

Issues: Group II Written Notice (failure to follow instructions, disruptive behavior, insubordination), Termination (due to accumulation), Workplace Harassment, and Retaliation; Hearing Date: 08/17/09; Decision Issued: 08/20/09; Agency: DVS; AHO: Carl Wilson Schmidt, Esq.; Case No. 9152; 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 Number: 9152

Hearing Date: August 17, 2009
Decision Issued: August 20, 2009

PROCEDURAL HISTORY

On May 4, 2009, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow a supervisor's instructions, disruptive behavior, insubordination, and refusal to work overtime as required. Grievant was removed from employment based on the accumulation of disciplinary action.

On May 27, 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 July 29, 2009, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 17, 2009, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
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?
5. Whether the Agency engaged in workplace harassment by creating a hostile work environment, and whether the Agency retaliated 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 Department of Veterans Services employed Grievant as a Certified Nursing Assistant. The purpose of her position was:

Duties include physical observation, behavior modification. To provide ADL care for residents. Assist with new admissions and discharges. Completing vital sign checks and completing cleaning assignments.¹

Grievant had prior active disciplinary action. She received a Group I Written Notice on May 21, 2008, a Group I on September 29, 2008, a Group I on November 25, 2008, a Group II on January 30, 2009, and a Group II on March 27, 2009.

Grievant's regular work shift was from 7 a.m. until 3 p.m. Grievant had been informed that she was mandated to work an additional shift on May 3, 2009 from 3 p.m. until 11 p.m.

¹ Agency Exhibit 1.

On May 3, 2009, Grievant came into the Supervisor's office. Grievant was loud and agitated and slinging her arms about. Grievant said, "I have some serious nursing care issues that need to be addressed. The Supervisor tried to ask Grievant to sit down and calm down. Grievant states, "I've had it! Nobody cares about these men but me and I'm not going to take it anymore." The Supervisor again asked Grievant to calm down and tell the Supervisor what was wrong. Grievant said she was tired of doing everyone else's work in addition to doing her own work. Grievant said that another CNA wheeled a resident up to the nursing desk and asked Grievant if she was going to change the wet pants of the resident before the end of the shift. Grievant said she had changed the resident before lunch and had not checked his brief prior to the CNA bringing the resident to the desk. Grievant said the resident had only spilled something on his pants or someone had thrown something on him, but Grievant was not sure and was not going to change the resident because he was not wet. Grievant complained that she had reported to the Charge Nurse that she had another resident who was soiled and needed to be changed but nothing was done about it. Grievant said she was tired of being picked on by other staff and charge nurses when all the other CNAs were allowed to sit "on their asses and laugh and joke" when the residents were not receiving care. The Supervisor told Grievant to calm down and that as soon as she had a chance to get her staffing in place, she would meet with Grievant, the nursing staff, and CNAs. Grievant said "fine" and "stormed out" of the Supervisor's office.

The Supervisor met with Grievant, the LPN, the Charge Nurse, and the CNA. The Supervisor explained that the meeting would not be a shouting match, but that Grievant had come to her with some concerns that needed to be worked out. Grievant expressed her concerns to the group. She described the treatment of two residents. She indicated she was tired of being picked on and doing everybody else's work in addition to her own. The Supervisor then attempted to have each of the other people in the group present their account of what had happened. As each person was trying to give her recollection of the events, Grievant repeatedly interrupted saying, "that's not what happened; you know you are lying on me." Each time Grievant interrupted a speaker, the Supervisor asked Grievant to allow the person to speak without interruption. Grievant ignored that instruction and continued to angrily tell them that they were conspiring against her and lying. After each person gave her recollection, the Supervisor attempted to explain to Grievant that on more than one occasion, the Supervisor had instructed staff that they were responsible for resident care on their unit and not just groups for which they were assigned responsibility. The Supervisor explained that she had also instructed Grievant that residents did not need to be sitting around in wet or damp clothing. Grievant responded, "you know that we don't have time to change every resident every time they spill something on themselves; we would never get anything else done." The Supervisor encouraged Grievant to calm down as there was no reason for Grievant to be raising her voice. The Supervisor told Grievant that she was to go through the chain of command with problems or concerns. Grievant said, "They don't like me and are continuously picking at what I do or don't do that's why I came to you, but it appears that you are taking their side and don't care about the type of care these residents receive either. I will be going down to talk to the director of nursing in the morning." Grievant continued to yell and said, "You have made me a

