

Issues: Group II Written Notice (failure to follow instructions/policy), and Termination (due to accumulation); Hearing Date: 04/01/15; Decision Issued: 04/02/15; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10558; 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: 10558

Hearing Date: April 1, 2015
Decision Issued: April 2, 2015

PROCEDURAL HISTORY

On February 2, 2015, Grievant was issued a Group II Written Notice of disciplinary action for with removal for failure to follow instructions and/or policy.

On February 9, 2015, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On February 23, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 1, 2015, 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 Behavioral Health and Developmental Services employed Grievant as a Pharmacy Technician at one of its Facilities. She had been employed by the Agency for approximately 9 years. Grievant had prior active disciplinary action. On September 6, 2012, Grievant received a Group II Written Notice for falsifying records.

The Agency maintained a weekly schedule to show when staff were scheduled to work at the Facility. If the Supervisor was not scheduled to work on a particular day, the schedule identified another employee as her designee to approve leave and complete timesheets. Grievant had access to the weekly schedule.

Grievant and the Supervisor were scheduled to work on January 15, 2015. Grievant began her shift at 8 a.m. on January 15, 2015. The Supervisor was in a meeting with external reviewers. Although she originally planned to leave that day at noon, Grievant told other employees that her father was being discharge from the hospital earlier than she expected and that she needed to leave immediately to be with her father. Grievant approached Ms. T and asked permission to leave. On occasion, Ms. T served as the Supervisor’s designee when the Supervisor was not working at the Facility. On January 15, 2015, Ms. T was not the Supervisor’s designee. Ms. T signed a leave slip at Grievant’s request and Grievant left the Facility at approximately 8:10 a.m.

The Supervisor finished her meeting at 8:30 a.m. and learned that Grievant had left the Facility. The Supervisor altered the work duties of some of her staff to account for Grievant’s absence from work.

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.”

Agency Policy 304-2D governs Standards of Conduct at the Facility. This Policy sets forth expectations for employees including:

2. Reports to work at the scheduled time and completes all assigned duties prior to the end of the shift.
3. Notifies the pharmacy director when leaving your assigned section (exceptions are previously approved absences, scheduled meetings, deliveries, lunches, and breaks).²

Failure to follow policy is a Group II offense.³ On January 15, 2015, Grievant left the Facility without notifying her Supervisor, the Pharmacy Director. Ms. T did not have the authority to excuse Grievant from work and Grievant knew or should have known that Ms. T was not the Supervisor’s designee on January 15, 2015. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice. Upon the accumulation of two Group II Written Notices, an agency may remove an employee. Accordingly, the Agency’s decision to remove Grievant must be upheld.

Grievant argued that it was necessary for her to leave without obtaining the Supervisor’s approval because of the urgency of attending to her father who was leaving the hospital following surgery. Grievant did not testify regarding the urgency of her decision to leave the Facility. The Agency referenced Agency Exhibit 5 which purports to show that Grievant’s father was discharge from the hospital on January 16, 2015 and not on the day Grievant left work early. Grievant has not established that it was necessary for her to leave the Facility without first obtaining permission to leave from the Supervisor.

Grievant argued that her absence did not adversely affect the Agency’s workflow as claimed by the Agency. This argument is unpersuasive because it was not necessary for the Agency to show that its workflow was affected by Grievant’s absence. The Agency has presented sufficient evidence to support its assertion that Grievant acted contrary to policy.

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

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

² Agency Exhibit 11.

³ See, Attachment A, DHRM Policy 1.60.

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.

Grievant argued that the disciplinary action with removal is unduly harsh. She presented evidence showing that her work performance at the Facility was well respected by other employees. It is clear that the Agency could have addressed Grievant’s behavior by discipline that did not include removal. The Hearing Officer’s authority to mitigate, however, is limited to those circumstances in which the Agency’s disciplinary action exceeds the limits of reasonableness. In this case, the Agency has established that Grievant acted contrary to policy and that it issued a Group II Written Notice in accordance with the Standards of Conduct. Grievant has not established that the disciplinary action exceeded the limits of reasonableness. In light of the standard set forth in the Rules, 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 II 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.

⁴ Va. Code § 2.2-3005.

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.