

Issue: Group I Written Notice (unsatisfactory job performance); Hearing Date: 11/06/12; Decision Issued: 11/07/12; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 9939; 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: 9939

Hearing Date: November 6, 2012

Decision Issued: November 7, 2012

PROCEDURAL HISTORY

On July 27, 2012, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory performance.

On July 31, 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 he requested a hearing. On October 22, 2012, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 6, 2012, a hearing was held at the Agency's office.

APPEARANCES

Grievant
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 Psychologist II at one of its Facilities providing treatment for sex offenders. No evidence of prior active disciplinary action was introduced during the hearing.

The Therapist and another employee were responsible for conducting a group counseling session with 12 residents with backgrounds as sex offenders. The group met four times per week, 1.5 hours per day, with the same facilitators. The second employee was unable to attend the group session and Grievant volunteered to assist. The Therapist perceived Grievant as someone with more experience and knowledge than she had and was looking forward to having Grievant participate in the group session.

During the group session on June 13, 2012, Grievant responded to the residents' questions in a condescending, passive-aggressive, and disrespectful manner. The effect of Grievant's behavior was to escalate the emotions of residents in the group. For example, when a resident asked Grievant a question, Grievant responded by laughing during his response. He gave a "thumbs up" and smiled with an exaggerated smile when the resident questioned Grievant's answer. Grievant was grinning as the resident was expressing that he was upset with Grievant.

Grievant's behavior so upset one resident that he said Grievant needed to be removed from the group. At one point, the resident left the room and then returned with the Unit Manager and the Emergency Response Leader in order to have assistance in

having Grievant removed from the group. The resident explained that he was using the coping skills he had learned, namely to seek assistance and to remove himself or others from escalated situations. When Grievant was not removed from the group, another resident left the group session because he was so upset with Grievant's behavior.

After the residents left the therapy room, Grievant told the Therapist that some of his behavior during the group session was intentional because residents do not make progress if they are comfortable. Grievant wrote the Therapist an email in which he stated that perhaps the group now had a person they could focus their anger on rather than on the Therapist. Grievant was referring to himself as the person on whom the residents could focus their anger. Based on these interactions, the Therapist believed that Grievant intentionally provoked the group members.

When the group reconvened on a later day without Grievant being present, the Therapist observed that Grievant's appearance in the group damaged her relationship with the residents. She had to devote an entire group session to processing Grievant's behavior with the residents rather than focusing on their treatment. The trust the Therapist had built with several residents had been damaged by Grievant's behavior and continued to be damaged for many weeks.

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."

"[U]nsatisfactory work performance" is a Group I offense.² 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 treating residents at the Facility with respect, courtesy, and in a manner designed to improve their mental health. During the group session, Grievant was sarcastic, disrespectful, and condescending thereby escalating the emotions of the residents in the group. Grievant's behavior was so disruptive that several residents wanted him removed from the group. The Therapist was unable to perform her duties because Grievant's behavior served to distract the residents from

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.

their treatment. Grievant's behavior disrupted the Therapist's relationship with the residents. The Agency has presented sufficient evidence to show that Grievant's behavior was unsatisfactory work performance thereby justifying the issuance of a Group I Written Notice.

Grievant denied engaging in the behavior alleged by the Agency. The testimony of the Therapist was more persuasive than Grievant's testimony. She had a better vantage point to view Grievant's interaction with the residents and her testimony was credible. Possibly, Grievant was not able to judge how his actions were affecting the group.

Grievant asserted that he would not intentionally attempt to harm the residents and that he had had significant success treating a number of sex offenders at the Facility. The Therapist stated that Grievant made several good treatment suggestions during the group session. Although Grievant's work performance was otherwise satisfactory, the Agency has established the facts showing that Grievant's work performance was unsatisfactory on a particular occasion. The Agency has met its burden of proof.

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 I Written Notice of disciplinary action is **upheld**.

³ 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.⁴

⁴ 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