

Issue: Group III Written Notice with Termination (failure to follow instructions; abuse of State time, destroying State property); Hearing Date: 02/05/16; Decision Issued: 02/25/16; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10745; Outcome: Partial Relief.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10745

Hearing Date: February 5, 2016
Decision Issued: February 25, 2016

PROCEDURAL HISTORY

On November 6, 2015, Grievant was issued a Group III Written Notice of disciplinary action with removal for failure to follow a supervisor's direct order, for knowingly discarding resident documents, and for leaving the workplace to attend a baby shower after being approved to leave early due to illness.

Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On December 28, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 5, 2016, 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 employed Grievant as an Administrative & Office Specialist II at one of its facilities. The purpose of her position was to provide "office support to the Treatment Teams and ... support services to the living units."¹ Part of Grievant's duties included shredding documents. She began working for the Agency in 2013. No evidence of prior active disciplinary action was introduced during the hearing.

On June 3, 2015, the Supervisor sent Grievant a memorandum regarding unfiled paperwork. The Supervisor instructed Grievant, "I need all of the filing caught up by next Friday June 12th." She pointed out that:

The Laundry cart had several different kinds of documents that are time sensitive.

- Progress Reports dating back to June 2004
- Receipts dated back to December 2014
- Withdrawal slips
- Copy requests
- Resident schedules for the last year
- [Name] order receipts
- [Name] Statement to be cross referenced with RFA's²

¹ Agency Exhibit 1.

² Agency Exhibit 2.

Grievant acknowledged the instruction but took no action to complete the assigned work.

Residents who worked at the Facility receive paychecks twice per months. Grievant was supposed to distribute the paystubs. Residents tended to notify Grievant if they did not receive payment.

On August 7, 2015, the Supervisor observed that Grievant had placed documents in a shred box to be shredded. The documents included 340 resident receipts for deposits, 105 resident receipts for withdrawals, 10 requests for copies, a stacks of pay stubs, stacks of account balance verification, and a legal document.

Ms. S testified that Grievant intended to shred papers that should not have been shredded. For example, Grievant placed resident money receipts into the bin for papers to be shredded. The resident money receipts belonged to the residents and should have been given to them. Other documents that should not have been shredded included resident paystubs. Ms. S testified that some of the “stuff was old stuff.” The Agency did not explain how Ms. S knew which documents could be shredded and which documents should not have been shredded.

The Supervisor asked Ms. W to look through the shredder box. Ms. W identified several patient money receipts and pay stubs. The paystubs were not “current.” She wrote apology letters to approximately 200 patients because they did not receive their papers on a timely basis.

On August 7, 2015 at 7:01 a.m., Grievant sent a text to the Supervisor indicting that she “[didn’t] feel good but I have my [doctor’s] note to cover me.”³ The Supervisor believed Grievant intended to leave early because she did not feel well. Grievant left her desk at approximately noon. The Supervisor believed Grievant was going home.

A baby shower was scheduled for one of the employees at the Facility. The shower was scheduled to begin at noon on August 7, 2015. Approximately 35 employees attended the event. Employees attending were expected to bring a food item to share. After the employees finished eating, they played games. Grievant attended the baby shower instead of going home. She participated in one of the games the group played. She remained at the party for approximately 30 minutes. She “clocked out” at 1:16 p.m. from a building closer to the baby shower than her work location.

³ Agency Exhibit 2.

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.”⁴ 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.”

The Agency grouped three separate fact scenarios into one written notice instead of issuing three written notices and attempting to support removal based on an accumulation of disciplinary action. Because the Agency issued only one Written Notice, the Agency must show that at least one of the three scenarios justified the issuance of a Group III Written Notice.

Abuse of State time is a Group I offense. Grievant’s failure to “clock out” at noon instead of after attending the baby shower is at most an abuse of State time. It is not necessary to address this allegation since the Agency has presented evidence to support a higher level of disciplinary action than a Group I offense.

Failure to follow a supervisor’s instructions is a Group II offense. On June 3, 2015, Grievant was instructed by a supervisor to finish filing paperwork by June 12, 2015. She did not complete the task. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice. Upon the issuance of a Group II Written Notice, an agency may suspend an employee for up to ten work days. Because the Agency otherwise chose to remove Grievant, the Hearing Officer will authorize a suspension of up to ten work days.

The Agency alleged that Grievant damaged State property or records and should receive a Group III Written Notice. This allegation is not supported by the evidence. No evidence was presented showing Grievant was prohibited from shredding any documents. Indeed, it appears that Grievant’s normal work duties included shredding documents. The Agency’s discipline rests on the assumption that Grievant knew or should have known that what she tried to shred were not documents for which she was authorized to shred. The Agency did not present evidence showing it had identified standards by which Grievant should have used to separate documents she could shred from those she could not shred. The Agency did not provide evidence of any policy or supervisory instruction that would have put Grievant on notice that she could not shred the documents. For example, the Agency did not show what Grievant was to do with a money receipt that a resident refused to accept. The evidence showed that many of the documents were “old” documents.

⁴ The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

To establish a basis for a Group III Written Notice for destroying State property, the Agency was obligated to show that it informed Grievant which documents she was allowed and which documents she was prohibited from destroying. The Supervisor testified that if a document which was no longer usable and could not be delivered to a resident, then it could be shredded. The Agency did not show how Grievant was to know if a document was “usable.” The evidence is not sufficient to show that Grievant knew or should have known her actions were inappropriate. There is no basis to support the issuance of a Group III Written Notice.

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 further the disciplinary action.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is **reduced** to a Group II Written Notice with a ten work day suspension. The Agency is ordered to **reinstate** Grievant to Grievant’s same position at the same facility prior to removal, or if the position is filled, to an equivalent position at the same facility. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal and credit for leave and seniority that the employee did not otherwise accrue. The Agency may reduce the back pay award by a ten work day suspension.

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:

⁵ Va. Code § 2.2-3005.

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

[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

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