Issue: Group III Written Notice with Termination (falsifying records); Hearing Date: 03/08/19; Decision Issued: 03/28/19; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 11314; 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: 11314

Hearing Date: March 8, 2019
Decision Issued: March 28, 2019

PROCEDURAL HISTORY

On December 26, 2018, Grievant was issued a Group III Written Notice of disciplinary action with removal for falsifying records.

On January 25, 2019, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On January 31, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 8, 2019, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
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 as a Psychiatric Technician at one of its facilities. No evidence of prior active disciplinary action was introduced during the hearing.

The Facility had a Timeclock located on a wall in the Building. Employees were required to swipe their badges when they entered and existed the Building. At the beginning of each week, the Timekeeper reviewed the Timeclock entries to ensure that each employee had a recorded entry and exit time. If a time entry was missing, the Timekeeper notified the employee's supervisor so that the employee could fill out a Time Clock Adjustment form to correct the Timeclock information.

On November 13, 2018, Grievant sent a text message to the Supervisor informing the Supervisor that Grievant would be late to work on November 14, 2018.

Grievant was scheduled to report to work at 7 a.m. on November 14, 2018. She was expected to arrive at the Facility and swipe her identification badge at the Timeclock to record her time of entry.

At 8:20 a.m. on November 14, 2018, Grievant stood in front of the Timeclock while she spoke with another employee to her for approximately 18 seconds. After finishing her conversation, Grievant turned away from the Timeclock and walked down the hall. Grievant was in possession of her badge but did not use her badge to swipe the Timeclock to record her time of entry.

The Supervisor spoke with Grievant on November 14, 2018 and reminded Grievant to submit a leave slip for being tardy that day. Grievant completed and submitted a leave slip for the time she was absent that day. The Supervisor did not know at that time that Grievant had not swiped in when she arrived to work.

On November 19, 2018, the Timekeeper sent the Supervisor an email stating that Grievant had a missed time entry. The Supervisor asked Grievant to submit a Time Clock Adjustment form. Grievant completed a Time Clock Adjustment and Occurrence Correction Form. Grievant checked a box showing she "FORGOT BADGE" and that she was "IN AT 7:00 a.m. on 11-14-18". Grievant submitted the form to the Supervisor. The Supervisor recognized that Grievant's TCA was not accurate since the Supervisor knew Grievant was late to work on November 14, 2018. The Supervisor took the form to the Assistant Chief Nursing Executive and asked how she was to proceed.

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."

Policy JI 8-10 governs Timekeeping/Leave Management. Section IV(B)(2) provides, "Upon arrival to work, all employees must swipe in."

Falsifying records is a Group III offense.[2] The Agency can establish that Grievant falsified records if it can show that Grievant knew or should have known she was submitting a document containing false information. On November 19, 2018, Grievant submitted a TCA claiming she had forgotten her badge on November 14, 2018 when in fact she stood in front of the Timeclock and made no attempt to swipe her badge.[3] Grievant submitted a leave slip on November 14, 2018 which should have served as a reminder that she was late on November 14, 2018. Grievant wrote that she reported to work at 7 a.m. when in fact she reported to work at 8:19 a.m. No evidence was presented showing that Grievant was late on any other date the week of November

[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.

[3] Grievant did not show that there was some other day that week where she forgot her badge that would have confused her regarding whether she forgot her badge on November 14, 2018. Grievant claimed the Supervisor checked "forgot badge" on the TAC but the Supervisor testified that Grievant presented the Supervisor with the box already checked. The Supervisor's testimony was credible.

14, 2018. Grievant should have remembered that November 14, 2018 was inconsistent with her regular schedule. Although Grievant later claimed it was an accident that she wrote the wrong swipe in time, the Agency has established that Grievant did not accidently enter the wrong time. The Agency has established that Grievant knew or should have known that she was falsely claiming to have forgotten her badge and reported to work at 7 a.m. on November 14, 2018. The Agency has presented sufficient evidence to support 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.

Grievant testified during the hearing that her badge malfunctioned. The badge was the size of a credit card and had to be swiped vertically in a slot. The video does not show Grievant making a swiping motion while she stood in front of the Timeclock. It appears most likely that Grievant stood in front of the Timeclock and chose not to swipe in.

Grievant argued that, "I do believe that the entire incident revolves around employee entrapment. I was lured into carrying out misconduct that I would not have carried out, but for the ensnarling method leading to my wrongful termination." No credible evidence was presented to show that the Agency caused Grievant to falsely claim to have reported to work on November 14, 2018 after having forgotten her badge. It is clear that Grievant disliked how the Agency sometimes treated her. It is not clear that this dispute affected her or the Agency's actions relating to the claim that she falsified records.

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 …."[4] 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**.

[4] Va. Code § 2.2-3005.

APPEAL RIGHTS

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

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 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 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

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