

Issue: Group II Written Notice (falsifying documents); Hearing Date: 11/19/12;
Decision Issued: 11/21/12; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.;
Case No. 9925; 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: 9925

Hearing Date: November 19, 2012

Decision Issued: November 21, 2012

PROCEDURAL HISTORY

On June 7, 2012, Grievant was issued a Group II Written Notice of disciplinary action for falsifying records.

On July 6, 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 October 2, 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 unexpected closure of State offices on the date of originally scheduled hearing. On November 19, 2012, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency's 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 employs Grievant as a Direct Service Associate II at one of its facilities. The purpose of her position is:

This position is responsible for monitoring the day-to-day activities of a therapeutic community. Residential Services Associates will be [responsible] for community development of up to 25 residents on [the] living unit; behavioral interventions supporting therapeutic progress; assisting with enforcing unit rules, policies, and procedures; performing room inspections; and documenting behaviors of residents.¹

No evidence of prior active disciplinary action was introduced during the hearing.

Many security doors in the Facility must be opened by an employee working in a control room. The doors are approximately 2.5 inches thick and slide open on a track instead of swinging open. In order to gain access to a secured area, an employee must notify the control room officer that he or she wishes to enter the area and the control room officer pushes the appropriate buttons to open the door.

¹ Grievant Exhibit 10.

The corridor is a small room that serves as a hub to enable employees to go into any of the four areas connected to the corridor. Inside the corridor is a line for which employees are expected to stand behind while a secured door opens. Only when the door is fully opened is the employee allowed to pass through the open doorway. The corridor connects the cook chill room, Unit 3A, Unit 3B, and a fourth area.

Grievant began working at approximately 3 p.m. on May 29, 2012. At approximately 4:20 p.m., Grievant was in the cook chill area of the Facility. The door from the cook chill area opened and Grievant passed into the corridor. To her left was Unit 3B. To her right was Unit 3A. She walked to the far right side of the slider door to Unit 3B to swipe her badge to close the cook chill slider door and also to push a button to inform the control room officer that she wished to enter Unit 3B. The control room officer observed Grievant and knew Grievant wished to enter Unit 3B and, thus, it was no longer necessary for Grievant to push the signal button. Grievant heard a “toot toot” sound which indicated to her that the slider door to Unit 3B was opening. Rather than waiting behind the yellow line in the middle of the corridor until the Unit 3B door was open as required by the Agency’s safety rules, Grievant immediately began moving towards the slider door. When the door opened enough for Grievant’s body to pass through, Grievant placed her right foot and head across the door’s threshold. For some unknown reason, the control room officer stopped the door from opening. This startled Grievant. The door began to move towards Grievant in order to close. The edge of the door came close to but did not hit Grievant’s body. Grievant quickly moved backwards so that her entire body was inside the corridor again. She placed her back against the slider door to the cook chill area and took deep breaths. The control room officer attempted to re-open the door. Once it was fully open, Grievant walked into Unit 3B. The control room officer apologized to Grievant several times for not opening the door fully the first time.

Grievant completed an Employee Injury and Illness Report regarding the incident. She wrote, “when the slider open I began to go through and then the slider closed back up and hit my whole right side.”² Grievant wrote that the “Injury/Illness Reported to: Right side.” She indicated that the location of the injury included her right shoulder, right arm, right leg, and that she felt stiffness in her neck.

On May 30, 2012, Grievant met with the Safety and Risk Manager who asked Grievant to describe the incident. As Grievant provided her account of the incident, the Safety and Risk Manager interrupted Grievant and asked, “[Grievant’s name] are you sure that the door hit you?” Grievant answered without hesitation, “Well No.” Grievant later denied making that statement to the Safety and Risk Manager.

² The last word in the sentence is difficult to read. Instead of “side” the word may be “shoulder”. See, Agency Exhibit 3.

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.”³ 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.”

"[F]alsification of records" is a Group III offense.⁴ Falsification is not defined by the Standards of Conduct 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 wrote that she had been hit by the slider door. She knew or should have known that the door did not hit her. Her report was false. The Agency reduced the disciplinary action to a Group II Written Notice. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

Grievant argued that the slider door hit her side and she suffered injury to her side. She presented a note from a medical provider showing that she suffered a contusion. The video shows that the door did not hit Grievant. That evidence is persuasive. During the hearing, Grievant demonstrated where the door hit her body and identified the back side of her arm from her shoulder to her elbow as being hit. The video does not show the back side of her arm below the shoulder crossing the threshold and entering the path of the slider door.

Grievant denied that she told the Safety and Risk Manager that she was not sure the door had hit her. The Safety and Risk Manager’s testimony was credible. Grievant

³ The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

⁴ See, Attachment A, DHRM Policy 1.60.

has not provided any motive for the Safety and Risk Manager to lie about her encounter with Grievant.

Grievant argued that she was denied procedural due process because the Agency had another camera in corridor that would have provided a second and better view of the incident. The Agency's decision was based on one camera and the video recording by that camera was provided to Grievant. That video is sufficiently clear to determine whether the door hit Grievant even though the video from the second camera would have been a good addition to the evidence. It is not clear that the Agency withheld the video from the second camera for any improper purpose.

Grievant also objected to not being provided an opportunity to interview all of the Agency's employee witnesses regarding what they observed. Nothing in the Grievance Procedure authorizes the Hearing Officer to order the agency to permit Grievant and her attorney to interview Agency employees during work hours. She argued that a patient viewed the incident but was not permitted by the Agency to appear at the hearing. . The Hearing Officer will not draw an adverse inference against the Agency for failing to produce the patient because it is not clear he was present during the incident and the Agency expressed concern regarding whether compelling him to participate would be inconsistent with his mental health treatment.

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 Human Resource Management"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 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 is **upheld**.

⁵ Va. Code § 2.2-3005.

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 e-mail.

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 e-mail 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.⁶

⁶ 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].

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer