

Issues: Group I Written Notice (unsatisfactory performance) and Termination (due to accumulation); Hearing Date: 11/05/12; Decision Issued: 11/09/13; Agency: DBHDS; AHO: Frank G. Aschmann, Esq.; Case No. 9917; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA
OFFICE OF EMPLOYMENT DISPUTE RESOLUTION
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 9917

Hearing Date: November 5, 2012
Decision Issued: November 9, 2012

PROCEDURAL ISSUE

No procedural issues raised.

APPEARANCES

Grievant
Grievant's Representative
Agency Representative
Agency Witness

ISSUE

Did the Grievant violate Agency policy by failing to perform his duties in a satisfactory manner such as to warrant the issuance of a Group I Written Notice with employment termination for accumulated written notices?

FINDINGS OF FACT

The Grievant was employed by the Agency as a Human Care Specialist (Shift Supervisor). The Grievant has been employed with the Agency for approximately three years and consistently received a performance evaluation rating of "contributor." The Grievant was promoted to the supervisor position after two years of service. The Grievant's job duties included reviewing and initialing event reports. From February 16, 2012, to April 9, 2012, twenty-seven event reports were generated in the Grievant's unit. The Grievant initialed two of the twenty-seven event reports. The Grievant testified that he was not instructed to review the event reports and was not given training as a supervisor. The Grievant stated that once he was told to initial the reports he consistently did so. Grievant subsequently testified he was aware he was suppose to initial the event reports but indicated he did not have enough time to complete his administrative duties because he was busy performing direct care functions. The Grievant further, stated that he only failed to sign seven out of hundreds of event reports. The Grievant stated he was being targeted for employment termination and was being treated differently than other employees. Grievant states that he was treated differently because his second line supervisor did not like him personally, the supervisor was angry with him for reporting a missing

item to security and the supervisor discriminated against him because of his national origin. The Grievant states that his second line supervisor, his first line supervisor and a social worker conspired against him, fabricating allegations and forging documents to create a negative performance record later used to terminate his employment.

On April 30, 2012, the Agency issued a Group I Written Notice for unsatisfactory job performance, specifying, "Failure to review/sign off on electronic event reports regarding individuals." The Agency terminated the employment of the Grievant with this Group I Written Notice on the basis that the Grievant had three active Group I Written Notices and one active Group II Written Notice. This personnel action is the subject of the Grievant's request for a due process hearing.

The Grievant has been the subject of numerous disciplinary actions by the Agency. The Grievant received verbal counseling as follows:

2/28/11	failure to attend training
4/15/11	failure to complete assigned duty by due date
10/6/11	failure to follow established protocol
12/11/11	unsatisfactory job performance
12/14/11	unsatisfactory job performance
2/23/12	failure to follow established protocol
2/23/12	unsatisfactory job performance
4/9/12	unsatisfactory job performance

The Grievant received written counseling as follows:

11/22/11	violation of the professional code of conduct
12/15/11	unsatisfactory job performance
2/17/12	failure to follow established protocol
3/1/12	unsatisfactory job performance

The Grievant received Group I Written Notices as follows:

6/1/11	unsatisfactory job performance
8/3/11	unsatisfactory job performance
4/30/12	unsatisfactory job performance

The Grievant received a Group II Written Notice as follows:

8/3/11	failure to follow Agency policy
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On August 3, 2011, the Grievant was suspended for one day as the sanction for the Group I Written Notice issued that day. On April 30, 2012, the Grievant was terminated from

employment as the sanction for the Group I Written Notice issued that day.

APPLICABLE LAW AND OPINION

The General assembly enacted the Virginia Personnel Act, Code of Virginia §2.2-2900 et seq., establishing the procedures and policies applicable to employment with the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. Murray v. Stokes, 237 Va. 653 (1989).

Code of Virginia §2.2-3000 et seq. sets forth the Commonwealth's grievance procedure. State employees are covered by this procedure unless otherwise exempt. Code of Virginia §2.2-3001A. In disciplinary actions, the Agency must show by a preponderance of the evidence that the disciplinary action was warranted and appropriate under the circumstances. Department of Employment Dispute Resolution Grievance Procedure Manual, §5.8 (2).

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Code of Virginia §2.2-1201, the Department of Human Resource Management promulgated Standards of Conduct Policy number 1.60. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards of Conduct serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action. The Agency uses these policies for its Standards of Conduct.

The Standards of Conduct define a Group I violation as offenses which have a relatively minor impact on agency business operations but still require management intervention and includes unsatisfactory performance as an example. The Standards of Conduct define a Group II violation as acts of misconduct of a more serious nature that significantly impact agency operations. An employee failing to follow a supervisor's instructions or comply with written policy are examples of Group II offenses.

The Standards of Conduct establish a system of progressive discipline which provides employees an opportunity to correct errors and improve performance in all but the most serious cases. Sanctions increase with continued violations of the Standards of Conduct. The Standards of Conduct maintain that an accumulation of three active Group I Written Notices in addition to one active Group II Written Notice should result in employment termination. Group I Written Notices remain active for two years and Group II Written Notices remain active for three years from date of issue.

