

Issue: Management Actions – assignment of duties; Hearing Date: 09/21/07;
Decision Issued: 09/24/07; Agency: DMHMRSAS; AHO: Carl Wilson Schmidt, Esq.;
Case No. 8683; Outcome: No Relief, Agency Upheld in Full; **Judicial Review:**
Appealed to the Circuit Court in Amherst County; Outcome: AHO's decision
affirmed [CL07-006891] issued 12/04/07.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8683

Hearing Date: September 21, 2007
Decision Issued: September 24, 2007

PROCEDURAL HISTORY

On April 2, 2007, Grievant timely filed a grievance to challenge the Agency's transfer of her from one living area at the facility to another. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On August 2, 2007, the EDR Director issued Ruling Number 2008-1752 qualifying this case for hearing. On September 5, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 21, 2007, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Representative
Witnesses

ISSUES

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 Mental Health Mental Retardation and Substances Abuse Services employs Grievant as a Direct Care Worker at one of its facilities. She has been employed by the Agency for over five years.

Grievant worked in a living area in Building 15 and enjoyed working there. She worked with several other employees including Ms. R who was the Charge Aide. The Charge Aide was responsible for directing the duties of the team working in the living area and providing services to clients.

Tension arose between Grievant and Ms. R.¹ Grievant suspected Ms. R may have taken home desserts intended for clients. Grievant expressed her concerns to others and Ms. R learned of Grievant's suspicion even though Grievant never directly asked Ms. R about the desserts. Ms. R began writing memos that Grievant believed were about her.²

¹ Ms. R has been employed by the Agency for over 26 years.

² Grievant complained that the Agency was slow to present her with the memos. She testified that she had them at the time of the hearing.

The tension between Grievant and Ms. R was felt by some of the clients in the living area. The Agency became concerned about how the tension between Grievant and Ms. R was affecting Agency operations. The Center Director decided to transfer both employees because she believed both employees were creating the tension. On March 20, 2007, the Agency transferred Grievant and Ms. R to new living areas in other buildings. Grievant's compensation remained the same. Her position description was unchanged. She did not receive disciplinary action.

CONCLUSIONS OF POLICY

A Hearing Officer only has the authority granted by statute and the Grievance Procedure Manual. Section 5.9(a) of the Grievance Procedure Manual give the Hearing Officer the authority to issue an "order that the agency comply with applicable law and policy." In this case, Grievant has not identified any law or policy violated by the Agency. Accordingly, there is no basis to grant relief.

The Agency identified a problem with the working relationship between Grievant and Ms. R and observed that the tension between them affected the clients they served. Agency managers concluded that both Grievant and Ms. R would be better served working in another unit.³ The Agency transferred Grievant and Ms. R to other living units with the objective of placing them in units where they would fit in and work well with other staff in those units.⁴ After Grievant challenged the transfer, the Agency assigned an independent investigator to examine the facts underlying the conflict. The Agency's decision was neither arbitrary, nor capricious.⁵ It was based on the facts and confirmed by the Agency Investigator.

Grievant argues that the Agency should not have based its decision "on all these lies." The Center Director did not conclude that employees were lying to her. The Agency Investigator did not conclude that the employees she spoke with were lying. If the Hearing Officer assumes for the sake of argument that Grievant's assertion is correct that it was Ms. R who was creating the tension and not Grievant, this merely shows that the Agency's conclusion was wrong. A wrong conclusion is not an arbitrary or capricious conclusion. The Agency properly formed its decision based on the facts it

³ One of Grievant's witnesses testified that Ms. R and another employee were causing the tension on the floor but then admitted that Grievant had been outspoken and that some staff in the unit had a problem with Grievant's outspokenness.

⁴ The Agency routinely transferred employees to obtain the best mix of employees providing services to clients in living areas.

⁵ The Agency Investigator failed to interview one of the employees, Ms. W, who worked in Grievant's unit. Although the investigation would have been enhanced with the additional testimony, there is no reason to believe that Ms. W's statements to the Agency Investigator would have altered the Agency's conclusion in this case. Ms. W testified at the hearing that Grievant was not the problem at the unit.

had before it. Reaching a wrong conclusion is not a violation of policy.⁶ The Agency's investigation and decision to transfer Grievant and Ms. R was within its right to manage the Agency's operations. The Hearing Officer is not a super-personnel officer who may impose his managerial preference on the Agency. There is no basis to grant Grievant's request for relief.

DECISION

For the reasons stated herein, Grievant's request for relief is **denied**.

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

⁶ Grievant also alleged that there were rumors about Grievant prior to her actual transfer. Grievant has not established who expressed the rumors or whether Agency managers were aware of the rumors. She also has not identified any policy violation because of those rumors.

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.⁷

[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

Carl Wilson Schmidt, Esq.
Hearing Officer

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