

Issues: Group II Written Notice (violation of safety rule), and Termination (due to accumulation); Hearing Date: 11/16/15; Decision Issued: 11/23/15; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10686; 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: 10686

Hearing Date: November 16, 2015
Decision Issued: November 23, 2015

PROCEDURAL HISTORY

On July 21, 2015, Grievant was issued a Group II Written Notice of disciplinary action for failing to return a knife to the lock box and failure to complete the Sharps Checklist. She was removed from employment based on the accumulation of disciplinary action.

On August 15, 2015, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On October 5, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 16, 2015, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Representative
Agency's 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 III at one of its facilities. She had been employed by the Agency for approximately 22 years prior to her removal effective July 21, 2015. One of her duties included being in charge of the Facility's "canteen". Grievant had prior active disciplinary action. She received a Group II Written Notice on July 18, 2013 for violating a safety rule.

Grievant usually worked from 7:30 a.m. until 4 p.m. She was responsible for supervising and teaching three to four patients working in the canteen when the canteen was open during her shift. At least one other employee also worked in the canteen with Grievant. The Agency kept sharp items such as knives in a locked tool box with the tool box locked in a closet. If a patient needed to use a knife while working, Grievant would go to the closet and remove the tool box, unlock the tool box, remove the knife, write on a checklist that "Sharps in use", and give the knife to the patient. When the patient finished with the knife, the patient would put the knife in the sink. Grievant was responsible for making sure the knife was clean and then locking it in the tool box in the closet. She was also supposed to mark in the checklist to show that the knife had been returned.

The canteen opened from 11:35 a.m. to 12:45 p.m. on May 11, 2015. Grievant removed a knife from the tool box and let a Patient use the knife. The Patient was admitted to the Facility because he was found not guilty by reason of insanity. After

using the knife, the Patient placed the knife in the sink. Grievant finished her duties in the canteen and left. She failed to place the knife in the toolbox and update the checklist. At approximately 3 p.m., Mr. G began his shift at the canteen. He was approached by the Patient who handed Mr. G the knife. Mr. G realized the Agency's procedures to secure sharp objects had not been followed. Facility managers began an investigation.

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."

Under the Facility's Safety and Security of Areas policy:

All sharps, recreation equipment and tools must be secured in a locked cabinet, desk, closet or box when not in use.²

"[V]iolation of a safety rule" is a Group II offense.³ The Agency established a safety rule requiring sharp objects such as knives to be accounted for and locked in a tool box in a locked closet after patients used the sharp objects while working in the canteen. On May 11, 2015, Grievant removed a knife and gave it to the Patient but failed to return the knife to a locked tool box. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

Grievant had prior active disciplinary action consisting of a Group II Written Notice. Upon the accumulation of two Group II Written Notices, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

Grievant argued that she experienced a serious and severe vehicle accident which adversely affected her memory. She contends she was disabled by the accident and should receive an accommodation. She asserted that she was advised by Mr. G that the Agency would provide her with a medical review of her cognitive function but she never received one.

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 C.

³ See, Attachment A, DHRM Policy 1.60.

The evidence showed that Grievant had a history of forgetting to perform tasks relating to her job prior to January 2015. To the extent Grievant was disabled, the Americans with Disabilities act does not require an employer to excuse violation of a safety rule as an accommodation. The ADA permits an employer to take disciplinary action for violation of an employer's rule regardless of an employee's disability and need for accommodation. The Agency initiated the process of having Grievant receive a medical review. She did not complete the process. The outcome of this case does not depend on whether Grievant was offered and completed a medical review of her cognitive function.

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. 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 II Written Notice of disciplinary with removal action 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

⁴ Va. Code § 2.2-3005.

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.