

Issue: Group III Written Notice with demotion and salary reduction (falsifying State documents); Hearing Date: 11/08/04; Decision Issued: 11/12/04; Agency: DMAS; AHO: David J. Latham, Esq.; Case No. 7889



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 7889

Hearing Date: November 8, 2004
Decision Issued: November 12, 2004

PROCEDURAL ISSUE

Grievant requested as part of her relief that she be awarded attorney fees and costs. A hearing officer does not have authority to award damages or attorneys' fees.¹ In any case, the issue is moot in this instance because grievant was not represented by an attorney during this hearing.

Grievant also requested that the agency be directed to mediate with grievant prior to taking any future disciplinary action against her. A hearing officer does not have authority to revise policies or award any relief that is inconsistent with the grievance statute or procedure.² Mediation is a *voluntary* process that requires that both parties (agency and grievant) to agree to utilize the services of a neutral third person.³

APPEARANCES

Grievant

¹ § 5.9(b)2. Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004. [NOTE: Effective for grievances filed on or after July 1, 2004, the statute was amended to allow attorneys' fees only in cases challenging discharge.]

² § 5.9(b)5 & 8. *Ibid.*

³ § 1.2. *Ibid.*

Program Integrity Manager
Advocate for Agency
Two 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? Did the agency discriminate against grievant?

FINDINGS OF FACT

The grievant filed a timely grievance from a Group III Written Notice for falsification of state documents, and for identifying herself as a Registered Nurse in quasi-judicial hearings and on agency business cards.⁴ As part of the disciplinary action, grievant was demoted to a non-supervisory position and her salary was reduced by ten percent. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for hearing.⁵ The Department of Medical Assistance Services (Hereinafter referred to as "agency") has employed grievant for 12 years. Prior to this disciplinary action, she was a program compliance supervisor; she was demoted to health care specialist.

In 1970, grievant was awarded a Nursing degree in the state of New York. After passing an examination and meeting other requirements that same year, grievant was "licensed to practice as a Registered Professional Nurse in the State of New York."⁶ Grievant allowed her New York license to be placed in an inactive status in 1979 and her current status in New York is "Not registered."⁷

In 1973, grievant was licensed as a Registered Nurse by the Virginia State Board of Nursing.⁸ Board of Nursing regulations provide that registered nurses shall renew their licenses biennially by completing an application form and paying a fee.⁹ Although the Board normally sends an application to all known registered nurses, failure to receive the application form does not relieve the licensee of the responsibility for renewing the license by the expiration date.¹⁰ If the licensee

⁴ Agency Exhibit 1. Written Notice, issued September 1, 2004.

⁵ Agency Exhibit 1. *Grievance Form A*, filed September 3, 2004.

⁶ Grievant Exhibit 1. New York State Education Department Division of Professional Education examination results and license, September 16, 1970.

⁷ Grievant Exhibit 1. New York State Education Department Office of Professions, License information, September 22, 2004. See also Grievant Exhibit 6. Memorandum from grievant to Human Resources Director, August 24, 2004.

⁸ Grievant Exhibit 1. Virginia State Board of Nursing license, February 20, 1973.

⁹ 18VAC90-20-220.A, B & C. Renewal of licenses. *Regulations Governing the Practice of Nursing*.

¹⁰ 18VAC90-20-220.D. *Ibid.*

fails to renew by the expiration date, the license automatically lapses; any person practicing nursing during the time a license has lapsed shall be considered an illegal practitioner and shall be subject to prosecution.¹¹ Only those persons who hold a license to practice professional nursing in Virginia have the right to use the title “registered nurse and the abbreviation “R.N.”¹² The Board of Nursing defines unprofessional conduct to include, inter alia, “falsely representing facts on a job application or other employment-related documents.”¹³

Grievant last renewed her license as a Registered Nurse in Virginia in 1987; it lapsed automatically when she failed to renew it in 1989. She has not renewed her license since that time, and her license remains in a lapsed status as of the date of this hearing.¹⁴

