



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11889

Hearing Date: February 6, 2023
Decision Issued: March 22, 2023

PROCEDURAL HISTORY

On April 15, 2022, Grievant was issued a Group III Written Notice of disciplinary action with a five workday suspension for gross negligence on the job that could have resulted in serious injury of an inmate.

On May 15, 2022, 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 October 3, 2022, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 6, 2023, a hearing was held by remote conference.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
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. 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 Corrections employs Grievant as an RNCB, Health Authority at one of its facilities. She began working for the Agency on December 10, 2012. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant was responsible for administering the Facility's Health Department. Grievant reported to the Regional Nurse Manager (RNM). The RNM did not work at Grievant's Facility. The RNM was a Registered Nurse who reported to the Chief Nurse and supervised the Health Authorities at the facilities within their assigned region. The RNM was responsible for overseeing between 15 and 20 facilities.

RN H and RN Ha were full time State employees who reported to Grievant. RN T was a contract nurse who reported to Grievant. They worked at the Facility with Grievant.

The Facility uses an electronic recordkeeping system called "Sapphire" to document when medication was distributed to inmates.

Several inmates in the Facility needed to receive medication including insulin on a frequent basis. Their health depended on it. The Facility conducted what were referred to as “treatment lines” or “pill lines” or “pill passes” where nurses gave medication to inmates. Nurses were to be escorted by corrections officers to ensure their safety. If nurses did not receive security escorts it meant that inmates did not receive their medication. Agency employees knew that the failure to provide escorts to nurses would result in inmates not receiving medication.

On several dates, the Facility was short-staffed. In addition, the Facility was sometimes “locked down” which made it more difficult for nursing staff to receive security escorts. On some occasions, no corrections officers were available to assist nurses.

Approximately 15 times between December 29, 2021 and January 14, 2022, diabetic and treatment lines were not completed. This meant that some inmates did not receive insulin, sliding scale insulin, glucose checks, blood pressure checks, and essential medications.

When staff did not dispense medication to inmates, they would write in Sapphire that “no security escort available” or use similar wording. Grievant instructed them to do so.

On December 29, 2021, Grievant sent the Major an email:

It is imperative that we complete sick call this weekend. Inmates must be seen within 72 to 96 hours of the request being received in medical. We are out of compliance this week due to shortages and modified lockdowns. All assistance you provide is appreciated.¹

On December 30, 2021 and December 31, 2021, Grievant was not made aware that a security escort was not available. On January 1, 2022 and January 2, 2022, Grievant was not working. On January 4, 2022², Grievant was informed that a treatment line was not completed. She notified the Major. On January 5, 2022, Grievant was not informed that the treatment line was not completed. On January 6, 2022, Grievant was informed that a security escort was not provided for the midday run. Grievant notified the Major. On January 7, 2022, Grievant received a report that no escort showed up for some buildings. She called the Watch Office and the Major to express her concerns. On January 8, 2022, January 10, 2022, January 11, 2022, January 12, 2022, and January 13, 2022, Grievant was not informed that the treatment line was not completed.

On January 2, 2022, Grievant sent the Warden an email. As part of that email, Grievant wrote, “We have to take advantage of a security escort when one is available

¹ Grievant Exhibit p. 111.

² The date may have been January 6, 2022 instead of January 4, 2022.

these days and that someone requires a swift change of plans, as appropriate, to facilitate meeting unified goals.”³

On January 2, 2022, Grievant sent the Warden an email informing him of the comments from one of her nurses.

