

Issue: Group III Written Notice with termination (unprofessional conduct outside of work resulting in hostile work environment and constituting negligence in regards to agency's duties to the public); Hearing Date: 11/09/07; Decision Issued: 11/19/07; Agency: DMHMRSAS; AHO: Thomas P. Walk, Esq.; Case No. 8731; Outcome: Full Relief.

BEFORE THE VIRGINIA DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION

IN RE: DEDR CASE NO. 8731 (DEPARTMENT OF MENTAL HEALTH, MENTAL  
RETARDATION AND SUBSTANCE ABUSE SERVICES)

DECISION OF HEARING OFFICER

HEARING DATE: NOVEMBER 9, 2007  
DECISION ISSUED: NOVEMBER 19, 2007

**PROCEDURAL MATTERS**

The agency, acting through its Medical Director, issued a letter to the grievant on May 15, 2007 advising her of the intent to issue to her a Group III Written Notice with possible termination from employment as a consequence. She was given until 10:00 a.m. on the following day to provide a written response to the allegations. The Written Notice was issued on May 16, 2007 and the grievant was terminated. She submitted her Grievance Form A on June 13, 2007. This matter was qualified for hearing on August 30, 2007. I was appointed as Hearing Officer on October 11, 2007 and received the letter of appointment on October 15, 2007. A telephone conference call was used for a pre-hearing conference on October 22, 2007. The hearing in this matter was conducted at the agency's facility on November 9, 2007.

**APPEARANCES**

Grievant

Counsel for Grievant

Agency Advocate

Representative of Agency

Four additional witnesses for agency (not including agency representative)

Two additional witnesses for grievant

### **ISSUES**

1. Whether grievant was improperly terminated by the agency pursuant to the Group III Written Notice issued on May 16, 2007?

2. Whether the agency violated established policy and procedure in the issuance of the Group III Written Notice on May 16, 2007?

### **FACTS**

At all relevant times the grievant has been employed by the agency in a nursing capacity. For a portion of that time one of her co-workers has been a certain Licensed Practical Nurse (hereinafter the LPN). From the first time that the grievant and the LPN met their relationship has been somewhat strained. The LPN made the comment to the grievant upon their first meeting that she (the grievant) had been given the job wanted by the LPN. Through the next approximately three years the relationship between the two of them continued to worsen. The LPN became frustrated when the grievant would not provide her with the shifts which she wanted at the times when the grievant was responsible for scheduling in their particular unit at the facility. The grievant eventually asked that scheduling responsibilities be given to another employee.

One other co-worker of the grievant was a Registered Nurse (hereinafter the RN). The RN and the LPN have a good working relationship and each of them have made apparent their unwillingness or inability to cooperate with the grievant. The grievant would need to exchange information with the RN and LPN upon a shift change. The two other employees refused to

discuss Unit matters with the grievant directly and would not facilitate the necessary exchange of information regarding the care of the residents on the unit. The Head Nurse for the Unit conducted a meeting to attempt to resolve this situation but the meeting had no positive results.

While working at the agency facility in 2007 the grievant was also employed on a part-time basis at a private medical office in the same locality. The LPN was also employed at this medical office on a part-time basis. On March 30, 2007 the husband of the RN came to the private medical office to check on a prescription written for their daughter. At the request of the husband, the grievant accessed the medical records of the child.

On April 11, 2007 the grievant took to the head nurse concerns about improper counting of medication. A second note regarding the same problem was delivered by the grievant to the head nurse. On April 18, 2007 a third note was given to the head nurse by the grievant. The grievant was counseled about having a non-medical services employee reviewing the medication count. On April 20, the grievant reported to the head nurse that she believed that the LPN had had made an erroneous entry on a medication administration record. The head nurse investigated and found that no error had been made and apprised the grievant of that fact. The grievant again involved a non-medical employee in an independent review of the record. Upon learning of this violation of her directions, the head nurse issued a written counseling session to the grievant.

On April 26 both the RN and LPN were off from work on unscheduled medical leave. While working at the private medical facility on that evening the grievant received a telephone call from the LPN asking her to check on certain laboratory test results for glucose testing done on the LPN. This call was received at approximately 5:45 p.m. and came into the facility on a telephone line, the number for which is not available to the public but is used only by employees

of the office and family members. As requested by the LPN, the grievant accessed her records and provided the results to her.

Shortly after that, also on April 26, the RN called to ask the grievant to verify for her certain lab results pertaining to her potassium levels. This call also came into the facility on the non-public line. The RN was not an employee of the medical office and the number for the line used is non-published. As requested by the RN, the grievant accessed her medical records and provided the information to her.

Subsequent to April 26 and prior to May 8, the medical office received complaints from the RN and the LPN about improper accessing of their medical records. An investigation was commenced by the office at the request of those parties. The investigation revealed that the grievant had accessed the records as described above using her own computer password to do so. Letters were sent to the LPN and RN apprising them of the results of the investigations. The grievant was terminated from employment by the medical office.

The RN and LPN provided to the medical director of the agency's facility copies of the letters from the private medical office. On May 15 the grievant was given her letter advising that she had "engaged in unprofessional conduct both on and off the job that has created a hostile and intimidating work environment. Moreover, the information gathered during the review indicated that your actions may be in violation of State laws/regulation pertaining to the privacy of patient information which causes further concerns regarding trust and your ability to continue as a nurse at this facility." On the following day the Written Notice was issued charging that the grievant had engaged in "unprofessional conduct outside of work that has resulted in a hostile work environment and created an atmosphere of distrust that could constitute negligence in regards to the agency's duties to the public and to the agency's employees."

