

Issues: Group II Written Notice (failure to follow instructions and policy) and Termination (due to accumulation); Hearing Date: 09/06/11; Decision Issued: 09/08/11; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 9667; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9667

Hearing Date: September 6, 2011
Decision Issued: September 8, 2011

PROCEDURAL HISTORY

On May 27, 2011, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow a supervisor's instruction and failure to follow policy. Grievant was removed from employment effective May 27, 2011 based upon the accumulation of disciplinary action.

On June 21, 2011, 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 August 2, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The Hearing Officer found just cause to extend the timeframe for issuing a decision in this case due to the unavailability of a party. On September 6, 2011, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party 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?

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 at one of its Facilities until his removal effective May 27, 2011. He had been employed by the Agency for approximately 8 years. Grievant had prior active disciplinary action. On April 21, 2010, Grievant received a Group I Written Notice based upon the accumulation of unplanned leave. On August 5, 2010, Grievant received a Group I Written Notice based upon the accumulation of unplanned leave. On September 21, 2010, Grievant received a Group I Written Notice based upon the accumulation of unplanned leave.

Grievant was responsible for assisting patients by removing their soiled linen when necessary. The Patient had soiled linen but indicated to Grievant that he had none. Grievant did not remove the soiled linen from the Patient's room. On May 19, 2011, Mr. J was doing an "environmental check" of patients' rooms. He observed that the Patient had soiled linen. Mr. J spoke with the Supervisor and indicated that the Patient had soiled linen in his room and that Grievant was the employee responsible for removing that linen during Grievant's shift.

At approximately 4:30 a.m., the Supervisor spoke with Grievant and requested that he pick up the dirty linen and a soiled incontinence brief that was left in the Patient's room. Grievant went to the Patient's room and then returned to the nurse's station where the Supervisor was located. Grievant asked the Supervisor "did he say

something?” The Supervisor said “Please just pick up the cloths.” Grievant said that he was counting on his coworkers to do that because they were working together. Grievant was angry and said “I’m going to say something to him”. Grievant was referring to saying something to Mr. J. The Supervisor said “please just let it go.” Approximately 10 minutes later, the Supervisor observed Grievant confronting Mr. J. Grievant said “did you say something? Man up, if you did.” The Supervisor stepped between the two men. She raised both her hands upward to shoulder level and with her palms facing outward gesturing to separate the two men. The Supervisor was concerned that the altercation could escalate into a physical confrontation. The Supervisor observed that Grievant was angry but that Mr. J was not angry. The Supervisor told both employees to “walk away”. Grievant did not walk away. He continued to argue with Mr. J. and called Mr. J a “punk ass” at least three times during the course of his confrontation with him.

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.”¹ 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.”

Facility Policy HR 053 – 62 governance, Mutual Respect Through Adherence to Vision Mission, and Values of [the facility]. The policy provides:

It is expected, as a performance issue, that all will treat each other with dignity and respect, as well as promote an environment which is free of disrupted behaviors. ***

Disruptive behaviors violate our Mission and Values and will not be tolerated or condoned at [the Facility]. The following list of behaviors (not all inclusive) will subject those involved to correct the progressive disciplinary action under the Standards of Conduct: ***

F. Disrespectful language (name-calling, racial/ethnic jokes, etc.).

Failure to follow policy is a Group II offense.² On May 19, 2011, Grievant used disrespectful language towards Mr. J by referring to Mr. J as a “punk ass”. Grievant intended his comments to be an insult to Mr. J. His behavior was disruptive to the

¹ The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

² See, Attachment A, DHRM Policy 1.60.

Agency because the Supervisor was distracted from her duties in order to intervene to calm the conflict between Grievant and Mr. J. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow written policy.

Upon the accumulation of four Group I Written Notices, an employee may be removed. With the disciplinary action issued on May 27, 2011, Grievant has accumulated three Group I Written Notices and one Group II Written Notice. Accordingly, the Agency's removal of Grievant must be upheld.

Grievant argued that the Agency failed to follow proper procedures because Mr. J reported the confrontation to Agency managers instead of resolving the dispute at the unit level with the Supervisor. This argument fails. No policy was presented that would prohibit Mr. J from reporting his concerns to Agency managers. Although the Agency could have resolved the matter by permitting the Supervisor to counsel Grievant regarding his inappropriate behavior, the Agency was not obligated to do so.

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. In light of this standard, 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 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:

³ Va. Code § 2.2-3005.

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.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.