There is so much confusion as to what and where staff had to go. Then not to mention finding officers to take us to the pods/buildings. There are 7 yellow zones and one red zone⁴ DUW. So the nursing staff has to go to 2 to 3 buildings for pill-pass and diabetes. Security staff have not had enough officers to stay with nurses in the pods, because I was getting temperatures and giving out pills in DUW and going cell to cell with only the officer in the booth to cover me. No one to round with me. Also I had two other nurses to say the same thing when they went to give pills themselves.⁵

On January 4, 2022, Grievant sent an email to the Warden, “Medical staff reported the listed concerns regarding the weekend operations. *** Nurses reported that the booth officer was the only officer present, observing them, as they made medication rounds in the building for pill pass. *** Nurses documented they were unable to complete assessments and medications in the red zone due to no escort available when called for (Sunday morning (rounds) and evening (meds-pm)). *** I am available tomorrow morning after 9:00 a.m. to discuss these concerns.” On January 4, 2022, the Warden replied to Grievant with a copy to the Major and Assistant Warden, “Aw Major let’s discuss in the morning.” On January 5, 2022, Grievant forwarded the email to the RNM, “Just a fee. Security plans to address.”⁶

On January 6, 2022, Grievant sent the Assistant Warden an email, “Today, the officer escorting the RN was unable to go into the red zone; therefore, the nurse did not enter to complete routine checks and medication passes for the inmate population in the DUW. *** Any assistance you can provide is appreciated.”⁷

On February 2, 2022, the RNM entered Grievant’s Facility. The Warden asked to speak with the RNM. He told her that an inmate had filed a grievance alleging the inmate had not received insulin on several occasions. He told the RNM that these dates had been documented in Sapphire as “HOLD-Security unable to provide ride to building.” Grievant was on leave on February 2, 2022 so the RNM could not speak directly with Grievant.

³ Grievant Exhibit p. 112.

⁴ Inmates held in the red zone were quarantined due to COVID19.

⁵ Grievant Exhibit p. 114.

⁶ Grievant Exhibit p. 93.

⁷ Grievant Exhibit p 127.

The RNM spoke with RN H about the issue. RN H told the RNM that Grievant told RN H to write “nurse unable to get escort” in Sapphire. RN H told the RNM that he would go to the Watch Office to try to get someone to escort the nurses. While speaking with RN H, RN Ha entered the room and without being prompted began speaking with the RNM. She told the RNM that they were told to document “no security available.” The RNM asked the two employees if the AWO was notified and they said, “no.” They said they were told to document on the assignment sheet/report sheet and in Sapphire that they did not have an escort.

On February 14, 2022, RN Ha wrote that

At this time, much of the facility was locked down which exacerbated the problem of getting an escort. When I spoke to [Grievant] about our problems in providing care to the inmates she told me to put a note in Sapphire stating that ‘nurse was unable to get security escort.’ This was added as a note on the treatment line per her recommendation.⁸

On February 13, 2022, RN H sent the RNM an email explaining there were several days RN H was not able to get into the building because there were no corrections officers available to provide escort. RN H wrote a statement including, “I made every effort to obtain an escort to the building by notif[ying] the medical officer and then going to the watch commander after a certain amount of time had passed about 30 minutes. I also notified my supervisor that I could not get an escort to the building in a timely manner”⁹

On February 17, 2022, Grievant sent the RNM an email stating, “At no time have I instructed any nurse to hold medications from any inmate. I have educated nurses that medications can only be held if the clinician has ordered it. I expect nurses to document the truth relating to inmate care in the written and electronic medical records at all times.”¹⁰

It is not a serious health threat if inmates miss treatment lines on occasion and infrequently. It is a serious health threat if inmates miss treatment lines continuously over a series of days.

CONCLUSIONS OF POLICY

Operating Procedure 701.1 governs Health Services Administration.

⁸ Agency Exhibit p. 7.

⁹ Agency Exhibit page. 19.

¹⁰ Agency Exhibit 5.

Facility Unit Head - The person occupying the highest position in a DOC residential facility, such as an institution, field unit, or Community Corrections Alternative Program.

The Health Authority is responsible for the administration of the facility medical department. The Health Authority is authorized and responsible for making decisions about the deployment of health resources and the day-to-day operations of the medical services program.

