



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11527

Hearing Date: July 9, 2020
Decision Issued: July 29, 2020

PROCEDURAL HISTORY

On March 18, 2020, Grievant was issued a Group III Written Notice of disciplinary action with removal for sleeping while on duty and falsifying records.

Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On April 27, 2020, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 9, 2020, a hearing was held by audio conference.

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. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. 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 at one of its facilities. She began working for the Agency in November 2017. No evidence of prior active disciplinary action was introduced during the hearing.

On February 23, 2020, Grievant was seated in the Nursing Station with her eyes closed. Grievant got up from her chair and walked into the common area and sat at a table. She placed her right palm towards the ceiling. She turned her head to the right and rested her head on her right palm. She closed her eyes and was asleep.

Grievant was responsible for conducting patient checks every fifteen minutes for several patients. To complete a check, Grievant was expected to view each patient and then record her observation on a Patient Monitoring Sheet. Grievant wrote her initials at the bottom of the sheet to show that she made checks at specific times.

On February 23, 2020, Grievant did not conduct a check of patients at 5 a.m. She wrote that she checked the status of seven patients. Grievant did not conduct a check of patients at 5:15 a.m. She wrote that she checked the status of one patient. Grievant did not conduct a check of patients at 5:30 a.m. She wrote that she checked the status of seven patients.

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.”

Sleeping during work hours is a Group III offense.² Falsifying records is a Group III offense.³ On February 23, 2020, Grievant sat at a table in the common area and tilted her head to her right to rest her head on the palm of her hand. Grievant closed her eyes and was asleep. Grievant did not conduct patient checks at 5 a.m., 5:15 a.m., and 5:30 a.m. She completed the Patient Monitoring Sheet to show that she had completed those checks. Grievant knew she had not conducted those checks. Grievant falsified the Patient Monitoring Sheet. The Agency has presented sufficient evidence to support its issuance to Grievant of a Group III Written Notice for sleeping during working hours and 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 she was not asleep. The Agency presented a picture of Grievant resting in a position consistent with someone asleep. Another employee observed Grievant sleeping. A patient observed Grievant asleep and approached her. She did not react to his approach. The Agency’s evidence is sufficient to show that Grievant was asleep.

Grievant argued that she asked Ms. J to conduct the patient checks from 5 a.m. to 5:45 a.m. Ms. J denied being asked by Grievant to conduct the checks. If Grievant had asked Ms. J to conduct the checks and Ms. J did so, then Ms. J would have entered her observations on the Patient Monitoring Sheet and initialed at the bottom of the sheet. Nevertheless, Grievant wrote that she made the checks.

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

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

² See, Attachment A, DHRM Policy 1.60.

³ See, Attachment A, DHRM Policy 1.60.

⁴ *Va. Code § 2.2-3005.*

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 removal is **upheld**.

APPEAL RIGHTS

You may request an administrative review by EDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EDR within 15 calendar days of the date the decision was issued.

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 must also provide a copy of your appeal to the other party 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.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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.^[1]

[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

^[1] Agencies must request and receive prior approval from EDR before filing a notice of appeal.