, 2008.

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.”² 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.”

Va. Code Section 2.2-3103 lists prohibited conduct and states, “No officer or employee of a state or local governmental or advisory agency shall: *** 5. Accept any money, loan, gift, favor, service, or business or professional opportunity that reasonably tends to influence him in the performance of his official duties” Grievant was an

¹ Grievant referred to her position as a substitute volunteer Assistant Administrator.

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

employee of a state governmental agency whose official duties included regulating Facility SB. She had the authority to identify and enforce correction of Facility SB's non-compliance with State regulations. In her capacity as a Licensing Inspector, Grievant could impose sanctions against Facility SB for erroneous decisions made by Ms. HJ. In her capacity as a volunteer Assistant Administrator, Grievant was subject to the direction of Ms. HJ. Grievant received a favor from Facility SB because Ms. HJ provided the necessary letter of reference that enabled Grievant to verify she had met the experience requirement to be licensed by the Board of Long-Term Care Administrators. Grievant received a professional opportunity from Facility SB because she was given the opportunity to learn the duties of an Assistant Administrator. The favor and professional opportunity received by Grievant from Facility SB are of the type that would reasonably tend to influence a person in the performance of his or her duties. A reasonable person in Grievant's circumstance could find himself or herself deciding whether to sanction Facility SB for erroneous management decisions of Ms. HJ for which the inspector had some participation. The Agency has presented sufficient evidence to show that Grievant violated Va. Code Section 2.2-3103.

Grievant argues that because she was not compensated for her services by Facility SB a conflict did not arise. This argument fails. Grievant received a favor from Ms. HJ and a professional opportunity. This is sufficient to establish a violation of Va. Code Section 2.2-3103. It is not necessary for Grievant to have received cash compensation in order for her to create a conflict of interest.

Grievant contends her duties as a volunteer Assistant Administrator did not affect her actions to regulate Facility SB. She contends she issued as many notices of violation while she was working for Facility SB as she did prior to working for Facility SB. There is no evidence showing that Grievant treated Facility SB differently from other facilities she regulated. Whether her behavior as a regulator was actually influenced by her duties as a volunteer Assistant Administrator is not of significance. Grievant violated State law. Every time she decided to sanction or refrain from sanctioning Facility SB, her decision was undermined by her conflict of interest status. All of her decisions regarding Facility SB were undermined from the Agency's perspective because they were no longer made by a neutral objective inspector.

DHRM Policy 1.60 provides examples of offenses giving rise to disciplinary action. "These examples are not all-inclusive, but are intended as examples of conduct for which specific disciplinary actions may be warranted. Accordingly, any offense not specifically enumerated, that in the judgment of agency heads or their designees undermines the effectiveness of agencies' activities, may be considered unacceptable and treated in a manner consistent with the provisions of this section." In the Agency's judgment, an employee who carries out her duties while having a conflict of interest for 18 months has engaged in behavior constituting a Group III offense. The Agency's judgment must be upheld. Grievant's conflict of interest undermined the Agency's ability to trust the work she performed with respect to Facility SB.

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 *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.

Grievant contends she did not receive notice of Va. Code Section 2.2-3103 and, thus, she should not be disciplined for violating the statute. She adds that no one in the Agency spoke with her about not volunteering to work for a regulated entity. State employees are deemed to have knowledge of statutes affecting the terms of their employment. In addition, Grievant received training regarding conflict of interest law applicable to State employees. There is a sufficient basis for the Hearing Officer to conclude that Grievant knew or should have known that her actions might create a conflict of interest. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

Grievant argued the Agency disciplined her as a form of age, sex and race discrimination. No credible evidence was presented to suggest that the Agency acted against Grievant because of her age, sex, or race. The Agency’s disciplinary action was not a pretext to discrimination.

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 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.

³ Va. Code § 2.2-3005.

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
600 East Main St. STE 301
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.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].

S/Carl Wilson Schmidt

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.