

Issue: Group II Written Notice (failure to follow policy); Hearing Date: 05/13/15;
Decision Issued: 06/02/15; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.;
Case No.10572; Outcome: Partial Relief.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10572

Hearing Date: May 13, 2015

Decision Issued: June 3, 2015

PROCEDURAL HISTORY

On December 18, 2014, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow instruction and/or policy.

On January 7, 2015, 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 March 23, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 13, 2015, 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 employs Grievant as a DSA II at one of its facilities. No evidence of prior active disciplinary action was introduced during the hearing.

On November 3, 2014, Grievant was working at the Facility in the day room. The 7:30 a.m. end of her shift was nearing. One patient hit another patient and an emergency "code white" was announced to summons other staff for assistance. After the patients were separated, the Supervisor instructed one of the patients to go to the seclusion room. Grievant did not agree with that decision and began arguing with the Supervisor while standing in the day room in front of patients and other staff. Grievant and the Supervisor were standing approximately ten to fifteen feet away while they argued. An employee who responded to the emergency call entered the day room and initially believed the emergency call was made regarding Grievant based on her observation of Grievant's behavior. The Supervisor instructed Grievant to leave several times. Grievant continued to argue with the Supervisor. After the Supervisor walked away, Grievant left the day room and later left the Facility.

The Agency introduced two videos of the incident. One of them was for November 3, 2014 and was relevant but did not reveal actions outside of what occurred in the day room. The second was for events occurring on January 29, 2015 and was not relevant.

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 053-062 governs mutual respect among staff. The policy provides:

Disruptive behaviors violate our Mission and Values and will not be tolerated or condoned at [the Facility]. The following list of behaviors (not all inclusive) will subject those involved to corrective progressive disciplinary action under the Standards of Conduct b. Intimidating and disruptive behavior such as verbal outbursts”²

Failure to follow policy is a Group II offense.³ On November 3, 2014, Grievant engaged in a verbal outburst when she began to argue with the Supervisor over the Supervisor’s decision to send a patient into seclusion. Grievant argued with the Supervisor in the day room in front of patients and other staff. She resisted the Supervisor’s instruction to leave and remained to argue until finally leaving several minutes later. Grievant failed to comply with the Agency’s 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 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.

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 6.

³ See, Attachment A, DHRM Policy 1.60.

⁴ Va. Code § 2.2-3005.

Grievant contends the disciplinary action should be mitigated because the Supervisor made an inappropriate comment to her but was not disciplined. During their argument, the Supervisor told Grievant that "You're now becoming the patient" suggesting that Grievant suffered from mental illness. The Supervisor's comment was intended to insult Grievant. Although a manager may have verbally counseled the Supervisor about her behavior, it does not appear that the Agency issued the Supervisor a Written Notice. The Supervisor's comment was also a violation of Policy 053-062 because she was yelling at Grievant in the day room and insulted Grievant in front of patients and other staff. Grievant has presented sufficient evidence to support mitigation of the disciplinary action due to the inconsistent application of disciplinary action. The Group II Written Notice should be reduced to a Group I Written Notice.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is **reduced** to a Group I Written Notice.

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.