nervous wreck and I can't stand any more of this. I will not stay and work with these people. You will have to move me to another unit then." Before the Supervisor could say anything else, Grievant jumped out of her chair and opened the door to leave the meeting. Grievant threw the door back against the wall with a loud crash and stomped out of the room. The Supervisor followed Grievant and attempted to get Grievant to calm down and think about her actions. Grievant then asked if the Supervisor was discriminating against her and the Supervisor said she was not discriminating against Grievant. Grievant said, "I am the only one up here who cares about what happens to the residents. What you all are doing is neglect. I don't have to put with this." The Supervisor reminded Grievant that she was mandated to work overtime. Grievant removed her purse from her locker and left the building and parking lot.

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."

Failure to follow a supervisor's instructions and insubordination are Group II offenses. Grievant was instructed repeatedly to calm down and to let others speak during the meeting. Grievant repeatedly ignored that instruction. Grievant remained upset and angry and interrupted other staff as they spoke.

Disruptive behavior is a Group I offense. Grievant was disruptive because she repeatedly yelled at the Supervisor despite the Supervisor instructing her to calm down. Grievant was disruptive because she did not let other staff speak without interruption during the meeting. Grievant was disruptive because she slammed the door open and stomped out of the meeting room.

Refusal to work overtime is a Group II offense. Grievant knew she was obligated to work overtime on May 3, 2009. Grievant left the Agency's facility and did not work overtime as required.

The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice of disciplinary action.

Accumulation of a second active Group II Written Notice "normally should result in discharge."³ With the disciplinary action giving rise to this grievance, Grievant has

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

³ DHRM § 1.60(VII)(D)(2)(b).

accumulated at least two active Group II Written Notices. Accordingly, the Agency's decision to remove Grievant from employment must be upheld.

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...."⁴ 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.

"The Commonwealth strictly forbids harassment of any employee, applicant for employment, vendor, contractor or volunteer, on the basis of an individual's race, sex, color, national origin, religion, sexual orientation, age, veteran status, political affiliation or disability."⁵ Grievant contends she was subject to workplace harassment in the form of a hostile work environment. She contends lewd and offensive statements were made to her. She contends she was singled out for her medical condition of Cataplexy. Grievant did not testify during the hearing. The fact surrounding her medical condition and the comments made by others were not presented in evidence. Agency witnesses admitted on cross-examination that they were aware of Grievant's medical condition of Cataplexy and that Grievant could suffer blackouts. Insufficient detail regarding the medical condition was presented for the Hearing Officer to determine the extent to which Grievant's medical condition affected her and would likely have affected her had she remained at the facility rather than leaving. Grievant has not established harassment.

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;⁶ (2) suffered a

⁴ *Va. Code § 2.2-3005.*

⁵ DHRM Policy 2.30.

⁶ See *Va. Code § 2.2-3004(A)(v)* and (vi). The following activities are protected activities under the grievance procedure: participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

materially adverse action⁷; and (3) a causal link exists between the adverse action and the protected activity; in other words, management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, retaliation is not established unless the Grievant's evidence shows by a preponderance of the evidence that the Agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual.⁸

Grievant argued that she engaged in a protected activity by complaining about the quality of care given to residents. Grievant suffered a materially adverse action because of her disciplinary removal from employment. No credible evidence was presented to show that the Agency took disciplinary action against Grievant because of her claimed protected activities. The Agency took disciplinary action against Grievant because of her behavior and did not retaliate against her.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II 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.
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

⁷ On July 19, 2006, in Ruling Nos., 2005-1064, 2006-1169, and 2006-1283, the EDR Director adopted the "materially adverse" standard for qualification decisions based on retaliation. A materially adverse action is, an action which well might have dissuaded a reasonable worker from engaging in a protected activity.

⁸ This framework is established by the EDR Director. See, EDR Ruling No. 2007-1530, Page 5, (Feb. 2, 2007) and EDR Ruling No. 2007-1561 and 1587, Page 5, (June 25, 2007).

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.⁹

[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

⁹ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.