



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11724

Hearing Date: December 8, 2021
Decision Issued: December 28, 2021

PROCEDURAL HISTORY

On July 29, 2021, Grievant was issued a Group III Written Notice of disciplinary action for violation of DHRM Policy 1.05, Alcohol and Other Drugs. On July 29, 2021, Grievant was issued a Group III Written Notice of disciplinary action with removal for falsifying records.

On July 29, 2021, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On August 16, 2021, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 8, 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 employed Grievant as a Direct Service Associate at one of its facilities. No evidence of prior active disciplinary action was introduced during the hearing.

On June 15, 2021, the Agency began investigating an "incident" at the Facility. Grievant was required to undergo drug testing as part of the Agency's operating procedures. Grievant was administered an oral drug test on site. The Agency received the results of the drug screen on June 22, 2021. The drug test showed Grievant tested positive for marijuana oral fluid. On July 8, 2021, Grievant sent an email to the RN Manager stating, "I will take all responsibility for the positive test and adhere to EAP guidelines to maintain my employment."¹

Form DC-307 is one of many pre-printed forms contained in the General District Court Manual. It is entitled "Certification for the Use of Cannabis Oil." The form is to be completed by a medical provider and submitted to the Virginia Department of Health Professions in order for a person to be licensed to use cannabis oil.

¹ Agency Exhibit E.

On June 23, 2021, Grievant began the process of obtaining a Virginia Medical Marijuana Card by “booking” a medical evaluation with an online medical provider. On June 23, 2021, the medical provider confirmed he had an appointment scheduled for June 30, 2021 at noon. He was instructed to complete an inpatient form and make payment at least 72 hours before the appointment.

Grievant did not make payment for the appointment 72 hours before the scheduled appointment so on June 28, 2021 the medical provider cancelled his appointment. Shortly after the first appointment was cancelled, Grievant paid \$185 to the medical provider to schedule another appointment on June 29, 2021 at 2:20 p.m. Grievant participated in his medical appointment. On June 29, 2021, the medical provider sent Grievant an email advising Grievant of the “next steps” including contacting the Virginia Department of Health Professions to seek registration. These steps included submitting to VDHP the “signed certification (attached below).” On June 30, 2021, the medical provider sent Grievant an email thanking Grievant for choosing the medical provider and asking how was his visit.

Grievant sought to become a Registered Patient for Cannabis Oil with the Virginia Department of Health Professions. He submitted his application to VDHP on June 30, 2021.

On July 2, 2021, Grievant emailed a copy of the Certification Form to the HR Director. When the HR Director initially downloaded the Certification form on July 7, 2021, it showed the name of Ms. S with an address in another locality and a date of January 20, 2021. When the HR Director saved the document, the name on the Certification changed to Grievant’s name with Grievant’s address and a date of June 29, 2021. The HR Director looked at the Certificate with Grievant’s name on it and believed it had been altered.² She believed whiteout had been used on Ms. S’s Certification and then Grievant’s contact information was typed on the form to fill in blanks for patient name, address, and date. The HR Director concluded Grievant falsified the Certification.

On July 23, 2021, the Department of Health Professions notified Grievant he was a Registered Patient for Cannabis Oil with an active license. Grievant received a card indicating his status.

Grievant denied falsifying any records.

Based on the consistency of the hand-printed signature and handwritten signature of the medical provider, it is clear that the medical provider did not sign separately sign each Certification form. For example, the medical provider’s “handwritten” signature on Ms. S’s Certificate is identical to the handwritten signature on Grievant’s Certification form. In other words, the medical provider used a blank DC-307 form to fill in its information and signatures. The medical provider used that as a template to use for each

² The HR Director contacted the Agency’s Information Technology Department for assistance. None of their staff could explain how the information for Ms. S appeared in Grievant’s email.

new patient. The medical provider changed the name, address, and date for each patient using its template.

If Grievant had not received a Group III Written Notice for falsifying records, the Agency would not have removed Grievant from employment.

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.”

