

Issue: Group I Written Notice (failure to follow policy); Hearing Date: 10/24/12;  
Decision Issued: 11/01/12; Agency: VDH; AHO: Carl Wilson Schmidt, Esq.; Case  
No. 9898; Outcome: No Relief – Agency Upheld.



# **COMMONWEALTH of VIRGINIA**

## ***Department of Human Resource Management***

### **OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

#### **DECISION OF HEARING OFFICER**

In re:

**Case Number: 9898**

Hearing Date: October 24, 2012  
Decision Issued: November 1, 2012

#### **PROCEDURAL HISTORY**

On April 10, 2012, Grievant was issued a Group I Written Notice of disciplinary action for failing to follow instructions or policy.

On May 3, 2012, 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 September 4, 2012, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The Hearing Officer found just cause to extend the time frame for issuing a decision in this grievance due to the unavailability of a party. On October 24, 2012, a hearing was held at the Agency's 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?

### **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 Health employs Grievant as a WIC Nutritionist at one of its Facilities. She began working for the Agency in 2001. No evidence of prior active disciplinary action was introduced during the hearing.

A 395 form is similar to a physician's order. For a client to receive vouchers to obtain certain food items, the client must have in his or her file a 395 form signed by a medical professional authorizing those items for the client. Grievant is responsible for making sure that the 395 form is placed in a client's file prior to or within five days of authorizing the client to have a voucher for a food item.

The client was a 4 year old child who required a 395 form to be completed authorizing him to obtain a special needs food package. He had received a 395 form in August 2011 and needed another form in February 2012. On February 15, 2012, the client and his mother arrived at the Facility and met with Grievant. Grievant noticed that the client did not have a current 395 on file. Grievant called the Medical Office staff to confirm that the client needed 32 oz. of whole milk for a six month period. Grievant failed to ask for a 395 form to be faxed to the Agency. Grievant then authorized the issuance of vouchers for a specialty food package for the client.

After Grievant learned of the allegations against her, she contacted the Medical Office and obtained a 395 form and placed it in the client's file.

## 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.”<sup>1</sup> 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.<sup>2</sup> In order to prove unsatisfactory work performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

Grievant was responsible for obtaining proper medical documentation to support the issuance of specialty food packages for the client. She knew that if a client did not have a 395 form on file, she was obligated to obtain a it within five days of providing vouchers for a client to receive a specialty food package. On February 15, 2012, the client and his mother arrived at the Facility and met with Grievant. She authorized the client to receive a voucher for a specialty food product for which the client did not have a 395 form on file. Grievant failed to call the Medical Office within five days and obtain a 395 form and then ensure that the form was placed in the client’s file. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice for unsatisfactory job performance.

Grievant argued that staff at the Medical Office faxed a 395 form to the Agency and that the Agency’s Clerk obtained the form but failed to place it in the client’s file. The evidence showed that the Medical Office did not fax a form to the Agency<sup>3</sup> and the Clerk did not fail to file a form in the client’s file.<sup>4</sup>

Grievant presented an audio recording of a telephone conversation she had with the nurse at the Medical Office. Grievant asserted that the nurse admitted sending the 395 form to Grievant on February 15, 2012. The audio does not support this conclusion. Grievant’s questions to the nurse were leading questions. The nurse did not confirm sending the 395 form on a specific date, namely on February 15, 2012.

---

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

<sup>2</sup> See Attachment A, DHRM Policy 1.60.

<sup>3</sup> The Agency had no record of sending a fax to the Agency on February 15, 2012 regarding a 395 form for the client.

<sup>4</sup> The clerk’s testimony that she did not receive on February 15, 2012 a fax relating to the 395 form needed by the client was credible.

Grievant argued that the Supervisor learned of her oversight shortly after she failed to obtain the 395 form and should have notified her within the five days so that she could have obtained the document on a timely basis. Grievant was responsible for obtaining the 395 form. The Supervisor took no action to assist Grievant because the Supervisor wanted to evaluate Grievant's work performance. The Supervisor's failure to provide assistance was within the Supervisor's discretion.

*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...."<sup>5</sup> 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 I Written Notice of disciplinary action 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:

---

<sup>5</sup> Va. Code § 2.2-3005.

Director  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by fax to (804) 371-7401, or e-mail.

3. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR 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:

Office of Employment Dispute Resolution  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto:EDR@dhrm.virginia.gov), or by fax to (804) 786-1606.

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 provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative 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.<sup>6</sup>

[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

---

<sup>6</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.