Issue: Group III Written Notice with Termination (falsifying records); Hearing Date: 01/31/18; Decision Issued: 02/01/18; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 11138; Outcome: No Relief – Agency Upheld.

# *COMMONWEALTH of VIRGINIA*

***Department of Human Resource Management***

**OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION**

## DECISION OF HEARING OFFICER

In re:

**Case Number: 11138**

Hearing Date: January 31, 2018
Decision Issued: February 1, 2018

## PROCEDURAL HISTORY

On October 17, 2017, Grievant was issued a Group III Written Notice of disciplinary action with removal for falsification of records.

On November 17, 2017, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On December 1, 2017, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On January 31, 2018, a hearing was held at the Agency's office.

## APPEARANCES

Grievant
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. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. 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 a Certified Nurse Assistant at one of its facilities. No evidence of prior active disciplinary action was introduced during the hearing.

On September 1, 2017, the Supervisor received a Note in her office inbox relating to Grievant's absence. The Supervisor reviewed the Note and noticed it was written on a doctor's prescription pad instead of the doctor's stationary the way most notes appeared from other employees. The Supervisor noticed that the blank space following the word "Age" showed the date of "8-21-17" instead of an age.

The Supervisor sent the Note to the Human Resource Officer. The Human Resource Officer contacted the doctor's office identified in the Note and spoke with the Office Manager. The Officer Manager said that the doctor's office had not used that prescription pad for several years, Grievant was not a patient of the doctor, and Grievant had not visited the doctor on August 21, 2017.

The HR Manager showed the Note to Grievant and questioned Grievant about the Note. Grievant responded that the Note "was not supposed to come here, it was supposed to go to my other job." The HR Manager concluded that Grievant knew of the Note and "claimed ownership" of the note.

## 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."

"[F]alsification of records" is a Group III offense. A doctor's note submitted to an agency becomes a record of that agency. The Note was falsified because it falsely represented that Grievant received medical services from a provider who had not treated Grievant. The Agency asserted that Grievant submitted the Note to the Supervisor[2] and, thus, falsified a record. The evidence is sufficient to support this conclusion and the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;[3] (2) suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity; in other words, management took an adverse employment action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse employment action, retaliation is not established unless the Grievant's evidence shows by a preponderance of the evidence that the Agency's stated reason was a mere pretext or excuse for retaliation. Ultimately, to support a finding of retaliation, the Hearing Officer must find that the protected activity was a "but-for"[4] cause of the alleged adverse action by the employer.[5]

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[1] The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

[2] The Agency's conclusion is supported by the evidence. When confronted with the Note, Grievant did not respond by denying she sent the Note. If another employee had submitted the Note without Grievant's knowledge, she most likely would have denied knowledge of the Note. Her failure to deny knowledge of the Note shows that she knew about the Note and likely submitted the Note to the Supervisor.

[3] See Va. Code § 2.2-3004(A)(v) and (vi). The following activities are protected activities under the grievance procedure: participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

[4] This requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer.

[5] *See,* Univ. Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2534 (2013).

Grievant argued that the Supervisor retaliated against her. The Supervisor instructed Grievant to work additional overtime and Grievant then complained to another supervisor. Grievant did not establish a connection between her complaint about the Supervisor and the issuance of the disciplinary action. The Supervisor received the Note and forwarded it to the Human Resource department. The Supervisor was not involved in the decision to issue disciplinary action. The Hearing Officer does not believe the Agency retaliated against Grievant because she complained about the Supervisor. The Agency took disciplinary action because it believed Grievant submitted a falsified medical excuse.

*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 …."[6] 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 III Written Notice of disciplinary action with removal is **upheld**.

## APPEAL RIGHTS

You may request an administrative review by EEDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EEDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Equal Employment and Dispute Resolution
Department of Human Resource Management

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[6] Va. Code § 2.2-3005.

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 must also provide a copy of your appeal to the other party 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.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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.[1]

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

*/s/ Carl Wilson Schmidt*

Carl Wilson Schmidt, Esq.
Hearing Officer

[1] Agencies must request and receive prior approval from EEDR before filing a notice of appeal.