The Agency presented documentary evidence which demonstrated the Grievant had failed to initial event reports as was required in his job duties. Based upon the documents presented, this was not just a one time event but a frequent occurrence which happened more often than not. The Agency requires the staff to initial the event reports to insure each employee is aware of the current conditions of each resident. Failure to do so violates a quality control and in this instance required intervention by management. In less than two months the Grievant failed to perform this duty 25 out of 27 times. While failure to place his initials on the event reports does not necessarily mean the reports were not reviewed it does place management in a position where it can not be sure the Grievant was aware of the resident's needs and condition and therefore cannot rely on him to insure the resident's safety. The Agency presented sufficient evidence to establish that a Group I Written Notice was appropriate for unsatisfactory performance of the Grievant's job duties.

The Grievant's explanation that he was not instructed to initial the event reports and was not trained lacks credibility. The documents show that the Grievant initialed event reports on 2/16/12 and on 4/9/12 but failed to initialed them on 25 occasions in between those two dates. It does not make sense that the Grievant would have initialed the event report in February if he was unaware of his responsibility to do so. The documents and the testimony of the Grievant are inconsistent as the Grievant claims he failed to initial on just seven occasions out of hundreds. The documents show 25 occasions of failure in 27 opportunities in a less than two month time frame. The Grievant's claim that he consistently initialed after being told to do so is also inconsistent with the documents which show his initials in February but not thereafter until April. The Grievant's testimony further lacks credibility because he gave a different explanation later in his testimony and admitted he was aware of the duty but claims he was not given time to perform this duty. I find that the Grievant was aware of his responsibility to initial the event reports and repeatedly failed to do so in the Spring on 2012.

The Agency has terminated the employment of the Grievant for an accumulation of written notices. The Grievant presented evidence through testimony that he did not agree with the prior written notices in his record and disputed their validity. The Grievant's objection to the prior written notices is untimely. The Grievant was required to file a request for a due process hearing within five working days of the final management resolution step or within thirty days of the issuance of the written notice. (Grievance Procedure Manual §§2.2, 3.3) This was not done for the Group I Written Notices issued on 6/1/11 and 8/3/11 and the Group II Written Notice issued on 8/3/11. The merits of these written notices are not the subject of this hearing.

With the present holding that the Agency's action to issue a Group I Written Notice is appropriate, the Grievant has accumulated three active Group I Written Notices and one active Group II Written Notice. A Group II Written Notice in addition to three active Group I Written Notices normally should result in employment termination. (Standards of Conduct 1.60 § B.2.b.) The Agency's action to terminate the employment of the Grievant is in accord with the Standards of Conduct and Agency policy. The Grievant was given progressive discipline, being verbally

counseled on numerous occasions, receiving multiple written counselings, several written notices with one prior suspension before his employment was terminated for accumulated written notices.

The Grievant did not present any mitigating evidence which demonstrated the Agency's sanction was unduly harsh or inappropriate. The Grievant alleges that he was targeted for employment termination by his superiors and co-workers. The Grievant states that he was watched by fellow employees who were told to report if they observed the Grievant fail in his duties. This is not surprising as the Grievant had numerous performance failures and management is expected to check and maintain the performance of employees. The Agency is acting properly when scrutinizing the work of an employee with performance issues. Further if the Grievant's supervisors were targeting him and he knew it he should have been even more careful to comply with all policies and perform all duties asked of him, yet he continued to have many documented performance failures. This corroborates the Agency's position that despite numerous efforts to improve the performance of the Grievant he was unable to satisfactorily perform the job.

Even if the Grievant's supervisors did not like him personally his failure to perform his job duties satisfactorily is documented over a long period of time with multiple infractions. The Grievant indicates the attitude of his superiors changed when he caught them trying to steal a DVD player from a resident. The Grievant's criminal allegations are uncorroborated in the evidence and thus lack credibility.

The Grievant also alleges national origin discrimination. The Agency's stated reason for employment termination is his failure to perform. The Agency presented significant evidence of the Grievant's performance failures. The Grievant's allegation of discrimination is uncorroborated in the evidence. This allegation is, actually, in conflict with the Grievant's other testimony. If the Grievant's supervisors were motivated to remove him because of a personal dislike or conflict over the DVD player they were not motivated to discriminate on the basis of national origin. The Grievant's allegation of discrimination further lacks credibility because one of the co-workers he alleges conspired against him with his superiors is of the same national origin. The burden to prove discriminatory motive lies with the Grievant. St. Mary's Honor Ctr. V. Hicks, 509 US 502 (1993). The Grievant's evidence is insufficient to prove national origin discrimination was the motive for his employment termination.

The Agency has acted in accord with policy and given the Grievant many opportunities to correct his performance. The Agency acted appropriately when it terminated the employment of the Grievant after accumulating one Group II Written Notice and three Group I Written Notices.

DECISION AND ORDER

The disciplinary action of the Agency is affirmed.

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 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

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

2. 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 14th St., 12th Floor
Richmond, VA 23219

or, send by email to 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. Agencies must request and receive prior approval from EDR before filing a notice of appeal.

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.

Frank G. Aschmann
Hearing Officer