

Issue: Group III Written Notice with Suspension (falsifying records); Hearing Date: 01/21/15; Decision Issued: 01/23/15; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10506; 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: 10506

Hearing Date: January 21, 2015
Decision Issued: January 23, 2015

PROCEDURAL HISTORY

On August 29, 2014, Grievant was issued a Group III Written Notice of disciplinary action with a 10 workday suspension for falsifying records.

On September 5, 2014, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On November 25, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 21, 2015, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency Counsel
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 employs Grievant as a Food Operations Supervisor at one of its facilities. She has been employed by the Agency for approximately two years. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant was ill and went to the medical provider on August 23, 2014. Grievant's Mother accompanied her. At the conclusion of the office visit, an employee of the medical provider wrote information onto a preprinted note. The note read:

To whom it may concern,

Please excuse [Grievant] from work/school. He/she was seen under my care on 8/23/14 and may return back to work/school on 8/25/2014.

Physicians comments: _____

Grievant's Mother took the note and put it in her purse.

Grievant did not report to work on August 25, 2014.

On August 26, 2014, Grievant and her Mother were in a hurry to get to work. Grievant's Mother realized that she had the note and that the return date on the note was inaccurate. She took a pen and changed the "5" to a "6" so that the note read

Grievant's return date was August 26, 2014. Grievant's Mother put the note in Grievant's car and Grievant took the note to work.

Grievant arrived at work and presented the note to the Human Resource Assistant. The note Grievant presented read:

To whom it may concern,

Please excuse [Grievant] from work/school. He/she was seen under my care on 8/23/14 and may return back to work/school on 8/26/2014.¹

Physicians comments: unable to perform job duties due to back pain/strep.²

The Human Resource Assistant observed that the note appeared altered. She observed that the "6" appeared to be an alteration and that the language "unable to perform job duties due to back pain/strep" was more information than a medical provider typically would put in an excuse note. The Human Resource Assistant called the medical provider's office. A woman at the office looked at a copy of the original note contained in the medical provider's records and reported to the Human Resource Assistance that Grievant's return to work date was August 25, 2014 and not August 26, 2014. The employee faxed a copy of the original note to the Agency.

On August 26, 2014, the Warden confronted Grievant and alleged Grievant had altered the note. Grievant was placed on pre-disciplinary leave and left the Facility. She went to the medical provider's office and obtained a redrafted note. The note read:

To whom it may concern,

Please excuse [Grievant] from work/school. He/she was seen under my care on 8/23/14 and may return back to work/school on 8/26/2014.³

Physicians comments: 2 days off, return on 8/26.

Grievant attempted to present this note to the Warden on August 26, 2014, but she was told to bring the note with her to the pre-disciplinary hearing scheduled for August 29, 2014. Grievant presented the second note to the Warden on August 29, 2014.

CONCLUSIONS OF POLICY

¹ The date of 8/26/14 was originally 8/25/14 but changed to read 8/26/14.

² Agency Exhibit 4.

³ The date of 8/26/14 had not been altered. This note was written on August 26, 2014.

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.”⁴ 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.”⁵ Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”⁶

Group III offenses include:

Falsifying any records, including but not limited to all work and administrative related documents generated in the regular an ordinary course of business, such as count sheets, vouchers, reports, insurance claims, time records, leave records, or other official state documents.⁷

Falsification is not defined by the Standards of Conduct but the Hearing Officer interprets this provision to require proof of an intent to falsify by the employee in order for the falsification to rise to the level justifying termination. This interpretation is less rigorous but is consistent with the definition of “Falsify” found in Blacks Law Dictionary (6th Edition) as follows:

The Agency has presented sufficient evidence to show the Grievant submitted a falsified medical provider’s excuse to the Agency on August 26, 2014. Prior to submitting the note to the Human Resource Assistant, Grievant was in a position to observe that the note had been altered. She could have obtained a corrected note from the medical provider if she believed the medical provider had entered an incorrect return to work date. Grievant knew or should have known that the note did not reflect the words written by the medical provider’s staff on August 23, 2014 when the note was completed. By presenting that note to the Agency, Grievant falsely represented that the medical provider had written August 26, 2014 as Grievant’s return to work date instead of the actual date written by the medical provider. Upon the issuance of a Group III Written Notice, an agency may remove an employee or suspend an employee for up to 30 workdays. Accordingly, Grievant’s suspension is upheld.

Grievant argued that she did not alter the note and thus should not be held accountable for falsification. Grievant’s Mother testified that she changed the date of August 25, 2014 to August 26, 2014 to correct an error made by the medical provider’s staff. Grievant’s Mother clearly testified that she only altered the date on the note. If

⁴ Virginia Department of Corrections Operating Procedure 135.1(V)(B).

⁵ Virginia Department of Corrections Operating Procedure 135.1(V)(C).

⁶ Virginia Department of Corrections Operating Procedure 135.1(V)(D).

⁷ Virginia Department of Corrections Operating Procedure 135.1(D)(2)(b).

the Hearing Officer disregards the alteration made by Grievant's Mother, the note remains altered. Grievant has not presented any evidence explaining why the note she presented to the Agency contained the alteration "unable to perform job duties due to back pain/strep." Grievant has not presented sufficient evidence to counter the Agency's allegation that she falsified the medical provider's note that she submitted to the Agency on August 26, 2014.

Grievant argued that the note was not falsified but rather corrected to reflect the doctor's actual instruction that she returned to work on August 26, 2014. Grievant's argument is unpersuasive. The note became falsified once it was changed from its original form regardless of the reason. The note was presented to the Agency as if it were a note written by the medical provider when in fact the note had been changed from what was drafted by the medical provider.

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"⁸ 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 a 10 workday suspension 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

⁸ Va. Code § 2.2-3005.

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.⁹

[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

⁹ Agencies must request and receive prior approval from EDR before filing a notice of appeal.