

Issue: Group I Written Notice (unsatisfactory job performance); Hearing Date: July 8, 2002; Decision Date: July 18, 2002; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; AHO: Carl Wilson Schmidt, Esquire; Case Number: 5461



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 5461**

Hearing Date: July 8, 2002  
Decision Issued: July 18, 2002

**PROCEDURAL HISTORY**

On March 14, 2002, Grievant was issued a Group I Written Notice of disciplinary action for:

*Unsatisfactory job performance – calling patient an abusive name that may have been overheard by another patient.*

On April 9, 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 she requested a hearing. On June 6, 2002, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 8, 2002, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Grievant's Representative  
Agency Party Designee  
Agency Representative  
Shift Administrator

Human Rights Advocate  
Director of Nursing  
Hospital Director  
DSA II  
Registered Nurse  
Psychiatric Aid

## **ISSUE**

Whether Grievant should receive a Group I Written Notice of disciplinary action.

## **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 Registered Nurse. She has been working for the Agency for approximately four years with positive performance evaluations. She has no active prior disciplinary action.

Grievant provides nursing care to patients with mental illness at the Facility. She is obligated to approach “patients at all times in a therapeutic and respectful manner.”<sup>1</sup>

On March 13, 2002, the Shift Administrator was in his office speaking with a female patient. His office is approximately 12 feet by 20 feet and his office door opens into a hallway frequently traveled by staff and patients. The Shift Administrator saw Grievant outside his door and called her into his office. She stepped inside the door a few feet. The female patient inside the office walked behind Grievant as if to leave the office. Grievant was facing the Shift Administrator and the doorway was directly behind her. The Shift Administrator wanted to speak with Grievant to inform her that one of her male patients felt she was “singling him out” so that she would be aware of the patient’s perception of her. The Shift Administrator was not attempting to discipline or counsel

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<sup>1</sup> Grievant Exhibit 3.

Grievant regarding her interaction with the male patient; he was only attempting to make sure she knew of that patient's complaint. As the Shift Administrator stated the complaint of the male patient, Grievant responded, "Well, he is just an asshole anyway." Unknown to Grievant, the female patient who appeared to have left the office, was still outside the doorway listening to the conversation. She overheard Grievant's comment. Once Grievant realized the female patient was behind her, she covered her mouth and then apologized to the Shift Administrator for having made the comment. Shortly thereafter, Grievant reported herself to her the Head Nurse.

The female patient who overhead Grievant's comment later threatened to tell the male patient of Grievant's comment.

### **CONCLUSIONS OF LAW AND POLICY**

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>2</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 she failed to perform those duties. This is not a difficult standard to meet.

Grievant's position requires her to provide adequate care and treatment for patients at the Facility. Serving as a positive role model is one of her duties. Avoiding non-therapeutic criticism of patients is also an obligation of her position. By describing a patient as an "asshole" within the proximity of another patient was inadequate and unsatisfactory work performance.<sup>3</sup>

Grievant contends that she should be excused because she did not realize a patient was behind her when she made the offensive statement. The Hearing Officer agrees that Grievant did not realize a patient could overhear her, but the Hearing Officer finds that Grievant should have known there was a significant risk that a patient could overhear her comment. As Grievant was entering the Shift Administrator's office, a

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<sup>2</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>3</sup> The evidence showed that the male patient about whom Grievant was referring was a difficult patient. Employees working in Grievant's position often work with difficult patients and are expected to interact with them appropriately.

patient was leaving. Patients often walked in the hallway outside of the Shift Administrator's office and often entered his office to speak with him.

Grievant contends that her comment was (1) "out of character" for her, (2) resulted from a stressful workload and her feeling poorly that day, (3) she quickly recognized her mistake, and (4) she apologized for having made the comment. The Hearing Officer agrees that it is surprising that Grievant made the comment and that her apology was genuine; however, part of her professional obligation includes adjusting to stressful and difficult situations.<sup>4</sup>

Grievant contends that other staff in the Facility make inappropriate comments about patients, yet they are not disciplined. The evidence, however, showed that to the extent other staff made inappropriate comments about patients, those comments were either not brought to the attention of Facility managers or the comments were made behind closed doors where patients would not have overheard the comments. Grievant did not make her remark behind closed doors. There is no reason for the Hearing Officer to believe the Agency is inconsistently disciplining its employees.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action is **upheld**.

## 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

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<sup>4</sup> The factors cited by Grievant show that the Agency's decision to issue a Group I Written Notice rather than a greater level of discipline was appropriate.

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