

Issue: Group III Written Notice with termination (falsification of State documents); Hearing Date: 06/03/04; Decision Issued: 06/08/04; Agency: DMHMRSAS; AHO: David J. Latham, Esq.; Case No. 729



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 729

Hearing Date: June 3, 2004
Decision Issued: June 8, 2004

APPEARANCES

Grievant
Attorney for Grievant
Representative for Agency
Four witnesses for Agency

ISSUES

Did the grievant's actions warrant disciplinary action under the Commonwealth of Virginia 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 III Written Notice for falsification of state documents.¹ As part of the disciplinary action, grievant was removed from state employment effective February 27, 2004. Following failure of

¹ Exhibit 8. Written Notice, issued February 27, 2004.

the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for hearing.² The Department of Mental Health, Mental Retardation and Substance Abuse Services (hereinafter referred to as "agency") employed grievant as a health services care worker (HSCW) for 15 years. Grievant has six prior disciplinary actions; however, all six were inactive when the disciplinary action being adjudicated herein was issued.³

Employees who work on the night shift are required to monitor clients at 30-minute intervals and record observations on a client bed check form.⁴ The observations indicate whether a patient is awake, asleep, toileted, in the infirmary, on pass, at other locations, and whether bedrails are up or down. Grievant had been trained on, and understood, the procedure. The training material specifies that, "It is very important that these checks are conducted at the assigned time ..."⁵ Grievant worked on the night of February 24-25, 2004 from 10:15 p.m. to 6:15 a.m. In addition to a building manager assigned to each building, the facility employs two roving managers who randomly come to buildings to assure that all policies and procedures are being followed. At about 4:15 a.m., one of the roving managers came to grievant's building to prepare medications for clients. She mentioned to grievant that the other roving manager would be coming to the building in a few minutes to review bed check forms.

At about 4:20 a.m., the second roving manager arrived and noticed that grievant was filling in the bed check form. He observed that grievant had completed the form for 12 clients through the 4:30, 5:00, 5:30, & 6:00 a.m. observation times.⁶ Since it was only 4:20 a.m., the manager asked grievant and her coworker (who had told grievant what entries to make for clients 9 through 12) why they had documented observations that could not yet have been made. Grievant responded that they were about to begin the client wake-up routine and would not have time to complete the form during the routine.⁷ He also asked her what she would do if, for example, a client died after she had recorded an observation. Grievant said she would erase the entry.⁸ The roving manager took the bed check form and directed that grievant begin filling out a new form with the actual observations to be recorded at the designated times. He then reported the incident to the Director of Residential Services.

The roving manager had noticed that the first client on the form was awake and sitting in the dayroom when he arrived at 4:20 a.m. When he left the building some 25 minutes later, the same client was still awake and still sitting in

² Exhibit 11. *Grievance Form A*, filed March 23, 2004.

³ Exhibit 10. Inactive written notices.

⁴ Exhibit 2. Facility Standard Operating Procedure, *Client Care & Training – 4850*, August 11, 1998.

⁵ Exhibit 7. Most recent training and attendance sheet, February 2, 2004.

⁶ Exhibit 4. Client Bedcheck Census, February 24, 2004.

⁷ Exhibit 3. Attachment to Event Report, February 25, 2004.

⁸ By the time of this exchange, the second roving manager had finished the medications and come into the dayroom. She corroborated that she heard grievant make this statement.

the dayroom.⁹ Grievant indicated on both the falsified bed check form and the second bed check form that this client was asleep at 4:30 a.m.

The Director interviewed grievant. He asked her how she knew, in advance, the location and status of each client. Grievant responded that, "I just know." After investigation, the Director consulted with the Human Resources unit and it was decided to remove grievant from employment. The agency considered whether to apply mitigation but felt that grievant's previous work history did not justify reducing the disciplinary action. The agency cited documentation problems noted in her performance evaluation and the concerns of supervisors about grievant's attitude and failure to follow supervisory instructions.¹⁰ Grievant's coworker received a Group I Written Notice. In recent years, there had been one other similar incident; the offender received a Group III Written Notice but was not removed from employment due to an otherwise good work history.

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. In all other actions, such as claims of retaliation, the grievant

⁹ The other roving supervisor corroborated that the client was awake in sitting in the dayroom when they left at about 4:45 a.m.

¹⁰ Exhibit 6. Grievant's performance evaluation, October 19, 2003.

must present her evidence first and prove her claim by a preponderance of the evidence.¹¹

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Va. Code § 2.2-1201, 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.3 of the Commonwealth of Virginia's Department of Personnel and Training Manual *Standards of Conduct* Policy No. 1.60 provides that Group III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal from employment.¹² Falsifying any records including reports, time records, or other official state documents is one example of a Group III offense.