Group III Written Notice – Positive Drug Test

Departmental Instruction 502 governs Alcohol and Drug Program. The policy identified Grievant’s position as Safety Sensitive and authorized the Agency to conduct an oral fluid drug test following an “incident.” The policy provides:

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

- Issue a Standard of Conduct Group III Written Notice and suspend the employee for a minimum of 15 work days; and
- Provide the employee with the opportunity for assistance through the EAP.⁴

Grievant held a safety sensitive position and was involved in an incident at the Facility thereby justifying the Agency’s decision to require a drug test. Grievant tested positive for marijuana oral fluid contrary to Departmental Instruction 502. The Agency’s issuance of a Group III Written Notice to Grievant must be upheld.⁵

Grievant admitted the drug test results presented by the Agency were accurate.

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

⁴ Agency Exhibit H.

⁵ The Agency did not choose to suspend Grievant. The Hearing Officer cannot add a suspension to a Written Notice that has been upheld.

Group III Written Notice – Falsifying Records

The Agency argued Grievant falsified the Certification For the Use of Cannabis Oil Form dated June 29, 2021. The Agency received an email from Grievant containing a copy of the June 29, 2021 Certification. The Agency also asserted that Grievant's email contained a Certification for Ms. S dated January 20, 2021. The Agency reviewed the Certification and looked at the blank lines above which information was typed. The Agency concluded that because there were gaps in the blank lines, Grievant applied whiteout to a Certification for Ms. S to remove Ms. S's name and address and the document date and then inserted his name, address, and the date of June 29, 2021.

This argument fails for several reasons. First, the evidence does not contain the original document Grievant received and handled. In other words, there is no document that the Hearing Officer can examine to observe whether whiteout actually was used on the document. Second, the Agency reviewed a copy of Grievant's original document and concluded it had been altered because the blank lines were blurred in spots. The blank lines were not solid lines but rather a series of closely placed dots. It is possible that the blurred spots resulted from the form being transmitted in electronic form and degrading in clarity after several reproductions. Third, the Agency has not established that Grievant was the one who altered the Certification. If whiteout was used, the medical provider could have erased Ms. S's name using whiteout and replaced it with Grievant's name. Grievant would not be responsible for the condition of the Certification if it was altered by the medical provider. Fourth, the Agency asserted the Certification was falsified because it was dated June 29, 2021 while Grievant's medical appointment was on June 30, 2021. The evidence showed that Grievant's initial medical appointment was scheduled for June 30, 2021 but it was changed to June 29, 2021. Thus, the Certification does not show a date of creation before Grievant had his medical appointment. Fifth, there is no reason or motive for Grievant to falsify the Certification. Grievant sent the purportedly falsified document to the Agency on July 2, 2021 after he had paid for an appointment with the medical provider and received a Certification from the medical provider. He would have no reason to falsify a Certification and present it to the Agency. Sixth, Grievant authorized the Agency to contact the medical provider. The Agency contacted the medical provider and asked if the medical provider used whiteout. The medical provider answered "no." The Agency did not ask the medical provider if the medical provider had issued a Certification form to Grievant and the date of that form. In other words, the Agency had the opportunity to do so but failed ask the medical provider the most important question, namely, did the medical provider issue the Certification the Agency believed Grievant had falsified.

The Agency's concern regarding the legitimacy of Grievant's June 29, 2021 Certification is understandable. Grievant has not provided any explanation of how Ms. S's Certification appeared in his email to the Agency. It is unclear how this happened. Nevertheless, the Grievant has established that he did not falsify a record and that there is no basis for disciplinary action. The Group III Written Notice with removal must be reversed.

Mitigation

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 ...”⁶ 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 Group III Written Notice for having a positive drug test.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group III Written Notice of disciplinary action regarding a positive drug test is **upheld**. The Agency’s issuance to the Grievant of a Group III Written Notice of disciplinary action for falsifying records is **rescinded**. The Agency is ordered to **reinstate** Grievant to Grievant’s same position at the same facility prior to removal, or if the position is filled, to an equivalent position at the same facility. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal. The Agency is directed to provide **back benefits** including health insurance and credit for leave and seniority that the employee did not otherwise accrue.

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

⁶ Va. Code § 2.2-3005.

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.