

Issue: Group II Written Notice (failure to follow supervisor's instructions, perform assigned work, or otherwise comply with established written policy); Hearing Date: 11/18/02; Decision Date: 11/19/02; Agency: Dept. of Health; AHO: David J. Latham, Esq.; Case No.: 5565



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5565

Hearing Date: November 18, 2002
Decision Issued: November 19, 2002

PROCEDURAL ISSUES

Grievant requested, as part of her relief, the opportunity to attend a communication skills class. A hearing officer has the authority to provide various forms of relief including the reduction or rescission of disciplinary actions, and the awarding of back pay. However, a hearing officer does not have authority to direct the methods or means by which work activities are to be carried out or any other relief that is inconsistent with the grievance statute or procedure.¹ If grievant desires specific training, she should make such a request to her supervisor and management chain of command.

APPEARANCES

Grievant

¹ Section 5.9(b), Department of Employment Dispute Resolution *Grievance Procedure Manual*, effective July 1, 2001.

Director
Representative for Agency
Four witnesses for Agency

ISSUES

Did the grievant's actions warrant disciplinary action under the Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

FINDINGS OF FACT

The grievant filed a timely appeal from a Group II Written Notice issued for failing to follow a supervisor's instructions, perform assigned work or otherwise comply with established written policy.² The grievant was suspended from work for a period of ten days from August 5 through 16, 2002. However, at the third resolution step of the grievance process, the agency rescinded the suspension and reimbursed grievant for lost pay.³ Following failure to resolve the matter at the third resolution step, the agency head qualified the grievance for a hearing.⁴

The Virginia Department of Health (hereinafter referred to as agency) has employed the grievant as an office services specialist (OSS) for 14 years. Her core responsibilities are to provide clerical support for the agency's programs, clinic activities, and health department activities.⁵ Grievant has not had any medical training other than taking a CPR (cardiopulmonary resuscitation) class.

In September 2001, grievant's supervisor met with grievant and reviewed grievant's job responsibilities and expectations, as outlined in her employee work profile.⁶ In April 2002, grievant's supervisor met with grievant and the other OSS in the office to discuss several topics. One issue discussed was the need to refer patients to the public health nurse or a nutritionist to discuss their problems.⁷

On the morning of July 26, 2002, a female patient in her upper 50s entered the health department and said she wanted to see a physician. Grievant explained that a physician was not in the health department at that time, and that the health department does not provide sick care. The patient leaned against a wall and appeared to be in physical distress. Grievant asked if the client wanted to go to a nearby health center; the patient said she was unable to drive herself there. Grievant offered to drive the patient to the health center. Grievant told a coworker before she left that she was taking a patient to the health center

² Exhibit 1. Written Notice, issued August 7, 2002.

³ Exhibit 1. Letter from Executive Advisor to grievant, September 26, 2002.

⁴ Exhibit 1. Grievance Form A, filed August 19, 2002.

⁵ Exhibit 6. Grievant's Employee Work Profile, May 18, 2001.

⁶ Exhibit 5. Meeting notes, September 13, 2001.

⁷ Exhibit 3. Minutes of meeting, April 15, 2002.

(located about 1.5 to 2 miles away). Grievant drove the patient to the health center where the patient refused treatment. The patient said she was having chest pains but refused to allow anyone to call 911 for her. Grievant then drove the patient back to the health department where the patient said she would drive own vehicle to her personal physician's office.

Grievant did not obtain the patient's name and there has been no further contact from the patient. Grievant did not ask the public health nurse, who was in the facility, to evaluate the patient before taking her to the health center. Upon returning from the health center, grievant again failed to seek advice from the nurse, even though the patient told grievant she was experiencing chest pain.

During the afternoon of July 26, 2002, grievant advised her supervisor of what had occurred that morning. The supervisor, the public health nurse and the district health director (physician) discussed the situation and decided that discipline should be issued because of the potential seriousness of the offense. Grievant asserts that she was only acting from her heart when she attempted to assist the patient. Grievant's supervisor corroborated that grievant is a very compassionate person who tries her best to help people in need.

Both parties agreed that routine illnesses such as a sore throat are not referred to onsite medical personnel. Rather, the office services specialist advises the patient that the health department does not provide routine health care and redirects the patient to a health care provider. However, when a patient presents with an emergency problem, the OSS is to refer the patient to the onsite health personnel (nurse or physician).