In September 1992, grievant applied for a position within the agency; she stated on the application form that she was licensed to practice the profession of nursing in Virginia and that her license was due to expire in August 1994.¹⁵ In November 2000, grievant applied for another position within the agency and stated on the application form that she was licensed to practice the profession of Nursing.¹⁶ Grievant has continually held herself out to be a Registered Nurse and has used the initials “R.N.” after her name on her agency business card.¹⁷ In at least one or more quasi-judicial hearings, grievant has sworn under oath that she is a licensed nurse in the state of Virginia.¹⁸

The agency first learned in the summer of 2004 that grievant does not have a current license when the Department of Health Professions (DHP) contacted the agency. DHP had received an anonymous complaint that grievant was representing herself as a Registered Nurse even though the Board of Nursing records show that grievant has not had a current license for 15 years. The agency subsequently reviewed grievant’s records and found the applications grievant had submitted in 1992 and 2000.

The Board of Nursing has previously investigated many cases similar to grievant’s case. Disciplinary actions have included monetary penalties, reprimands, suspension of the nurse’s right to renew her license and, in some cases, referral to the Office of Attorney General for prosecution under the law.

¹¹ 18VAC90-20-220.E & F. *Ibid.* See also Agency Exhibit 7, Va. Code § 54.1-3011.C.

¹² Va. Code § 54.1-3016. Use of title “registered nurse” or “R.N.”

¹³ 18VAC90-20-300.A.2.e

¹⁴ Testimony, Executive Director of the Virginia State Board of Nursing. [NOTE: Grievant avers that she paid a renewal fee to the Board of Nursing in August 2004, however, the Executive Director indicates grievant’s license remains in a lapsed status (presumably because of the ongoing investigation being conducted by the Board).]

¹⁵ Agency Exhibit 3. Application for Employment, received September 9, 1992.

¹⁶ Agency Exhibit 3. Application for Employment, signed November 8, 2000.

¹⁷ Agency Exhibit 4. Grievant’s agency-provided business card.

¹⁸ Agency Exhibit 5. Transcript of formal appeal hearing, April 1, 2004.

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 the grievant must present her evidence first and prove her claim by a preponderance of the evidence.¹⁹

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 (DHRM) 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

¹⁹ § 5.8, Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

employment.²⁰ Falsifying any records including reports, time records, or other official state documents is one example of a Group III offense. The offenses listed in the Standards of Conduct are intended to be illustrative, not all-inclusive. Accordingly, an offense that in the judgment of the agency head undermines the effectiveness of the agency's activities or the employee's performance should be treated consistent with the provisions of the Standards of Conduct.²¹

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. Specifically, grievant stated on her 1992 application for employment that she was licensed to practice the profession of nursing in Virginia and that her license would expire in August 1994. In fact, grievant's license had expired in 1989 and, therefore, she was not licensed to practice nursing in Virginia. Grievant knew, or reasonably should have known, that her license expired in 1989. Accordingly, grievant knowingly falsified the application form.

Grievant contends that because she had been licensed in Virginia in 1973, she now holds a "valid" license that entitles her to call herself an "R.N." She further argues that she can continue to practice nursing and call herself an R.N. even though her license has lapsed. Grievant's contention is specious and unpersuasive. In an analogous situation, a driver's license is valid only as long as the license is current. When a driver's license expires, the driver must renew her license by completing an application and paying a fee to the regulatory agency (Department of Motor Vehicles). If the driver fails to renew her license she is not allowed to drive a motor vehicle. Similarly, when grievant's nursing license expired, she was no longer entitled to practice nursing.

If one were to accept grievant's argument that she can continue to practice nursing and hold herself out as an R.N. without renewing her license, the regulation requiring biennial license renewal would have no *raison d'être*. Since the regulation was enacted for the purpose of regulating the nursing profession, its terms require compliance in order to maintain the currency, and therefore, the validity of the nursing license. When a license lapses, the holder of the license is no longer authorized to perform those functions for which the license was issued. The word "lapse" means "The termination or failure of a right or privilege through neglect to exercise it within some limit of time, *or through failure of some contingency.*"²² (*Italics added*). In this case, the applicable contingency was grievant's failure to renew her license by filing an application form and paying a fee.

