

Issue: Group III Written Notice with Termination (failure to follow instructions and insubordination); Hearing Date: 04/17/14; Decision Issued: 04/21/14; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10314; Outcome: No Relief – Agency Upheld; **Administrative Review: EDR Ruling Request received 05/02/14; EDR Ruling No. 2014-3880 issued 05/28/14; Outcome: AHO’s decision affirmed;** **Administrative Review: DHRM Ruling Request received 04/29/14; DHRM ruling issued 05/29/14; Outcome: AHO’s decision affirmed.**



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10314

Hearing Date: April 17, 2014

Decision Issued: April 21, 2014

PROCEDURAL HISTORY

On February 20, 2014, Grievant was issued a Group III Written Notice of disciplinary action with removal for insubordination, failure to follow instructions and/or policy, and failure to comply with hospital staffing requirements.

On March 6, 2014, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On March 25, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 17, 2014, 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. 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 License Practical Nurse at one of its Facilities. She had been employed by the Agency for approximately 20 years. No evidence of prior active disciplinary action was introduced during the hearing.

The Facility provided services to adult patients including geriatric patients. When Grievant reported to the Facility she usually worked in Pod 2B, the medical unit. When patients residing in other pods became ill, they received treatment in Pod 2B. Up to five patients could be treated at one time in Pod 2B.

Geriatric patients resided in Pod 4. It was often difficult for staff to render services to these patients because these patients required more time than other adult patients to receive services. For example, an employee responsible for dispensing medication to a geriatric patient may have to crush the patient's pills, mix those pills with food, and assist with feeding the geriatric patient. In December 2013, several staff complained to Mr. B, a Registered Nurse Coordinator, about being moved to Pod 4. As a result of employee complaints, the Facility adopted a practice where employees moved to Pod 4 would receive an orientation before beginning their shifts and would be able to ask questions of other employees working in Pod 4 and Agency supervisors responsible for supervising Pod 4. The Facility also adopted a practice of cross training and held a skills fair for employees.

When the Facility lacked adequate staffing in a particular pod, Facility managers would move employees from other pods into the inadequately staffed pod. Employees were selected to be moved to an understaffed pod based on a sequential rotation.

On February 15, 2014, Facility managers realized that Pod 4 would be understaffed for the day unless an additional employee was assigned to work in Pod 4. It was Grievant's turn to be moved to another pod. Grievant was notified she was expected to work her shift in Pod 4. At 7 a.m., Grievant called Ms. J, a Registered Nurse Coordinator, and said that she had been told to go to Pod 4 but that she could not do so. Grievant said she did not feel comfortable. Ms. J asked why. Grievant stated that she could not complete her tasks in a timely manner and that she was not able to do so because she did not feel comfortable working in Pod 4. Ms. J told Grievant that employees do not always feel comfortable going to another unit but that Grievant would be fine if she gave herself a chance. Ms. J said she would call staff in Pod 4 and make sure that they gave her the assistance she needed and an orientation if she needed one. Grievant said that she had worked in Pod 4 several times before and she could not do it and that she did not feel safe. Grievant then asked Ms. J what Ms. J wanted Grievant to do. Ms. J stated that she wanted Grievant to go to Pod 4 as directed. Grievant said she could not do so. Grievant asked Ms. J if she wanted Grievant to go home. Ms. J said she wanted Grievant to go to Pod 4. Ms. J told Grievant that Grievant was being directed to go to Pod 4 and that if Grievant did not do so then Grievant would not be following the directive given to her and that Grievant could suffer consequences. The telephone call ended.

At 7:15 a.m., Ms. N, the RNCB called Ms. J and said that Grievant had not reported to Pod 4. Ms. J called Pod 2B and Grievant answered the telephone. Ms. J asked Grievant if she was getting ready to go because they were waiting on her in Pod 4. Grievant said she was not getting ready to go. Grievant restated her position that she could not work in Pod 4. Ms. J told Grievant again the Grievant was refusing an assignment. Grievant insisted that she was not refusing the assignment but that she was not going to Pod 4 because she could not complete her assignment. Grievant repeated herself and became louder and louder and was insisting that she would not go to Pod 4. Ms. J hung up the phone because Grievant would not stop her arguing. Ms. J then called the Chief Nursing Executive and explained what had happened.

