

Issue: Group I Written Notice (unsatisfactory job performance); Hearing Date:
05/12/05; Decision Issued: 05/23/05; Agency: DMHMRSAS; AHO: Carl Wilson
Schmidt, Esq.; Case No. 8058



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8058

Hearing Date: May 12, 2005
Decision Issued: May 23, 2005

PROCEDURAL HISTORY

On December 15, 2004, Grievant was issued a Group I Written Notice of disciplinary action for:

Unsatisfactory work performance. A caseload of five or six residents in a four hour period should be able to be completed without too much difficulty barring any unforeseen emergencies, appointments, etc. On several occasions, she attempted to treat a resident not on her caseload as well as not see residents on her caseload ([Client Ki] on 11/15 and [Client Re] on 11/17/04).

On February 3, 2005, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On April 20, 2005, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 12, 2005, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant

Grievant's Attorney
Agency Party Designee
Agency Advocate
Witnesses

ISSUE

Whether Grievant should receive a Group I Written Notice of disciplinary action for unsatisfactory job performance.

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

Based on 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 Physical Therapist Assistant at one of its Facilities.¹ Clients at the Facility require continuous care. Grievant is one of two Physical Therapist Assistants reporting to the Supervisor who is a Physical Therapist. The purpose of Grievant's position is:

This position serves to assist the physical therapist in the provision of physical therapy services to the center residents. The physical therapy assistant provides treatment/training to a fixed caseload in order to achieve maximum functional skill to assigned residents. The physical therapy assistant maintains documentation on all residents identified as having contractures. This documentation includes measurement of joint ranges, identification of deformities, pictures of contractures/deformities, and Physical Medicine and Rehabilitation Clinic reports. The physical therapy assistant assists the physical therapist/ occupational therapists in developing and monitoring positioning programs. Additionally, the physical therapy assistant provides in-service training to cottage staff and

¹ She has been employed at the Facility for approximately two and a half years.

ID team members to ensure that comprehensive physical therapy goals are provided, and that physical management goals are met.²

Grievant received an overall rating of “Contributor” in her performance evaluation dated October 20, 2004.³ No evidence of prior disciplinary action against Grievant was introduced during the hearing.⁴

Grievant is assigned specific clients for whom she renders physical therapy services. The majority of her assigned clients do not change often. When another physical therapy assistant is on vacation, however, that assistant’s clients are shared by Grievant and the Supervisor.

One of Grievant’s duties is to perform a “range of motion” on clients. This procedure involves lifting and rotating a client’s arms and legs in order to exercise a client’s muscles. The typical range of motion service lasts approximately 20 minutes. If a client receives more than one range of motion during a day, that client may suffer discomfort or injury.

In November 2004, Grievant performed range of motion on Client A. Grievant was not assigned Client A. Grievant was assigned to perform range of motion on Client Ai instead. The Team Leader was so concerned about Grievant’s action, that she drafted a letter to the Supervisor to bring her concerns to his attention.

On November 9, 2004, Grievant was scheduled to provide Client Ric with physical therapy services during the morning. Grievant did not provide services to that client. The Supervisor counseled Grievant regarding the importance of performing scheduled physical therapy services.⁵

From November 8, 2004 to November 19, 2004, the other Physical Therapy Assistant was not working. Her clients were divided between Grievant and the Supervisor. The Supervisor drafted a schedule for Grievant to follow which included the absent Assistant’s clients. Client Re was left off of the schedule. Grievant noticed this omission and added Client Re to the schedule for the first week. She failed to add Client Re to the schedule on November 15 and November 17, 2004. Because Client Re was not on the schedule, Grievant failed to provide range of motion to Client Re even though Grievant had been assigned responsibility to do so.

² Agency Exhibit 5.

³ Grievant Exhibit 1.

⁴ Grievant has worked in her field for approximately 30 years.

⁵ Agency Exhibit 3.

On November 15, 2004, Client Ki was on Grievant's schedule to receive range of motion. Grievant failed to provide services because she mistakenly believed the Physical Therapist was responsible for the client that day.

CONCLUSIONS OF 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." DHRM § 1.60(V)(B).⁶ 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." DHRM § 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." DHRM § 1.60(V)(B)(3).

"Inadequate or unsatisfactory work performance" is a Group I offense. In order to prove inadequate or unsatisfactory work performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

Grievant is responsible for performing services with respect to those clients assigned to her. Grievant performed range of motion on Client A when Grievant was not assigned to assist Client A. If the physical therapist assistant assigned to Client A had also performed range of motion on Client A that day, Client A may have suffered discomfort or injury. Grievant's work performance was unsatisfactory.

Grievant was assigned responsibility for providing services to Client Re. The Supervisor drafted a schedule for Grievant but failed to include Client Re. Grievant realized the Supervisor had omitted Client Re from Grievant's schedule. Grievant reinstated Client Re to the schedule for some days but failed to schedule Client Re for November 15, and November 17, 2004. As a result, Client Re did not receive range of motion services from Grievant on those days. By failing to include Client Re on those two days, Grievant's work performance was unsatisfactory.

Grievant was assigned responsibility to provide services to Client Ki on November 15, 2004. Grievant failed to provide services to Client Ki. Because she failed to provide scheduled services, Grievant's work performance was unsatisfactory.

Grievant argues that assuming responsibility for clients of another employee may have influenced her ability to perform her duties. Although Grievant experienced an additional workload, the evidence is sufficient for the Hearing Officer to conclude that

⁶ The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

Grievant's workload was not excessive. Grievant should have been able to manage the additional clients without incident.

The Agency has presented sufficient evidence to support its issuance of a Group I Written Notice.⁷

DECISION

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

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. Please address your request to:

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

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. Please address your request to:

Director
Department of Employment Dispute Resolution
830 East Main St. STE 400
Richmond, VA 23219

⁷ No credible evidence was presented to justify mitigation of the disciplinary action in accordance with the *Rules for Conducting Grievance Hearings*.

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. 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.⁸

[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].

Carl Wilson Schmidt, Esq.
Hearing Officer

⁸ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.