²⁰ Agency Exhibit 8. Section V.B.3, DHRM Policy No. 1.60, Standards of Conduct, September 16, 1993.

²¹ Agency Exhibit 8. Section V.A. *Ibid.*

²² *Black's Law Dictionary*.

Grievant argues that her New York State license entitles her to use the “R.N.” designation in any state as long as she wants to. The source of grievant’s argument is unclear. The New York license submitted by grievant states only that she is licensed to practice “*in the state of New York;*” the license neither states nor infers that it is valid outside the state of New York.²³ It is axiomatic that the laws and licensing of any state do not have any legal effect outside that state, unless another state enacts legislation to give full faith and credit to the laws of the first state. Each of the 48 states enacts laws that regulate the health professions inside its own state. The New York licensing authority has no jurisdiction in Virginia or any other state. It is also worth noting that New York, like Virginia, requires nurses to periodically renew their license in order to continue practicing under authority of their license.²⁴

Accordingly, whether grievant is licensed to practice nursing in any state other than Virginia is irrelevant. One may practice a profession in Virginia only if the appropriate Virginia regulatory agency issues a license and, the licensee maintains the currency of the license and otherwise remains in good standing, as determined by the regulatory agency. For example, attorneys, physicians and other professionals regulated by state governments may only practice in those states where they maintain current licenses. In the instant case, the Board of Nursing has determined that grievant’s license to practice nursing lapsed in 1989; grievant has failed to provide any evidence to the contrary.

Grievant correctly notes that the regulations provide for licensure by endorsement. Thus, one who has a license in good standing from another jurisdiction, or if lapsed, is eligible for reinstatement, may be eligible for licensure in Virginia – provided all other requirements are met. Specifically, an applicant for licensure by endorsement must submit the required application and fee.²⁵ Accordingly, even if grievant could show that she is eligible for reinstatement in New York State, she would still have to submit the requisite application and fee to the Virginia Board of Nursing to receive a Virginia license. While grievant may have originally obtained her Virginia license by endorsement, that has no bearing on whether she has maintained her license in a current status.

Grievant also argues that she was not “practicing nursing” because her position does not involve hands-on clinical nursing (patient care). The Executive Director of the Virginia Board of Nursing testified that grievant’s position and responsibilities fall within the practice of nursing.²⁶ Grievant has been utilizing her nursing education, knowledge, and experience to make decisions that could

²³ In any case, grievant’s own evidence (Grievant Exhibit 1) demonstrates that she is not currently registered as a nurse in New York State.

²⁴ Grievant Exhibit 1. New York Office of Professions General Licensing Information.

²⁵ 18VAC90-20-200, Licensure by Endorsement, *Regulations Governing the Practice of Nursing*.

²⁶ DHP is currently investigating grievant’s case; a determination as to whether to take disciplinary and/or enforcement action is pending.

affect the health care of Medicaid recipients, and she has been representing herself as a Registered Nurse.

Grievant argued that the Department of Health Professions (DHP) had no right to subpoena copies of her personnel records from the agency;²⁷ she contends that the subpoena should have been served on the Office of Attorney General. This issue is a red herring. The hearing officer takes no position with regard to whether DHP served its subpoena on the proper party because that issue is irrelevant in this case. Grievant's discipline resulted from her own offense; the discipline would have been issued regardless of which agency was served with the subpoena. She further contended that the agency violated her rights by providing information to the DHP. However, grievant offered no statute, regulation, or policy to support this allegation. The applicable DHRM policy provides that agencies must comply with subpoenas ordering employee records to be turned over to the court and that the agency may, but is not required to, inform the subject employee of the subpoena.²⁸ There is no evidence to conclude that the agency's response to the subpoena was not lawful.

