

Issue: Formal performance improvement counseling, 90-day performance warning and two-day suspension; Hearing Date: 01/12/04; Decision Issued: 01/13/04; Agency: UVA Health System; AHO: David J. Latham, Esq.; Case No. 479



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 479

Hearing Date: January 12, 2004
Decision Issued: January 13, 2004

PROCEDURAL ISSUES

Due to availability of participants, the hearing could not be docketed for hearing until the 33rd day following appointment of the hearing officer.¹

APPEARANCES

Grievant
Representative for Agency
Four witnesses for Agency
Observer for EDR

ISSUES

Were the grievant's actions subject to 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?

¹ § 5.1 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001, requires that a grievance hearing must be held and a written decision issued within 30 calendar days of the hearing officer's appointment unless just cause is shown to extend the time limit.

FINDINGS OF FACT

Grievant filed a timely grievance from a formal performance improvement counseling, 90-day performance warning and two-day suspension from work.² Following failure to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.³

The University of Virginia Health System (Hereinafter referred to as "agency") has employed grievant for 15 years as a patient care assistant (PCA).⁴ Grievant had been given a 45-day performance warning and a one-day suspension from work on January 6, 2003 for, among other things, leaving his unit before his work assignment was completed.⁵

Grievant works the day shift from 7:00 a.m. to 3:30 p.m. The night shift employees work from 11:00 p.m. to 7:30 a.m. During the half-hour overlap from 7:00 a.m. to 7:30 a.m., day shift employees acclimate to any patient changes from the previous day, while night shift employees complete required paperwork. Grievant often arrives at work 15-20 minutes before his starting time because he likes to take extra time to acclimate himself and prepare whatever supplies will be needed during his shift.

When grievant arrived at work on September 21, 2003 at about 6:40 a.m., he read the personnel schedule and noticed that the PCA who had been assigned to work with him had been reassigned to a different floor that day.⁶ She had been reassigned at the last minute due to a staffing shortage on the other floor. Another PCA who was employed in a temporary capacity was the only other PCA that would be working with grievant. On day shift, there are usually three nurses and two or three PCAs assigned to each floor. Patient population per floor varies but is usually between 15 and 20. On this date, there were 18 patients on the floor. Grievant was assigned 10 patients and the other PCA was given eight patients.⁷

Grievant felt that the other PCA was inexperienced, incompetent, and shirked some of his work, which would place much of the burden for caring for all 18 patients on grievant. This upset grievant and he decided to speak to a supervisor about it. Grievant chose not to speak with the charge nurse on his

² Exhibit 6. Formal Performance Improvement Counseling Form, issued September 29, 2003.

³ Exhibit 1. Grievance Form A, filed October 2, 2003.

⁴ Subsequent to the filing of this grievance, grievant was removed from employment on November 12, 2003 for an offense that occurred on October 31, 2003. Grievant has separately grieved his removal but that grievance has not yet been qualified for a hearing. Grievant's removal from employment and the incident that precipitated it have no bearing on the instant case, and were not given any consideration in making this Decision.

⁵ Exhibit 4. Formal Performance Improvement Counseling Form, January 6, 2003.

⁶ Exhibit 5. Personnel assignment schedule, September 21, 2003.

⁷ It was known that one of grievant's patients was scheduled to be discharged that morning, and that a new incoming patient would be assigned to the other PCA. Thus, each PCA would have nine patients by midday.

own floor (third) because when he had asked her questions in the past, she often directed him to someone else. Instead he decided to speak with the charge nurse on the second floor. As grievant was going to the elevator at about 6:45 a.m., he told his own charge nurse, "I'm not taking care of 11 patients; I'm leaving. I'm not going to put up with this; I have to do something about it." He did not tell his charge nurse where he was going, when he would return, or even whether he intended to return. The standard policy, of which grievant is aware, is that before leaving the floor, PCAs must always advise the charge nurse where they are going and when they will return. The charge nurse placed a telephone call to the second-floor charge nurse to ask for help because she thought the grievant might have left the building and gone home.

By this time, grievant had arrived on the second floor and suggested to that charge nurse that the temporary employee be placed on the second floor so that the more experienced employee could be placed on the third floor with grievant. The second-floor charge nurse agreed and sent the experienced employee and grievant back to the third floor. She told the third floor charge nurse that she was sending grievant and the other experienced PCA back to the third floor. Grievant returned to the third floor a few minutes later and before 6:55 a.m. In the past, grievant has always advised the charge nurse when he was leaving the floor and advised her when he would return.

