

Issue: Group III Written Notice (falsifying records); Hearing Date: 05/15/14; Decision Issued: 05/19/14; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10316; 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: 10316

Hearing Date: May 15, 2014

Decision Issued: May 19, 2014

PROCEDURAL HISTORY

On February 13, 2014, Grievant was issued a Group III Written Notice of disciplinary action with removal for submission of a falsified physician notes to excuse him from a mandatory draft.

On February 28, 2014, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On April 1, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 15, 2014, 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. 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 Corrections employed Grievant as a Corrections Officer at one of its facilities. No evidence of prior active disciplinary action was introduced during the hearing.

The Facility must be staffed on a continuous basis to ensure public safety with respect to the offenders within its custody. If Facility Managers cannot place staff at every post on every shift, employees scheduled to work on other shifts may be "drafted" to work an additional shift. The Facility maintains a list of employees showing when an employee was last drafted and indicating who would be drafted next.

Grievant was not scheduled to work on December 16, 2013 and December 17, 2013. The Lieutenant realized that he would not have sufficient staff to work on December 16, 2013 and December 17, 2013. The Lieutenant told Grievant that Grievant was at the top of the draft list and that Grievant was needed to work on December 16, 2013. Grievant told the Lieutenant that he could not work on December 16, 2013 because he had to take his children to a doctor's appointment. The Lieutenant said "ok" but that Grievant was needed to work on December 17, 2013. Grievant said he could not work on December 17, 2013 because had to take his children to a doctor's appointment. The Lieutenant told Grievant to bring in a doctor's excuse for those days.

For several days after December 17, 2013, the Lieutenant asked Grievant for his doctor's excuse. When Grievant failed to produce the note, the Lieutenant told Grievant

that he needed to produce a doctor's note otherwise he may be subject to disciplinary action.

On December 24, 2013, Grievant brought a note from Dr. K's office. The document was titled "RETURN TO WORK/SCHOOL AUTHHOZIATION" and was a preprinted form with handwriting in some of the blank spaces on the form. The note stated, in part:

I have examined [Grievant's handwritten name] and can certify that he/she is:

Fully able to resume work/school as of [Dec. 18, 2013 *in handwriting*] with no *restrictions*. [Pt had scheduled appointments on Dec 16 and Dec 17, 2013 *in handwriting*].

Sincerely

[Dr. K *in handwriting*]

Grievant was not a patient of Dr. K. His name was not in the doctor's computer system. He had not been treated by Dr. K on December 16, 2013 or December 17, 2013. Ms. B worked in Dr. K's office. She was Grievant's fiancée. Grievant had received from Ms. B several doctor's notes purporting to excuse him from work because he was treated by Dr. K.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three groups, according to the severity of the behavior. Group I offenses "include types of behavior less severe in nature, but [which] require correction in the interest of maintaining a productive and well-managed work force."¹ Group II offenses "include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal."² Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."³

Virginia Department of Corrections Operating Procedure 135.1(IV)(C), *Standards of Conduct*, states, "[t]he list of offenses in this procedure is illustrative, not all-inclusive. An action or event occurring either during or outside of work hours that, in the judgment of the agency head, undermines the effectiveness of the employee or of the agency

¹ Virginia Department of Corrections Operating Procedure 135.1(V)(B).

² Virginia Department of Corrections Operating Procedure 135.1(V)(C).

³ Virginia Department of Corrections Operating Procedure 135.1(V)(D).

may be considered a violation of these *Standards of Conduct* and may result in disciplinary action consistent with the provisions of this procedure based on the severity of the offense.”

In the Agency’s judgment, Grievant engaged in behavior supporting the issuance of a Group III Written Notice with removal. The Agency’s judgment is supported by the evidence. Grievant told the Lieutenant he had to take his children to the doctor on December 16, 2013 and December 17, 2013. He did not take his children to the doctor. Grievant was not a patient of Dr. K and was not treated by Dr. K on December 16, 2013 and December 17, 2013. Grievant presented a note to the Lieutenant that falsely stated Grievant had an appointment with Dr. K on December 16, 2013 and December 17, 2013. Grievant knew the note was false. He presented the note to the Lieutenant with the objective of convincing the Lieutenant that his refusal to be drafted was justified. Grievant’s behavior was untruthful. Although he did not falsify the note itself, his actions were deceptive and 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 argued that the Agency’s information was incorrect. Grievant did not present any witnesses or other evidence to counter the Agency’s evidence. The Agency’s witnesses were credible and showed that Grievant presented a note to the Agency even though he knew the note was false.

Grievant argued that the Agency’s investigative report was not reliable and contained incorrect dates. The hearing decision is based on the testimony of witnesses and documents presented by the Agency. To the extent the investigative report contained inaccuracies those inaccuracies were clarified by the credible testimony of the Agency’s witnesses.

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.

⁴ *Va. Code § 2.2-3005.*

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 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

[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

⁵ Agencies must request and receive prior approval from EDR before filing a notice of appeal.