



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11703

Hearing Date: September 23, 2021
Decision Issued: October 25, 2021

PROCEDURAL HISTORY

On December 31, 2020, Grievant was issued a Group II Written Notice of disciplinary action for leaving the workplace without permission.

On January 29, 2021, 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 June 7, 2021, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 23, 2021, a hearing was held by remote 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 employs Grievant as a Direct Service Professional at one of its facilities. She received favorable annual performance evaluations. Grievant had prior active disciplinary action. Grievant received a Group I Written Notice on February 11, 2020.

Grievant reported to the Charge Nurse. Ms. P worked as the medication nurse.

On December 16, 2020, Grievant had been "pulled" to work overtime after the end of her regular shift. Her additional shift was scheduled to end at 11:30 p.m. Grievant was working on the floor. She was holding monitoring sheets. Ms. P was working in the nursing station office. At approximately 10:30 p.m., Grievant knocked on the office door, entered the room, and handed the monitoring sheets to Ms. P. Ms. P asked Grievant if she needed to go to the restroom. The Charge Nurse was also in the nursing station office and heard Ms. P ask Grievant if Grievant wanted to go to the restroom. Grievant nodded her head to indicate "yes." Ms. P observed Grievant nod her head. The Charge Nurse was looking at her computer and did not see Grievant nod her head. Grievant left the area and walked in the direction of the restroom.

If Grievant could not complete an assignment, she was to notify the Charge Nurse. If Grievant wanted to leave the Facility before her shift ended, she was obligated to obtain permission from the Nursing Unit Manager or the Administrator on Duty.

Ms. P went to look for Grievant at approximately 10:45 p.m. She went to the floor and medication room window to look for Grievant. Grievant had left the Building and gone home. She did not obtain permission to end her assignment from the Charge Nurse. She did not obtain permission to leave the Facility from the Nursing Unit Manager or the Administrator on Duty.

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.”

[L]eaving work without permission” is a Group II offense.² On December 16, 2020, Grievant was scheduled to work until 11:30 p.m. At approximately 10:30 p.m., Grievant left her assigned post and exited the Facility. She did not obtain permission from any supervisor before leaving. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

Grievant argued that she asked to leave early and was authorized to do so. The evidence showed that Ms. P and the Charge Nurse did not hear Grievant ask to end her assignment and leave the Facility. Neither Ms. P nor the Charge Nurse told Grievant she could leave the Facility.

Grievant argued the Agency failed to follow progressive discipline by first counseling her for leaving before the end of her shift. Although agencies are encouraged by State policy to follow progressive discipline, they are not obligated to do so and may take disciplinary action without first counseling an employee.

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 ...”³ Under the *Rules for Conducting Grievance Hearings*, “[a] hearing officer must give

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 Va. Code § 2.2-3005.

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 action 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].

Carl Wilson Schmidt, Esq.
Hearing Officer

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