Approximately 23 years ago, grievant sustained a head injury from an automobile accident and was in a coma for a period of time. He has made a remarkable recovery although he has a slight ocular malalignment (diplopia)⁸ and a slightly noticeable deliberateness in his articulation. Grievant acknowledges that at times he "blurts" things out without fully evaluating beforehand how others will perceive his statements.

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).

⁸ Exhibit 2. Letter from grievant's physician, May 27, 1999.

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.⁹

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.

The agency has promulgated a policy that addresses Standards of Performance, which provides for progressive counseling of employees who fail to meet performance expectations.¹⁰ After informal counseling, the policy provides for formal counseling, then a suspension and/or Performance Warning (probation) and ultimately, termination of employment.

The essential facts in this case are undisputed. Grievant left his assigned floor without telling his charge nurse where he was going or when he would return. Within five minutes the charge nurse learned by calling the second-floor charge nurse that grievant was on the second floor and would be returning to the third floor within a few minutes.

The discipline in this case appears to have been issued, in part, because of incorrect information provided by the charge nurse. Initially, she claimed that the grievant said he was leaving the hospital and going home. In fact, grievant never made any such statement. In a subsequent interview with the administrator, the charge nurse acknowledged that grievant had not made the statement she attributed to him. Nonetheless, the same false allegation was

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

¹⁰ Exhibit 3. Policy # 701: *Employee Rights and Responsibilities*, revised July 1, 2003.

repeated in the Formal Performance Improvement Counseling Form issued to grievant. This repeated false allegation weakens the *raison d'être* of the disciplinary action.

Also of concern is the undisputed fact that the incident herein occurred outside grievant's official working hours. The incident occurred and was resolved several minutes before grievant's scheduled shift starting time at 7:00 a.m. Thus, grievant was not "on the clock" (to use a phrase found in the counseling forms) by the time the incident was over. This factor also weakens the assertion in the Counseling Form that grievant's actions increased the workload of other staff.

However, despite these concerns, the fact remains that grievant's actions did constitute a performance issue that required performance improvement counseling. Even though grievant was not yet officially on duty, he had reported for work and had begun his usual preparation for the day. At that point, his charge nurse had the reasonable expectation that grievant was going to work his full day shift. But when grievant suddenly exclaimed that he was "not going to put up with this and that he was leaving," and then did leave, the charge nurse had no way of knowing whether grievant was going to return. The charge nurse was then only minutes away from the beginning of her shift and was concerned that she had only one PCA on duty. Therefore, it was entirely understandable that she called the second-floor charge nurse to request staffing help.

Given the totality of the circumstances, grievant's precipitous leaving without explanation only minutes before the start of his shift caused a supervision problem and a potential staffing problem. While the matter was resolved within minutes, grievant could have avoided the problem entirely if he had first discussed his concerns with his own charge nurse, or at least told her where he was going and why, and when he would return. Grievant's sudden departure from the floor without explanation was rash and unnecessary. Accordingly, the agency has demonstrated by a preponderance of evidence that grievant's actions required disciplinary action.

The agency counseled grievant, suspended him for two days, and placed him on performance warning (probation) for 90 days. If this were the first such incident, the discipline might appear heavy-handed. However, grievant had been disciplined only eight months earlier for a similar type of offense. In that case, grievant had been counseled, suspended, and placed on probation for leaving work before the end of his shift. Thus, grievant knew, or reasonably should have known, that the agency places a high priority on assuring that adequate staffing for patients is maintained at all times. His actions on September 21, 2003 caused supervision to have a reasonable concern that staffing for the day shift might be inadequate because grievant had suddenly left without explanation. As grievant had been previously disciplined with only a one-day suspension and 45-day probation, it was logical that the agency decided to escalate the level of

discipline for the September 21, 2003 incident. Therefore, the discipline issued in this case was reasonable and appropriate.

DECISION

The decision of the agency is affirmed.

The issuance of formal counseling, imposition of a two-day suspension, and 90-day performance warning on September 29, 2003 are hereby UPHELD.

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.¹¹ 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.¹²

[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]

S/David J. Latham

David J. Latham, Esq.
Hearing Officer

¹¹ 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).

¹² Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.