

Issue: Group III Written Notice with suspension (failure to follow policy); Hearing Date: 12/11/13; Decision Issued: 12/27/13; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10213; Outcome: Partial Relief.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10213

Hearing Date: December 11, 2013
Decision Issued: December 27, 2013

PROCEDURAL HISTORY

On October 7, 2013, Grievant was issued a Group III Written Notice of disciplinary action with a 15 workday suspension for violation of Departmental Instruction 502.

On October 7, 2013, 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 13, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 11, 2013, 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 Direct Service Associate II at one of its Facilities. No evidence of prior active disciplinary action was introduced during the hearing.

On Sunday, September 22, 2013 at approximately 5:45 a.m., Grievant was assisting a Patient to her room. Grievant began helping the Patient put on a shirt. The Patient pulled away but quickly moved forward which caused the Grievant and the Patient to fall to the ground. Grievant hit her head and rear end on the floor as the Patient fell on top of Grievant. Grievant was taken to the local Hospital and treated for her injuries. Grievant received a diagnosis of "Head Injury, Distal Sacrum fracture." She was prohibited from working until she completed a follow-up visit with Dr. G. She received Special Instructions, "Judgment or reflexes may be impaired because of injury or medications."¹ Grievant's Discharge Instructions were to "[t]ake Percocet up to every 4 to 6 hours for pain." Dr. L prescribed that she take, "Oxycodone-Acetaminophen (Percocet) 5-325 MG PO TABS" every six hours as needed.²

Grievant's Husband took her from the Hospital to her home. Grievant was in pain when she left the Hospital. She complained to the Husband about her back pain. She remained in pain when they arrived at their home approximately 23 minutes after

¹ Agency Exhibit 10.

² Agency Exhibit 11.

leaving the Hospital. The Husband took Grievant to her bed so she could rest. The Husband had Tylenol 3 pills remaining from a prescription as part of his recovery from a previous surgery. The Tylenol 3 pill contained codeine. He took a Tylenol 3 pill and gave it to Grievant.³ He gave Grievant water and Grievant took the pill.

Grievant was instructed to report to work on September 23, 2013 to complete a drug test as part of the Agency's "post-accident" review process.⁴ She completed the oral fluid collection process and signed the Chain of Custody and Control Form.⁵ On September 30, 2013, the Medical Review Officer signed a Drug Test Report showing that Grievant's oral fluid sample had tested "Positive for: EXTENDED OPIATES ORAL FLUID, ORAL FLUID." Grievant did not have a prescription for medication containing opiates. The Agency initiated disciplinary action because of Grievant's positive drug test.

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."⁶ 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."

The Agency is "committed to ensuring the integrity of the services it provides, safeguarding consumers and employees, and preserving public trust and confidence in its ability to serve the citizens of the Commonwealth by maintaining a safe, healthy, and efficient environment for consumers and the workplace that is free of the illicit drug and alcohol use." Departmental Instruction 502 governs the Agency's Alcohol and Drug Program and "is to provide guidance for administering drug and alcohol testing of employees"⁷ This Policy authorizes the Agency to collect "Oral fluid/saliva samples" from employees.

³ The Husband testified that Grievant asked him for an aspirin but that he chose to give her a Tylenol 3 because of the pain she was experiencing. The Hearing Officer is not convinced that the conversation between Grievant and the Husband was of sufficient detail to include a request for aspirin. The Hearing Officer, however, does not believe the Grievant knew she was taking a Tylenol 3 pill.

⁴ Grievant held a "Safety Sensitive" position requiring her to submit to a drug test following a work-related accident.

⁵ Grievant did not contest at the hearing the accuracy of the drug test or the procedures used to establish the test results.

⁶ The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

⁷ Agency Exhibit 8.

Departmental Instruction 502-5 states that “[n]o employee, intern or volunteer in a safety sensitive position shall: Use drugs that have not been prescribed for him, or use prescription drugs in a manner that is not consistent with his prescription.” Departmental Instruction 502-7 states:

For all other employees who test positive for drugs, the Department shall take the following actions:

- Issue a Group III Written Notice and suspend the employee under the Standards of Conduct, for a minimum of 15 work days; and
- Provide the employee the opportunity for assistance through the [Employee Assistance Program].

On September 22, 2013, Grievant took Tylenol 3 after receiving it from her Husband. On September 23, 2013, Grievant took a drug test that came back as “Positive for: EXTENDED OPIATES ORAL FLUID, ORAL FLUID.” She did not have a prescription for Tylenol 3 and thus used a drug that had not been prescribed for her. Her behavior was prohibited by Departmental Instruction 502. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice with a 15 workday suspension subject to mitigation as discussed below.

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.

The disciplinary action in this case exceeds the limits of reasonableness and must be reduced. Grievant was obligated to take only medication for which she had a prescription. Her action of taking Tylenol 3 was influenced by factors beyond her control. Grievant suffered injury to her head which caused her significant pain such that Dr. L prescribed that she take Percocet every six hours as needed. She was in pain when she left the hospital and when she arrived at her home. She was focused on her pain when she asked her Husband to help her. Grievant’s Husband decided to take a Tylenol 3 pill and give it to her to reduce her pain. Grievant did not control the

⁸ *Va. Code § 2.2-3005.*

Husband's decision to select Tylenol 3 as the medication to give her. Grievant, however, was not in so much pain that she was incapable of determining the type of medication given to her by her Husband.⁹ Thus, she retained some responsibility for taking a non-prescribed medication despite her pain. The Written Notice should be reduced to a Group II Written Notice of disciplinary action with a 10 workday suspension. This level of discipline remains sufficient to account for the Agency's high expectation that employees not misuse medication in a way which could place employees at risk of harming the Agency's often fragile patient population.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with a 15 workday suspension is **reduced** to a Group II Written Notice of disciplinary action with a 10 workday suspension. The Agency is directed to provide the Grievant with **back pay** for five workdays less any interim earnings that the employee received during the five days of suspension and credit for leave and seniority that the employee did not otherwise accrue.

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:

⁹ No evidence was presented that Grievant was incapable of looking at the medication to see what she was taking or incapable of asking her Husband what medication he was giving her.

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.¹⁰

[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

¹⁰ Agencies must request and receive prior approval from EDR before filing a notice of appeal.