The Chief Nursing Executive called Grievant in Pod 2B. At approximately 7:26 a.m., the Chief Nursing Executive told Grievant that if she did not intend to go to Pod 4 she should take her keys and badge to Ms. J and leave the Facility. Grievant went to Ms. J's office and turned in her keys and badge and left the Facility at 7:45 a.m.

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.”

Insubordination is a Group II offense.² Failure to follow a supervisor’s instruction is a Group II offense.³ Ms. J instructed Grievant to go to Pod 4 and perform her work duties there. Grievant rejected Ms. J’s instruction and refused to go to Pod 4. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow a supervisor’s instruction.

In certain extreme circumstances, an offense listed as a Group II Notice may constitute a Group III offense. Agencies may consider any unique impact that a particular offense has on the agency. For instance, the potential consequences of a security officer leaving a duty post without permission are likely considerably more serious than if a typical office worker leaves the worksite without permission.

The Agency has presented sufficient evidence to support the elevation of the disciplinary action from a Group II to a Group III Written notice based on the impact of Grievant’s offense on the Agency. The essence of Grievant’s concern with working in Pod 4 was that Pod 4 lacked sufficient staff to enable her to perform her duties efficiently. On February 15, 2014, Pod 4 lack sufficient staff. The Agency attempted to enhance the level of staffing on Pod 4 by requiring Grievant to perform duties in Pod 4. Grievant refused to work in Pod 4. As a result of Grievant’s refusal, the Agency had to compel an employee who had already worked 12 hours to remain at the Facility and work an additional four hours in Pod 4. There is little doubt that an employee who worked an additional four hours after a 12 hour shift would be tired and more likely to commit errors than she might otherwise make. Grievant’s refusal to work in Pod 4 placed additional strain on the Facility’s ability to staff its required positions at the Facility. Adequate staffing is an essential component of providing patient care.

Upon the issuance of a Group III Written Notice of disciplinary action an agency may remove an employee. Accordingly, Grievant’s removal must be upheld.

Grievant argued that she had the right to refuse to work in Pod 4 because she did not feel comfortable providing services to approximately 20 geriatric patients with each patient requiring a heightened level of attention. Grievant’s argument fails. Grievant was asked to go to Pod 4 to dispense medication to patients. She was responsible for dispensing medication to patients in Pod 2B. Grievant was capable of performing her work duties in Pod 4. She had worked in Pod 4 on August 16, 2013

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, DHRM Policy 1.60(B)(2)(b).

³ See, Attachment A, DHRM Policy 1.60.

August 17, 2013 and August 18, 2013. Grievant was asked to perform duties that were within the scope of her medical license. Working in Pod 4 did not pose any physical or other risk of injury to employees working there. No legitimate basis existed for Grievant to refuse to work in Pod 4.

Grievant argued that she and other employees had complained about the working conditions in Pod 4 on many occasions. The evidence showed that Agency supervisors listened to the employee complaints and made changes to their Facility practices. If an employee felt uncomfortable working in Pod 4, the employee was offered an orientation before beginning his or her shift in Pod 4. Senior supervisors were made available to employees if they had questions about their duties in Pod 4. The Agency took sufficient action to address the employees' complaints.

Grievant argued that the Agency denied her procedural due process because the Agency failed to comply with the time frames necessary to inform her of the allegations against her. To the extent the Agency may have denied Grievant procedural due process, such errors were cured by the Hearing Process. Grievant was provided with all of the Agency's documents at least four workdays in advance of the hearing. Grievant had the opportunity to present any relevant evidence she wished to challenge the Agency's allegations against her.

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 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.⁵

⁵ 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