The Health Authority and the facility administration should remain in constant communicate to ensure that provision of health services is integrated into facility operations so health care can be provided with minimal inconvenience to medical staff and minimal impact on other facility operations.

The Health Authority will be both administrative and clinically responsible for all nurses, correctional health assistants, allied health care staff, and medical records/clerical staff.

The Health Authority must report to the Facility Unit Head any serious health threats that may affect staff, inmate, or CCAP probationer/parolee health and safety.

The Warden was the Facility Unit Head. As the Health Authority, Grievant was obligated to report to the Warden any serious health threats that may affect inmate health. Serious health threats included when inmates were not receiving essential medication because security escorts were not available.

The Agency alleged Grievant “gave verbal approval to document ‘no security escort available’ and therefore withheld medical treatment. The issue was never reported to the Unit Head nor to the Regional Nurse Manager for resolution.”

It was appropriate for Grievant to instruct her staff to document the reason why treatment lines were not being completed. Grievant did not instruct her staff to withhold medical treatment simply because they documented no security escort was available. They were not able to provide medication to inmates because security escorts were not available.

The Agency’s policy does not require Grievant to notify the RNM of serious health threats. Moreover, Grievant was not obligated to report to the Warden any threats of which she was not aware.

The Agency claimed the issue was not reported to the Warden. Contrary to the Agency’s assertion, Grievant repeatedly reported that nurses were not receiving security escorts. On January 2, 2022, Grievant sent the Warden an email about security escorts “when one is available these days.” On January 2, 2022, Grievant sent the Warden an

email about a nurse who complained, “No one to round with me.” On January 4, 2022, Grievant sent the Warden an email that nurses were “unable to complete assessments and medications in the red zone due to no escort available.” On January 6, 2022, Grievant sent the Warden an email “the officer escorting the RN was unable to go into the red zone; therefore, the nurse did not enter to complete routine checks and medication passes for the inmate population.” The Warden testified that Grievant called him to complain about not receiving security escorts.

The Agency asserted that the Warden was not aware that medication was not being delivered because Grievant did not specify that medication was not being delivered. This assertion is not persuasive. A primary purpose of treatment lines was to distribute medication. Nurses could not conduct treatment lines if security escorts were not available. By notifying the Warden that security escorts were not available, the Warden knew or should have known that medication was not being distributed to inmates.¹¹ It was not necessary for Grievant to add that medication was not being given to inmates. Informing the Warden that security escorts were not available was the same as telling him that medication was not being distributed to inmates. To be sure, on January 4, 2022, Grievant sent the Warden email “unable to complete assessments and **medications**”. Grievant’s January 6, 2022 email to the Warden mentioned “nurse did not enter to complete routine checks and **medication** passes.” (Emphasis added.)

It appears that the Agency is asserting that at the moment a security escort was not available, a nurse or Grievant should have immediately contacted the Warden to advise that a security escort was not available. The Agency’s policy requires that the Warden be notified of the problem; it does not specify a time period of immediacy. It was appropriate for nurses to contact security staff and give security staff an opportunity to arrange for escorts. Only once that procedure was no longer working was Grievant obligated to report the issue to the Warden. Grievant did report the matter to the Warden and did so repeatedly if she knew a treatment line was not completed. She informed the Warden within a reasonable time period of learning that treatment lines were not being completed. Grievant acted consistently with her obligation under policy.

In conclusion, Grievant performed her reporting duties as required by the Agency’s policy. There is no basis for disciplinary action. She did not engage in gross negligence. The Group III Written Notice must be reversed.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group III Written Notice of disciplinary action with five workday suspension is **rescinded**. The

¹¹ The Warden testified there was a difference between being notified that inmates were getting medication on a delayed basis instead of not receiving medication at all. Grievant did not tell the Warden the treatment lines were delayed because of not having a security escort, Grievant clearly indicated treatment lines were not being done. Grievant is not responsible if the Warden mistakenly assumed that Grievant meant the treatment lines were merely being delayed.

Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of suspension. 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

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