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. Murray v. Stokes, 237 Va. 653, 656 (1989).

Code § 2.2.3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . .

To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.⁸

Commonwealth of Virginia and pursuant to § 2.2-1201 of the Code of Virginia, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60 effective September 16, 1993. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action. Section V.B.2 defines Group II offenses to include acts and behavior which are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal from employment. One example of a Group II offense is failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with established written policy.⁹

In her grievance, the grievant complained that she was being charged with an unidentifiable offense. However, the Written Notice specifies that the offense was a Group II offense, and the attachment provides the details of the offense. The offenses listed in the Unacceptable Standards of Conduct are not all-inclusive but are intended as *examples* of unacceptable behavior for which specific disciplinary actions may be warranted. Accordingly, any offense that, in the judgment of the department head, undermines the effectiveness of departmental activities may be considered unacceptable and treated in a manner consistent with the provisions of the Standards of Conduct policy.¹⁰

The agency has shown, and grievant admits, that she transported a patient in obvious physical distress from the agency's facility to a health center. Grievant has no medical training or experience yet made a decision that the patient did not need to be seen immediately by the health department nurse, who was in the agency facility at the time. Grievant concluded that the patient was sufficiently in distress to require assistance and transport, yet maintains steadfastly that she was not making a "medical decision." However, when grievant made the decisions that the patient needed medical attention, and that she required transport, these conclusions constituted a medical decision. Since

⁸ § 5.8, EDR *Grievance Procedure Manual*, effective July 1, 2001.

⁹ Exhibit 2. DHRM Policy No. 1.60, *Standards of Conduct*, September 16, 1993.

¹⁰ Exhibit 2. Section V.A, DHRM Policy 1.60, *Standards of Conduct*, September 16, 1993.

grievant has no medical training, it was not appropriate for her to decide either that the patient needed medical attention, or that the patient was incapable of transporting herself. Grievant had other alternatives available to her. She could have consulted with the on-site nurse before taking any action, with her own supervisor, or she could have called 911 if she believed the situation was serious enough. Grievant decided against taking any of these courses of action, and in so doing, made the decision that she thought was the best course of action for the patient.

While grievant is clearly a caring, compassionate person who intended only to assist the patient, she made a decision and took action for which she has no medical training or experience. By making such a decision and taking such action, grievant was acting well outside the scope of her employment. Her job responsibilities encompass only clerical functions, not medical decision-making or medical transport.

Undoubtedly, grievant intended only to assist a person in need, and did not intend to put her employer in potential jeopardy. However, by undertaking to transport a person who may have been having a serious medical problem, grievant exposed the employer to the potential for a major liability situation. Grievant's actions were not in compliance with her written job description, and were contrary to her supervisor's instructions regarding the duties and responsibilities expected of her. However, regardless of how one categorizes grievant's offense, it must be concluded that it was serious enough that a repetition would warrant removal from employment. Therefore, the act was sufficiently serious that it fits within the general definition of a Group II offense.¹¹

Grievant contends that she acted under the aegis of the Good Samaritan law.¹² However, a careful reading of that statute reveals that the law does not obligate one to take action. Rather, it provides immunity from liability when one voluntarily takes action – under certain very specific circumstances. Grievant is not a licensed physician, an emergency services dispatcher, or an emergency medical attendant or technician. She was not providing emergency care as the result of an accident, fire or life-threatening emergency, or providing obstetrical care, administering epinephrine or administering CPR. Therefore, the Good Samaritan law was not applicable to the situation that confronted grievant on July 26, 2002.

DECISION

The disciplinary action of the agency is affirmed.

¹¹ Exhibit 2. Section V.B.2, *Ibid.*

¹² Code of Virginia § 8.01-225 (commonly referred to as the Good Samaritan law) provides immunity to physicians and others when rendering emergency care and obstetrical services under certain specified conditions.

The Group II Written Notice issued on August 7, 2002 is hereby UPHELD. The Written Notice shall be retained in the grievant's personnel file for the period specified in Section VII.B.2 of the Standards of Conduct.

APPEAL RIGHTS

You may file an administrative review request within **10 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy.
3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 10 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 10-calendar day period has expired, or when administrative requests for review have been decided.

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.¹³

[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]

David J. Latham, Esq.

¹³ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

Hearing Officer