

Issue: Group III Written Notice with Termination (falsifying records); Hearing Date: 07/22/14; Decision Issued: 08/06/14; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10387; Outcome: No Relief – Agency Upheld; **Administrative Review: EDR Ruling Request received 08/13/14; EDR Ruling No. 2015-3978 issued 08/29/14; Outcome: AHO’s decision affirmed.**



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10387

Hearing Date: July 22, 2014
Decision Issued: August 6, 2014

PROCEDURAL HISTORY

On May 7, 2014, Grievant was issued a Group III Written Notice of disciplinary action with removal for falsifying records.

On May 18, 2014, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On June 10, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 22, 2014, 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 employed Grievant as a Direct Service Associate II at one of its facilities. The purpose of her position was:

Provide direct patient care to adult and geriatric psychiatric patients that conforms to care and treatment policies and procedures and demonstrates knowledge of population specific needs and competencies.¹

Facility employees holding Grievant's position were required to conduct safety checks of patients. When a patient was asleep in his or her room, a safety check involved opening the patient's door, looking inside the room to see the patient's condition, and then recording that observation on an Intermittent Supportive Observation sheet. The sheet showed times in fifteen minute increments. Next to each time was a space for an employee to write the patient's behavior at the time of the observation. Next to the space describing a patient's behavior was a space for the observer to write his or her initials.

Grievant received in-service training regarding how to conduct safety checks. The Agency verified that she knew how to conduct a safety observation. She also received training specifying that "[d]o not document what you did not do."²

¹ Agency Exhibit 13.

² Agency Exhibit 16.

Grievant was working at the Facility from 1 a.m. until 4 a.m. on April 27, 2014. She was responsible for conducting patient checks. Most or all of the patients were asleep in their rooms. Grievant did not walk to any patient's room and open the door to observe each patient. Grievant filled in an Intermittent Supportive Observation sheet for that time period. For each fifteen minute period, Grievant wrote the location of each patient, the behavior she claimed to have observed such as "sleep" and her initials. Someone reading the sheets would believe that Grievant had conducted safety checks of each patient every 15 minutes beginning at 1 a.m. and ending at 4 a.m. on April 27, 2014.

Two other employees were working at the time Grievant was working. They engaged in similar behavior to Grievant. The Agency issued those employees disciplinary action with removal.

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."³ 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."

Falsifying records is a Group III offense.⁴ On April 27, 2014, Grievant was working at the facility and was responsible for conducting patient checks every fifteen minutes. She did not conduct patient checks by going to each patient's room and observing each patient. She wrote on the Intermittent Supportive Observation sheet that she checked each patient every fifteen minutes from 1 a.m. until 4 a.m. Grievant knew that she had not conducted checks when she wrote that she had completed safety checks. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for falsifying records. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, the Agency's decision to remove Grievant must be upheld.

Grievant argued that she could hear patient's breathing while in the hallway. The evidence showed that it was unlikely that someone seated in the nutrition room or hallway where Grievant was located could hear each patient breathing and determine they were asleep.

³ The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

⁴ See, Attachment A, DHRM Policy 1.60.

Grievant argued that she performed checks at 1 a.m., 1:45 a.m., 2:45 a.m., and 3:30 a.m. Even if Grievant's assertion is true, she falsified at approximately ten other entries on the Intermittent Supportive Observation form. There remains a basis for disciplinary action.

Grievant alleged she was disciplined as a form of retaliation. She did not present any credible evidence to support this assertion. The Agency took disciplinary action in this case based on Grievant's behavior on April 27, 2014.

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"⁵ 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 she did not receive the policies upon which the Agency relies to take disciplinary action. The evidence showed that Grievant received training regarding how to conduct safety checks and that she signed a statement indicating she had "read and understood the Patient Safety Counts staff education material related to CHPP 6.063 Patient Safety Checks."⁶

Grievant argued that the Agency did not consistently discipline its employees. The evidence showed that other employees who engaged in similar behavior were removed from employment. Grievant was not singled out for disciplinary action. 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 III Written Notice of disciplinary action with removal is **upheld**.

⁵ Va. Code § 2.2-3005.

⁶ Agency Exhibit 18.

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.⁷

⁷ Agencies must request and receive prior approval from EDR before filing a notice of appeal.

[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