Prior to their receiving the notification from the medical office regarding the accessing of records, the RN and LPN had stated to be willing to engage in mediation with the grievant to resolve the differences between them. This mediation had been requested by the grievant upon receiving the letters, they withdrew their consent.

### **APPLICABLE LAW AND OPINION**

This matter arises under Virginia Personnel Act (Code of Virginia §2.2-2900, et seq.), Policy 1.60 of the Department of Human Resource Management) (Standards of Conduct) and Facility Instruction No. 106. The Written Notice cites the grievant for “unprofessional conduct” as defined by 18 VAC 90-20-300 in addition to the allegation that her conduct undermined her effectiveness as a nurse at the facility. Because this grievance involves a disciplinary action, under the Virginia Grievance Procedure Manual §5.8 the agency bore the burden of proving the allegations by a preponderance of the evidence.

I cannot find that the agency has met its burden. The case presented by the agency attempts to establish that the grievant accessed the medical records of the other two employees, as well as the child of the RN for improper purposes, arising from the personal conflicts which existed. The RN, LPN and husband of the RN deny that the grievant was asked to access the subject medical records. The grievant says that she was. This presents a classic he said-she said situation.

One factor looked at by me in determining the resolution of the dispute in the evidence is the credibility of the parties. This was done by assessing the testimony itself as well as the

demeanor of the witnesses. This factor tends to support the version of events given by the grievant.

Neither of the other two employees disputed the testimony of the grievant as to the testing described by the grievant being performed. Neither explained how they happened to both be off work on the same date. Neither explained why they felt compelled to ask the medical office to determine whether the grievant had accessed the personal health information. No evidence was presented whatsoever of any further conflict between the grievant and these two employees after their leave commenced up until the medical office issued its findings on May 8. Each of these two ladies denied being friends with the other, yet the LPN testified that the RN was the one who asked her to consider reporting to the agency the letter received from the medical office. A certain closeness between them would seem to be the most logical explanation for their discussing with each other any accessing of any personal health information. Also, the LPN directly contradicted the testimony of the head nurse on the question of whether her attitude toward the grievant had changed after the meeting was held regarding the lack of communication in the unit. As between the LPN and the head nurse, the testimony of the head nurse was certainly more credible.

Both the LPN and the RN seemed to be extremely defensive in their responding to questions. They were also extremely guarded. I also found the testimony of the husband of the RN to be unconvincing. He proclaimed absolute certainty on whether he had seen the grievant at the medical office on March 31 yet was very unsure of other facts.

The circumstantial evidence also tends to refute the theory of the case argued by the agency. The grievant could have easily used another computer at the medical office to access the

information if she was doing so for her own purposes. There was no evidence presented as to what the grievant believed she stood to gain from accessing the records improperly, particularly the information on the daughter of the RN. No evidence from the medical office was presented to establish what records were accessed or the specific times at which they were accessed. Such evidence would have greatly bolstered the agency's case, if inconsistent with the innocent explanation provided by the grievant. Instead, I was merely presented with the letter from the medical office to the Board of Nursing setting forth the curious explanation from the grievant that she had accessed the files to obtain "phone numbers." I have chosen to give greater weight to the testimony of the grievant than to the hearsay information contained in the May 8, 2007 letter.

The agency offered into evidence certain handwritten notes from the head nurse certain handwritten notes from the head nurse, reflecting discussions or dealings with the grievant at various times from April 1, 2005 through April 23, 2007. I withheld ruling on the admissibility of those documents during the hearing. I have reviewed them and find them to be admissible. I note, however, that the notes for events prior to 2007 are largely irrelevant to the issue in this case and would have been considered by me only on the question of whether sufficient mitigating circumstances had been shown. Because of my findings, I have given them no weight.

Also, because of my findings of fact I find it unnecessary for me to address the issue raised by the grievant as to the lack of appropriate and due notice.



## DECISION

For the reasons stated above, I hereby Order the following:

1. Recission of the Written Notice and reinstatement of the grievant to her former position, or, if occupied, an objectively similar position;
2. Back pay from May 16, 2007 through reinstatement, to be offset by any interim earnings of grievant from full time employment;
3. The grievant shall be restored to full benefits and annual leave; and
4. The grievant shall be entitled to an award of attorneys fees pursuant to §7.2 (E) of the Grievance Procedure Manual. Counsel shall submit his petition for review by me in accordance with that section.

## APPEAL RIGHTS

As the Grievant Procedure Manual sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

**Administrative Review:** This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.

2. **A challenge that the hearing decision is inconsistent with state or agency policy** to the Director of the Department of Human Resource Management. This request must cite to a particular mandate in the state or agency policy. The Director=s authority is limited to ordering the hearing officer to review the decision to conform it to written policy. Requests should be sent to the Director of Human Resources Management, 101 N. 14<sup>th</sup> St., 12<sup>th</sup> Floor, Richmond, VA 23219 or faxed to (804) 371-7401.

3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director=s authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the EDR Director, One Capital Square, 830 E. Main St., Suite 400, Richmond, VA 23219 or faxed to (804) 786-0111.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar** days of the **date of the original hearing decision**. A copy of each appeal must be provided to the other party.

A hearing officer=s original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,

2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

**Judicial Review of Final Hearing Decision:** Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The court shall award reasonable attorneys= fees

and costs to the employee if the employee substantially prevails on the merits of the appeal. Either party may appeal the final decision of the Circuit Court to the Court of Appeals pursuant to Virginia Code ' 17.1-405.

DECIDED this November 19, 2007.

/s/ Thomas P. Walk  
Thomas P. Walk, Hearing Officer