

Issue: Group II Written Notice (failure to follow instructions/procedure); Hearing Date: 03/05/07; Decision Issued: 03/06/07; Agency: Department of Rehabilitative Services; AHO: Carl Wilson Schmidt, Esq.; Case No. 8523; Outcome: Employee granted partial relief.



***COMMONWEALTH of VIRGINIA***  
***Department of Employment Dispute Resolution***

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8523**

Hearing Date: March 5, 2007  
Decision Issued: March 6, 2007

**PROCEDURAL HISTORY**

On September 14, 2006, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow established procedure. On October 13, 2006, 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 January 25, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 5, 2007, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Grievant's Representative  
Agency Representative  
Witnesses

**ISSUE**

1. Whether Grievant engaged in the behavior described in the Written Notice?

2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

### **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**

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Department of Rehabilitative Services employs Grievant as a Registered Nurse I at one of its Facilities. The purpose of her position was:

To work as a team leader/charge nurse directing a group of staff. To ensure the plan of care for individuals with disabilities (established by the RN Case Manager) is carried out on assigned shift. To provide direct client care by assessing, planning, implementing and evaluating the established plan of care, advocating for the highest quality nursing services that will support the client's fullest participation in individualized program goals.<sup>1</sup>

The Client is not able to control when he urinates and must be catheterized. Catheterization involves inserting a sterile catheter into the urethra to remove urine inside one's bladder. He weighs approximately 220 lbs. and must be placed in his bed or be seated in a chair to be catheterized.

On August 14, 2006 at about 12:15 p.m., the Client informed the Specialist II that he had urinated, needed to have his clothes changed and needed to be catheterized.

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<sup>1</sup> Agency Exhibit A.

The Specialist II sought the assistance of Grievant and they both responded to the Client's room. Grievant questioned the Client as to why he had not told her previously that he needed to be catheterized. She had passed him several times in the prior hour and asked him if he needed anything and he responded he did not. The Client replied that he did not say anything because he was talking to his father on the cell phone when she asked him if he needed anything.

While the Specialist II used a lift to place the Client in his bed, Grievant attempted to locate towels, washcloths, and gloves to wear for the procedure. Grievant washed her hands and wanted to be careful what she touched. When she reached for gloves in a drawer, the box was empty. Each client's room was supposed to be properly stocked with necessary supplies including gloves. When an employee uses the last glove in a box that employee is supposed to replace the empty box rather than leaving it in a drawer. Grievant became angry that she was not able to obtain a properly sized glove. She picked up the empty box and threw it approximately 15 feet across the room and said sarcastically, "Thanks to whoever stocked the supplies." Both the Client and the Specialist II heard Grievant's comments and observed her behavior.

While Grievant and the Specialist II were in the Client's room, the Client complained that Grievant was taking too long to perform the catheterization and that he continued to urinate. A client who is urinating cannot be catheterized until the flow stops. Grievant said to the Client, "If you would stop pissing, I would cath you."<sup>2</sup>

After Grievant finished her work, the Specialist II walked the Client to his class. The Client asked the Specialist II what was Grievant's problem. The Specialist II replied that Grievant was under stress. The Client replied that Grievant did not have to be so mean and that it was not his fault he could not control his urination.

## 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).<sup>3</sup> 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).

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<sup>2</sup> Grievant contends she said "If you would stop pissing, I could cath you" which she contends is a true statement. She admits, however, that regardless of whether she said "would" or "could" her comments to the Client were inappropriate given that he had no control over his ability to urinate.

<sup>3</sup> The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

The Agency contends Grievant failed to follow established policy thereby justifying the issuance of a Group II Written Notice. "Failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with established written policy" is a Group II offense.<sup>4</sup> (Emphasis added). Although the Agency introduced two policies governing catheterization of clients, no Agency witness could identify the specific language of any policy that Grievant violated. Accordingly, the Agency has not established that Grievant failed to comply with established written policy.

The Agency contends Grievant failed to follow a supervisor's instructions because she failed to comply with the terms of her Employee Work Profile. A document outlining an employee's work duties is not the type of instruction anticipated by the Standards of Conduct to constitute a Group II offense. To establish a Group II offense for failure to comply with a supervisor's instructions, an agency must show that, (1) a supervisor, (2) gave a specific instruction, (3) on a certain date and/or time, (4) grievant knew or should have known of the instruction, and (5) grievant failed to comply with that instruction without excuse. Grievant did not receive any instruction from a supervisor on August 14, 2006 and, thus, did not fail to comply with a supervisor's instruction.

"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.

Based on Grievant's training and experience, she knew she was expected to provide medical services to clients without upsetting or distracting clients. Grievant's work performance was inadequate or unsatisfactory because she threw an empty box of gloves across the room while displaying anger. She also told the Client, "If you would stop pissing, I would cath you." Given that the Client had no control over his ability to urinate, suggesting he should stop urinating was inappropriate. Grievant admits her behavior was inappropriate. The Client reasonably construed Grievant's behavior as mean.<sup>5</sup> The Agency has presented sufficient evidence to support the issuance to Grievant of a Group I Written Notice.

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Employment Dispute Resolution...."<sup>6</sup> Under the *Rules for Conducting Grievance Hearings*, "[a] hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the

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<sup>4</sup> DHRM § 1.60(V)(B)(2)(a).

<sup>5</sup> To Grievant's credit, she later apologized to the Client. The Client told her no apology was needed.

<sup>6</sup> Va. Code § 2.2-3005.

hearing officer shall state in the hearing decision the basis for mitigation.” A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive.

Grievant contends the disciplinary action should be mitigated because the unit was short-staffed on a date when new clients were being admitted and she was under a lot of pressure and stress. The evidence showed that working at the Facility often involved stress and pressure. Handling stress was an expectation of Grievant’s employment and, thus, not a mitigating circumstance.

In light of the standard set forth in the *Rules*, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

### **DECISION**

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group II Written Notice of disciplinary action is **reduced** to a Group I Written Notice for inadequate or unsatisfactory work performance. The Group I Written Notice becomes inactive September 14, 2008.

### **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 14<sup>th</sup> St., 12<sup>th</sup> 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

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 all of your appeals to the other party and to the EDR Director. 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.<sup>7</sup>

[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/Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>7</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.