Black's Law Dictionary defines "falsify" as, "To counterfeit or forge; to make something false; to give a false appearance to anything." The word "falsify" means being intentionally or knowingly untrue. The agency has borne the burden of proof to show that grievant knowingly recorded information she knew to be untrue. Grievant contends that the agency has not shown intent to falsify. The element of intent may be inferred when a misrepresentation is made with reckless disregard for the truth. *Haebe v. Department of Justice*, 288 F.3d 1288, 1306 Fn. 35 (Fed. Cir. 2002). In this case, grievant recorded fictitious information that stated as fact the status of clients in the future. By her own testimony, she did so in order to complete paperwork before she began the client wakeup routine.

In the past, the practice had been that the roving managers would pick up bed check forms at the end of the night shift. However, beginning in December 2003, the procedure changed and it was decided that the bed check forms would be retained in a notebook binder in each resident building. The roving managers randomly checked the notebook during rounds to assure policy compliance but did not collect the forms after December 2003. Grievant contends that she made a mistake and thought that the roving manager was going to *collect* the bedcheck form rather than review it. This contention is not credible because grievant was well aware that, since December 2003, the procedure had been changed to retain the bed check forms in a notebook that stays in the building. Moreover,

¹¹ § 5.8, Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001.

¹² Exhibit 9. Section V.B.3, DHRM Policy No. 1.60, *Standards of Conduct*, September 16, 1993.

the first roving manager told grievant only that the other manager would be coming to *look* at the forms, not collect them.¹³

Grievant argues that she should not be removed from employment because this was the first time that she had falsified a bed check form. However, grievant testified during the hearing that she had falsified bed check forms on several occasions in the past when the rovers would collect the forms prior to the 6:00 a.m. observation. Grievant's two statements are mutually inconsistent. Her allegation that the rovers had repeatedly directed her to fill out forms in advance of the observation time is not credible for three reasons. First, grievant had not previously mentioned this assertion until this hearing. If this were a common instruction, it is only logical that grievant would have raised this defense when first confronted, or at least during the grievance resolution process.

Second, if the allegation was true, grievant could have requested orders for coworkers to testify to corroborate her allegation; grievant brought no witnesses to the hearing and did not request orders for any witnesses. When a party fails to offer such witnesses, it is presumed that their testimony would not have been favorable to grievant. Third, grievant has not offered any theory as to why the roving managers would report grievant on this occasion for something that they had purportedly told her to do on repeated occasions in the past. It is more likely than not that the managers reported this offense because they had not seen it occur in the past and it represented an anomaly that required reporting on this occasion.

It appears from the agency's second step response that it gave consideration to inactive disciplinary actions in deciding to uphold the disciplinary action in this case.¹⁴ An agency may not consider inactive disciplinary actions in determining the appropriate level of discipline for the new offense.¹⁵ It may consider relevant past work history if it corroborates a pattern of behavior that is the same as or similar to the new offense. Past work history could include an inactive disciplinary action if it met this criterion. In this case, none of the inactive disciplinary actions involved falsification of records. The agency contended that a November 1997 offense was tangentially related to the instant case because it showed a disregard for patient well-being. While the falsification of a bed check form could represent disregard for client safety, the hearing officer considers the connection to be sufficiently tenuous, and the prior discipline sufficiently remote in time, that the previous disciplinary action was given little evidentiary weight in this decision.

¹³ Exhibit 5. Memorandum from first roving manager to Director, February 25, 2004.

¹⁴ Exhibit 11. Second Step response, April 6, 2004.

¹⁵ Exhibit 9. Section VII.B.2.e, DHRM Policy 1.60, Standards of Conduct, effective September 16, 1993. Because the prior disciplinary actions are inactive, they may not be considered either in an employee's accumulation of Written Notices, or in determining the appropriate disciplinary actions for the new offense.

In weighing whether mitigation should be applied in this case, the hearing officer gave consideration to grievant's 15 years of service. However, it appears from the testimony and evidence that grievant has been having an ongoing problem with documentation. The agency properly considered that grievant was given a Notice of Improvement Needed/Substandard Performance in March 2003 for unacceptable documentation. The problem was again noted in grievant's annual performance evaluation in October 2003. Of even more concern is grievant's apparent lack of concern about documenting patient status accurately even *after* the roving manager spoke to her on the morning of February 25, 2003. Grievant made untrue entries on the second bed check form. For example, she recorded the first client as being asleep at 4:30 a.m.; however, the weight of the evidence is that the client was awake and sitting in the day room at that time. Grievant's failure to record the client's correct status after being directed to complete a new form suggests that she was more concerned about just filling in the form than in *accurately* recording client status. For these reasons, the grievant's length of service is outweighed by the aggravating circumstances in this case.

DECISION

The disciplinary action of the agency is affirmed.

The Group III Written Notice and the removal of grievant from state employment on February 27, 2004 are hereby UPHELD. The disciplinary action shall remain active pursuant to the guidelines in 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. Address your request to:

Director
Department of Human Resource Management
101 N 14th St, 12th floor

Richmond, VA 23219

3. If you believe 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. Address your request to:

Director
Department of Employment Dispute Resolution
830 E Main St, Suite 400
Richmond, VA 23219

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.¹⁶ 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.¹⁷

[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.
Hearing Officer

¹⁶ An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

¹⁷ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.