

Issues: Group II Written Notice (creating a non-therapeutic environment), Group III Written Notice (falsification of records) and Termination; Hearing Date: 08/25/10; Decision Issued: 08/30/10; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 9385; Outcome: Partial Relief.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9385

Hearing Date: August 25, 2010
Decision Issued: August 30, 2010

PROCEDURAL HISTORY

On May 26, 2010, Grievant was issued a Group II Written Notice of disciplinary action for creating an inappropriate and non-therapeutic environment. Grievant also received a Group III Written Notice of disciplinary action for falsification of records. Grievant was removed from employment effective May 26, 2010.

On June 8, 2010, Grievant timely filed a grievance to challenge the Agency's actions. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On August 3, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 25, 2010, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Representative
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notices?
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 Behavioral Health and Developmental Services employed Grievant as a Direct Service Associate II at one of its Facilities. He had been employed by the Agency for approximately 5 years prior to his removal. Grievant had active prior disciplinary action. On September 21, 2009, Grievant received a Group II Written Notice of disciplinary action for failure to follow policy.¹

The Individual is a 43-year-old male who has resided at the Facility since 2000. He is severely intellectually disabled, ambulatory, verbal, and has several medical problems for which he receives treatment and support from Agency staff.

Grievant was responsible for recording information on the Individuals' flow sheets and sleep data collection charts. He had been instructed to record his actions and observations as they occurred. The Agency relied upon the accuracy of the information collected by Grievant to determine the appropriate treatment of individuals at the Facility.

On March 21, 2010, Grievant and Ms. C were working in a living area with the Individual. Ms. C observed scratches on the Individual's back and told Grievant to fill out an event report. Grievant told Ms. C that it was not his responsibility to do so and that she should fill out the event report. Ms. C then incorrectly accused Grievant of

¹ Agency Exhibit 12.

causing harm to the Individual and stating that that was why Grievant did want to fill out the event report. The conversation escalated into a shouting match and curse words were used by Grievant and Ms. C. Grievant told Ms. C "F-k you!" Another employee overheard the shouting and came to hold Grievant and Ms. C apart. That employee did not feel that her safety was at risk of harm. The shouting match occurred within a few feet of the Individual and was observed by the Individual. Grievant was instructed to leave the Facility and he did so prior to 10 p.m. and did not return for the remainder of his shift.

The Agency's investigation revealed that Grievant had documented on the Individual's flow sheet that he had given fluids to the Individual in accordance with a doctor's order at 10 p.m. Grievant documented on the Individual's sleep data collection charts that the Individual had gone to bed between 10 p.m. and 11 p.m. Grievant documented on the living area report that five individuals had gone to bed between 10 p.m. and 10:30 p.m.

Grievant was not present at the Facility at the time he claimed to have given fluids to the individual, observe the Individual go to bed, and observed five other individuals go to bed.

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."

"[U]nsatisfactory work performance" is a Group I offense.³ Grievant knew from his annual training that individuals at the Facility could be adversely affected by observing shouting and cursing by an employee. The Agency expected its employees to refrain from engaging in verbal conflicts with other employees in front of individuals. On March 21, 2010, Grievant engaged in a shouting match with Ms. C in front of the Individual thereby engaging in a non-therapeutic interaction with the Individual. Grievant's behavior was unsatisfactory to the Agency thereby justifying the issuance of a Group I Written Notice.

The Agency argued that Grievant should receive a Group II Written Notice. The Agency did not present a written policy or other basis to elevate the disciplinary action

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

³ See, Attachment A, DHRM Policy 1.60.

to a Group II Written Notice. Grievant's behavior was not sufficiently severe so as to justify the issuance of a Group II Written Notice.

"[F]alsification of records" is a Group III offense.⁴ "Falsifying" is not defined by DHRM § 1.60, 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:

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

Grievant knew or should have known that he was to record information regarding individuals as events occurred and not in advance. Prior to 10 p.m. on March 21, 2010, Grievant wrote in several Agency records that he had observed the Individual receive fluids and go to bed at a time in the future. He wrote that he had observed several individuals go to bed at a time in the future. At the time Grievant made his entries in the Agency's records, the events had not yet occurred. Grievant falsified Agency records thereby justifying the issuance of a Group III Written Notice of disciplinary action.

Upon the receipt of a Group III Written Notice, an employee may be removed from employment. In this case, Grievant received a Group III Written Notice. 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..."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

⁴ See, Attachment A, DHRM Policy 1.60.

⁵ Va. Code § 2.2-3005.

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 argued that he was more harshly disciplined than Ms. C who was not removed from employment. It is not clear that Ms. C and Grievant are similarly situated employees. No evidence was presented that Ms. C falsified any documents. Accordingly there would not be a basis to support Ms. C's removal. 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 a Group II Written Notice of disciplinary action is **reduced** to a Group I Written Notice for unsatisfactory work performance. 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.
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.⁶

[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

⁶ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.