Grievant alleged that the Division Director who issued the disciplinary action did so in order to push grievant aside and put someone else in her position. However, other than speculation, grievant failed to present any witnesses or documentation to support her allegation. However, even if the Director had such an ulterior motive, the agency has provided sufficient non-retaliatory reasons to support issuance of the disciplinary action.

Grievant also argues that the discipline was issued to appease the provider who filed a complaint with the Board of Nursing. There is no evidence to support grievant's speculation. The agency believes it had no choice but to discipline grievant and remove her from a supervisory position because of the criminal provisions in the law which might result in liability to the agency if it took no action. The law prohibits both knowing employment of an unlicensed person as a professional nurse and, knowingly allowing an unlicensed person to represent herself as a professional nurse.²⁹

Grievant contended that she is not subject to Virginia law because her position is partially federally-funded.³⁰ Federal funds are provided to the agency based, in part, on having registered nurses in certain positions. However, the fact that the federal government reimburses the agency for a portion of its

²⁷ Agency Exhibit 2. DHP Subpoena, July 21, 2004.

²⁸ Grievant Exhibit 4. Section V.A & B, DHRM Policy 6.05, *Personnel Records Disclosure*, September 16, 1993. [NOTE: While this policy refers to court orders, Va. Code § 54.1-2506 gives the DHP Director the authority to issue an order for business records and to have it enforced by a magistrate of the court.]

²⁹ Agency Exhibit 7. Va. Code § 54.1-3008.A.3.

³⁰ Va. Code § 54.1-3001.3 provides that Virginia Board of Nursing law does not apply to a legally qualified nurse of another state who is employed by the United States government while in the discharge of his official duties.

expenses does not make grievant a federal employee. In fact, grievant is an employee of the Commonwealth of Virginia; her salary and benefits are paid by the Commonwealth. Grievant is not an employee of the United States government. As a resident of Virginia and an employee of the Commonwealth, she is subject to the laws of the Virginia Board of Nursing.

Discrimination

Grievant has alleged that the agency discriminated against her but has not asserted that such discrimination was based on any protected classification. Rather, she contends that there has been disparate treatment based on her relatively lower hierarchical position in the agency. However, other than allegation, grievant has offered no testimony or documentation to support her charge.

Grievant also contends that changing her position from a supervisory to non-supervisory position will negatively affect her disability thereby creating a potential for further disciplinary action. In 1999, grievant sustained nerve damage of the median and ulnar nerves that limits manual dexterity and makes keyboarding difficult.³¹ In her supervisory position, the agency had accommodated grievant by providing her with a software voice recognition dictation program that obviates the necessity of extensive keying. In addition, the agency had constructed a special cubicle for grievant to minimize the ambient sound level when she dictates. Since grievant's demotion to a position in another department, the agency has provided the same accommodations by constructing another sound-resistant cubicle in her new department and by making the voice recognition software available to her.

Grievant alleges that the agency is attempting to force her to resign but she has not presented any testimony or evidence to support this allegation. Moreover, the agency has pointed out that while a Group III offense normally results in removal from employment, the agency sufficiently values grievant's knowledge and experience that it elected to retain her in employment, and went to the added expense of making the above accommodations in her new position. If the agency had wanted to dismiss her, it could have done so as part of this disciplinary action; there would be no need to wait for some theoretical future disciplinary action. Accordingly, grievant has not borne the burden of proof to show that the agency's actions were discriminatory or that it treated her disparately.

³¹ Grievant Exhibit 3. Letter to Human Resource Director from nurse practitioner, September 15, 2004.

DECISION

The disciplinary action of the agency is affirmed.

The Group III Written Notice, demotion, and salary reduction issued on September 1, 2004 are hereby UPHELD. The disciplinary action shall remain active pursuant to the guidelines in the Standards of Conduct.

Grievant has not shown that the agency discriminated against her.

APPEAL RIGHTS

You may file an administrative review request within **15 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 15 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 15-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.³² 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.³³

[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

³² 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).

³³ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.