



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11721

Hearing Date: March 4, 2022

Decision Issued: March 7, 2022

PROCEDURAL HISTORY

On June 10, 2021, Grievant was issued a Group II Written Notice of disciplinary action with removal for failure to follow policy. On June 10, 2021, Grievant was issued a Group II Written Notice of disciplinary action with removal for unsatisfactory attendance.

On July 8, 2021, Grievant timely filed a grievance to challenge the Agency's actions. The matter advanced to hearing. On July 26, 2021, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The hearing was initially scheduled for November 19, 2021 but continued at Grievant's request. On March 4, 2022, a hearing was held by remote conference. Grievant was advised of the date and time of the hearing but did not participate.

APPEARANCES

Agency Representative
Agency Party Designee
Witness

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notices?

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 Psychiatric Technician II at one of its facilities. Grievant had prior active disciplinary action. Grievant received a Group II Written Notice on July 17, 2018. Grievant received a Group I Written Notice on October 23, 2020.

Under Facility policy, an employee was required to perform patient checks every hour during the day and every half hour at night. To monitor a patient, the employee was expected to observe the patient and record the patient's location.

On May 13, 2021, Grievant was assigned responsibility to monitor patients in the Unit at the Facility. Between 6:30 p.m. and 7:30 p.m., Grievant failed to check patients who were in their bedrooms. Between 9:30 p.m. and 10:30 p.m., Grievant made rounds once. He failed to check patient bedrooms.

The Agency describes an employee's unscheduled absence as an "occurrence." Upon the accumulation of eight occurrences in a 12 month consecutive period, the Agency may issue disciplinary action to an employee. Grievant accumulated 15 occurrences and received a Group I Written Notice on October 23, 2020 for unsatisfactory attendance. Grievant was scheduled to work on October 29, 2020 and May 7, 2021. He

was absent a portion of the day on October 29, 2020 and all of the day on May 7, 2021. His absences were unplanned and unexcused.

For the period, May 19, 2020 through October 20, 2020, Grievant had 13 occurrences.

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.”

Group II Written Notice – Failure to Follow Policy

Facility Policy P-7 governed Routine Observation Status. Section III(C) and (D) required:

Designated nursing staff shall ascertain the whereabouts and safety of each patient hourly during the waking hours and half-hourly during the sleeping hours.

A code denoting each patient’s location shall be noted on the form at the designated intervals.²

On May 13, 2021, Grievant was designated to conduct patient monitoring. Between 6:30 p.m. and 7:30 p.m., Grievant failed to check patients who were in their bedrooms. Between 9:30 p.m. and 10:30 p.m., Grievant made rounds once. He failed to check patient bedrooms. Grievant failed to comply with Facility Policy P-7 thereby justifying the issuance of a Group II Written Notice for failure to follow policy.

Group II Written Notice – Attendance

Facility Policy JI 8-1b governed Attendance. Under this policy, an occurrence is an unscheduled absence. Unsatisfactory attendance is defined as eight occurrences in a 12-month period. Section K provides, “[o]nce a Group I Written Notice has been issued for unsatisfactory attendance (occurrence), an employee is eligible for additional disciplinary

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 p. 25.

action for each additional occurrence as long as the record exceeds eight (8) occurrences accumulated during the 12-month consecutive period.”

Grievant received a Group I Written Notice on October 23, 2020. Grievant was absent a portion of the day on October 29, 2020 and all of the day on May 7, 2021. His absences were unplanned and unexcused. He had a record of more than eight occurrences accumulated during the 12-month period prior consecutive period. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice for unsatisfactory attendance. Because Grievant’s behavior was a “repeated violation of the same offense”, the Agency was entitled to elevate the Group I offense to a Group II offense.

Grievant filed a grievance disputing the Agency’s basis for disciplinary action. Grievant did not present any evidence or argument to support his assertions. There is no evidence to support the basis for his request for relief.

Accumulation of Disciplinary Action

Upon the accumulation of two active Group II Written Notice, an agency may remove an employee. Grievant has accumulated three active Group II Written Notices and one active Group I Written Notice. Accordingly, the Agency’s decision to remove Grievant must be upheld.

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 ...”³ 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

³ Va. Code § 2.2-3005.

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with removal for failure to follow policy is **upheld**. The Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action for unsatisfactory attendance 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].

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

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer