

Issue: Group I Written Notice (unsatisfactory job performance); Hearing Date: 05/08/02; Decision Date: 05/10/02; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; AHO: Carl Wilson Schmidt, Esquire; Case Number: 5429



***COMMONWEALTH of VIRGINIA***  
***Department of Employment Dispute Resolution***

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 5429**

Hearing Date: May 8, 2002  
Decision Issued: May 10, 2002

**PROCEDURAL HISTORY**

On January 30, 2002, Grievant was issued a Group I Written Notice of disciplinary action for "Unsatisfactory Job Performance."

On February 25, 2002, Grievant timely filed a grievance to challenge the disciplinary action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On April 10, 2002, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 8, 2002, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Agency Party Designee  
Agency Representative  
Head Nurse  
Staff Psychiatrist  
Administrative Assistant  
Facility Director  
Nurse Manager

## **ISSUE**

Whether Grievant should receive a Group I Written Notice of disciplinary action and have his authorization to engage in outside employment removed.

## **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 Mental Health Mental Retardation and Substance Abuse Services employs Grievant as a Psychiatrist at one of its facilities. Grievant has been employed with the Agency for over two years. In December 2001, he received a Group I Written Notice for taking sick leave while he was working at his outside employment.<sup>1</sup>

Attending physicians often schedule team meetings during which the status is discussed of patients treated by the team. Each team includes several people such as nurses in addition to the attending physician. Family members are also informed of the team meetings and if they come to the facility are briefed regarding the status of their family members. Community Service Board staff are also notified of the time of the meetings and, if they arrive at the facility, are given information about the team's patients. Attending psychiatrists do not always know whether family members or CSB staff will come to the facility for team meetings.

Although team meetings are usually scheduled for a specific time during the day such as 9:30 a.m., it is not unusual for the meeting to be delayed at the last moment depending on the schedule of the attending physician.

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<sup>1</sup> The Medical Director's memorandum to Grievant states, "Although I am not concluding that you took sick leave in order to work at your place of outside employment, the fact remains that you were there on the day you called in sick."

If an attending psychiatrist must be absent from work on a day a team meeting is scheduled, that physician must arrange for another physician to assume his or her duties including reviewing patient status during team meetings.

On Thursday, January 24, 2002, Dr. R informed Grievant that she would not be working on Friday, January 25, 2002 and asked Grievant to cover for her. Grievant agreed. Dr. R informed her team that Grievant would conduct team business shortly after 9:30 a.m. once Grievant had completed the team meeting for his patients. Grievant's meeting was also scheduled for 9:30 a.m.

When Grievant arrived at work on Friday, he had forgotten he had agreed to cover for Dr. R. He had already planned to leave the facility at 10:15 a.m. in order to give a presentation at a local school. Grievant left the facility at 10:15 a.m. and returned at 1:30 p.m. to conduct the team meeting.

The father of one of Dr. R's patients decided to attend the team meeting originally scheduled for 9:30 a.m. on Friday to find out his daughter's medical status. He showed up early and became increasingly frustrated as the time for the scheduled meeting passed. Once Agency staff realized Grievant would not be able to hold the team meeting to discuss the status of the father's daughter, they coordinated with Grievant to have another physician meet with the father. After 10 a.m., the father met with the another physician and then left the facility.

At approximately 10:50 a.m., Agency staff learned that staff from a local Community Service Board had arrived earlier at the facility for the scheduled 9:30 a.m. team meeting. The CSB staff were displeased at having had to wait for several hours.

One of Dr. R's patients was admitted into the facility in the afternoon on January 24, 2002. Since Grievant assumed responsibility for Dr. R's patients on Friday, he assumed responsibility for completing the medical documentation relating to this patient. He began the process of documentation and asked the Admission Specialist for the necessary documents in order to complete his assessment. He received all of the needed documents by Friday afternoon. He could have completed the assessment Friday afternoon but did not do so until the following Monday.

Grievant has a history of not completing necessary medical documentation as required. The three other physicians at the facility complete approximately 95 percent of their medical documentation consistent with Agency policy whereas Grievant completes only 61 percent.<sup>2</sup> Grievant received a "Below Contributor" rating on his October 2001 evaluation because of poor documentation.

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<sup>2</sup> Agency Exhibit 9.

The Agency removed Grievant's authority to engage in outside employment as a result of the problems arising on January 25, 2002.<sup>3</sup>

## CONCLUSIONS OF LAW

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force." P&PM § 1.60(V)(B).<sup>4</sup> Group II offenses "include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal." P&PM § 1.60(V)(B)(2). Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal." P&PM § 1.60(V)(B)(3).

"Inadequate or unsatisfactory work performance" is a Group I offense. In order to prove inadequate or unsatisfactory work performance, the Agency must establish that Grievant was responsible for performing certain duties and that he failed to perform those duties. This is not a difficult standard to meet.

The Agency offers two instances to show that Grievant's performance was unsatisfactory. First, the Agency contends Grievant failed to fulfill the duties of Dr. R before he left the facility. Second, the Agency contends Grievant failed to document a patient assessment within 24 hours of the patient's admission to the facility. The Hearing Officer must consider these allegations separately and together in order to determine whether Grievant's behavior rises to the level of a Group I offense.

### Unfulfilled Duties

The Agency does not have a specific policy<sup>5</sup> governing the procedure a physician must follow in order to have another physician cover for him or her. Physicians are professionals and are expected by the Agency to coordinate having one physician assume the duties of an absent physician. The Agency does not have a policy prohibiting attending physicians from changing the time of their team meetings even though the meeting time may have been announced to patient families or outside groups.

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<sup>3</sup> In a memorandum dated January 30, 2002, the Medical Director states, "Therefore I am attaching another Group I Standard of Conduct (unsatisfactory job performance) and I am suspending your privileges to work outside of [the facility] for a period of three months starting Monday, February 5."

<sup>4</sup> The Department of Human Resource Management has issued its *Policies and Procedures Manual* (P&PM") setting forth Standards of Conduct for State employees.

<sup>5</sup> The Agency presented Agency Exhibit 2 which addresses leave taken by staff psychiatrists. The Medical Director testified that this policy does not cover short-term absences by physicians.

On January 25, 2002, two events occurred which upset the Agency's operations. First, the father of a patient arrived for the scheduled team meeting but was forced to wait before meeting with a physician about his daughter. Second, the Community Service Board staff arrived at the scheduled team meeting and were upset that they could not complete their duties at the scheduled meeting time.

Grievant's actions may have set in motion the chaos that arose on January 25<sup>th</sup>, but he is not at fault for that chaos. Grievant complied with the Agency's accepted practices. He covered for Dr. R while he was working at the facility and had another physician cover for him and Dr. R while he was away from the facility. Although he delayed meetings to accommodate his schedule, such delays were consistent with the customary practice at the facility. The problem lies not with Grievant but with the absence of a more restrictive policy governing substitution of one physician for another.

#### Untimely Medical Documentation

Agency policy requires physicians to complete documentation of medical assessments within 24 hours of a patient's arrival at the facility. Patient B.N. arrived at the institution late in the day on Thursday, but Grievant did not complete the assessment until the following Monday. Although Patient B.N. was the patient of Dr. R, Grievant assumed to perform the duties of Dr. R in her absence and those duties included completing the assessment. Grievant received all of the necessary information by Friday afternoon and could have completed the documentation that day. There exists a sufficient basis for the Hearing Officer to conclude that Grievant's work performance was unsatisfactory.

Grievant contends that it is not uncommon for documentation of medical assessments to be completed more than 24 hours after a patient's arrival and, thus, this one late documentation should be excused. Grievant presented evidence that the other three physicians at the facility sometimes do not comply with the 24-hour requirement. The Agency, however, showed that poor documentation was the exception for the three other physicians but more frequent for Grievant. The Agency also showed that Grievant had received several notices informing of his need to improve medical documentation. Given this background, the Hearing Officer concludes that Grievant has a pattern of poor documentation and there is a sufficient basis to discipline Grievant.

Grievant contends he was not given proper procedural due process before the disciplinary notice was issued. He contends he was not given an opportunity to present his side of the dispute to the Medical Director before the Medical Director decided to issue the Group I Written Notice. Grievant's concern is well founded, but it does not affect the outcome of this case. Grievant should have notified the Agency of his noncompliance during the early stages of the grievance process and sought a compliance ruling from the Department of Employment Dispute Resolution. Having failed to do so, Grievant has waived any objection to the Agency's procedural errors that could have been corrected through the grievance step process.

Grievant argues he is being singled out for discipline because other physicians have not been disciplined for their poor behavior. He offered the example<sup>6</sup> of a physician who claimed sick leave but was running errands at the post office. This physician was not disciplined. Although this evidence may be sufficient to raise questions regarding the appropriateness of Grievant's prior Group I Written Notice for improperly claiming sick leave, Grievant has not established that he is improperly being singled out from the other physicians.

### Outside Employment

The Agency has a policy governing outside employment.<sup>7</sup> This policy is written in negative form – in other words, it assumes an employee may engage in outside employment unless the employee violates certain conditions. Outside employment must be pre-approved by the Agency. Outside employment will not be approved if the employment will involve “interference with the employee's ability to devote the expected time and attention to work or performance of duties with the Department ....”

The Agency has a great deal of discretion when applying its outside employment policy. It does not have discretion, however, to use its outside employment policy as a form of discipline.<sup>8</sup> An employee may be disciplined only with the sanctions provided under DHRM Policy 1.60, *Standards of Conduct*. In this instance, the Agency disciplined Grievant by issuing to him a Group I Written Notice and by revoking his authorization for outside employment. No evidence was presented suggesting Grievant's poor performance on January 25<sup>th</sup> related to his outside employment. Indeed, he was away from the facility to speak with students at a local school. By tying the removal of outside employment with the Group I Written Notice, the Agency has discarded its otherwise broad discretion and made an arbitrary and capricious decision. The Agency's decision to remove Grievant's authorization for outside employment must be reversed.<sup>9</sup>

## **DECISION**

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<sup>6</sup> Grievant offered other examples, but none were sufficient for the Hearing Officer to conclude Grievant was being treated differently from other employees.

<sup>7</sup> Agency Exhibit 7.

<sup>8</sup> The Agency's policy specifies that an employee's failure to obtain approval for outside employment may result in disciplinary action, but it does not state that authorization for outside employment may be removed as a form of discipline.

<sup>9</sup> The Hearing Officer's decision does not affect the Agency's procedure requiring annual renewal of outside employment. This decision would also not affect the Agency's separate and future considerations regarding whether Grievant should be permitted to engage in outside employment.

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action is **upheld**. The Agency's decision to withdraw Grievant's authorization for outside employment is **reversed**.

## **APPEAL RIGHTS**

As Sections 7.1 through 7.3 of the Grievance Procedure Manual set forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review – This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.
2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resource Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy.
3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **10 calendar** days of the **date of the original hearing decision**. (Note: the 10-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 10 days; the day following the issuance of the decision is the first of the 10 days). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 10 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.



### Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

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Carl Wilson Schmidt, Esq.  
Hearing Officer