

Issue: Group II Written Notice (failure to perform assigned work or comply with established written policy); Hearing Date: 07/10/02; Decision Date: 08/07/02; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; AHO: Carl Wilson Schmidt, Esq.; Case No.: 5463



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5463

Hearing Date: July 10, 2002
Decision Issued: August 7, 2002

PROCEDURAL HISTORY

On April 3, 2002, Grievant was issued a Group II Written Notice of disciplinary action for:

Failure to perform assigned work and comply with established written policy. Nurse is responsible to complete patient pass and responsible to administer all meds to the patient and keep all medication under lock and key. [Grievant] delegated these duties to an aide.

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 10, 2002, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee

Agency Representative
Two Psychiatric Aides
Assistant Administrator
Head Nurse
Nursing Instructor
Shift Administrator
DSA II

ISSUE

Whether Grievant should receive a Group II 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 received a Group I Written Notice on March 14, 2002 and a Group I Written Notice on April 3, 2002.

The Agency permits some patients to leave the Facility for a brief period of time. When this occurs, a patient is referred to as "going on pass." In order to make sure patients continue to take necessary medication, Agency staff obtain, organize, and bag medications for patients to take with them during their absences from the Facility. When a patient is going on pass, the nurse is required to (1) review the medication with the patient and/or the patient's family, (2) walk the patient to the front exit, (3) give the medication to the patient, (4) have the family member sign the pass to accept responsibility for the patient, and (5) to sign the pass as the person who released the patient.

A patient was scheduled to leave the Facility on pass beginning on March 29, 2002 at 7 p.m. and returning on March 31, 2002 at 7 p.m. The pharmacy had organized

her medications and given them to Grievant. Grievant counted the medications and made sure they were the correct dosages. She verified the information on the pass form and instructed the patient regarding taking the medication. Grievant was scheduled to leave at 7 p.m., but the patient's family was late. Grievant decided to leave the Facility but instructed the Psychiatric Aide to hand the bag of medications to the patient, walk the patient to the front of the building, and then sign the pass form along with obtaining the signature of the family member taking the patient. Grievant chose not to sign the pass form herself because after reading it carefully she concluded she would not be the person releasing the patient. Thus, she instructed the Psychiatric Aide to sign the pass. During her orientation, the Psychiatric Aide had been instructed not to handle medications and thus questioned Grievant as to whether she was supposed to be giving the medications to the patient. Grievant indicated it would be appropriate for the Psychiatric Aide to do so. When the patient's family arrived, the Psychiatric Aide took the medications, walked the patient from the resident area up to the front desk near the Facility, asked the patient's family member to sign the pass form and then signed the pass form as well.

Prior to March 29, 2002, Grievant had never asked a Psychiatric Aide to deliver medications or sign a pass for a patient. None of the witnesses who testified at the hearing were aware of a nurse asking a Psychiatric Aide to deliver medications to a patient going on pass or signing the pass.

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).¹ 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).

"Failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with established written policy" is a Group II offense. P&PM § 1.60(V)(B)(2)(a). The Agency's policy was that only medical professionals such as nurses were to give medications to patients. By giving the medication bag to the Psychiatric Aide with instructions to sign out the patient on the pass, Grievant failed to follow established written policy. She had received adequate training of the policy and had complied with the policy in the past.

¹ The Department of Human Resource Management has issued its *Policies and Procedures Manual* (P&PM") setting forth Standards of Conduct for State employees.

Corrective action may be reduced based on mitigating circumstances. Mitigating circumstances include: (1) conditions related to an offense that justify a reduction of corrective action in the interest of fairness and objectivity, and (2) consideration of an employee's long service with a history of otherwise satisfactory work performance. P&PM § 1.60(VII)(C)(1).

Grievant's intent was to comply with established written policy. Every employee should attempt to comply with Agency policy. Grievant simply overanalyzed the Agency's policy thereby causing her to fail to comply with the policy she desired to follow. She believed that if she signed the pass, she would be acting contrary to policy because the pass states² that the person releasing the patient is to sign the pass and the Psychiatric Aide was the person releasing the patient. If Grievant was unsure of the policy, she should have consulted with a manager rather than changing how she handled patients going on pass. Grievant's behavior is consistent with unsatisfactory job performance rather than an intentional failure to comply with established written policy. The disciplinary action against her must be reduced to a Group I Written Notice.³

Grievant contends that certain Agency staff had targeted her for firing. No credible evidence was presented supporting this contention.⁴

DECISION

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

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.

² Under the Departure section of the pass, it states, "Name & title of person who released client."

³ Another reason to mitigate the disciplinary action against Grievant is that the Agency's policies are not as clear as they could be regarding what constitutes administration of medication and whether a Psychiatric Aide can hand medication in a bag to a patient. This is in contrast to the Agency's actual practice which was very clear – Psychiatric Aide are not permitted to deliver medication to patients and this rule was routinely followed. It does not appear that the Agency's policy fully anticipated the factual situation giving rise to this grievance.

⁴ Grievant testified that she had overheard other staff discussing that the Agency wanted to terminate her. Speculation of co-workers is insufficient to support Grievant's claim that the Agency had targeted her for dismissal.

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.

Carl Wilson Schmidt, Esq.
Hearing Officer

