

Issue: Group I Written Notice (unsatisfactory job performance); Hearing Date: 12/19/07; Decision Issued: 12/21/07; Agency: DOC; AHO: William S. Davidson, Esq.; Case No. 8742; Outcome: No Relief – Agency Upheld In Full.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 8742

Hearing Date: December 19, 2007
Decision Issued: December 21, 2007

PROCEDURAL HISTORY

The Grievant received a Group I Written Notice on June 14, 2007 for inadequate or unsatisfactory job performance in failing to strictly follow established policy as set forth in IOD 721 and IOD 425.

On July 12, 2007, the 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 he requested a hearing. On November 13, 2007, the Department of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. On December 19, 2007, a hearing was held at the Agency's location.

APPEARANCES

Grievant
Agency Representative
Agency Party
Witnesses

ISSUE

1. Whether the Grievant was inadequate or unsatisfactory in his job performance because of a failure to follow Policy IOD 425.2 and IOD 721.

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 Agency provided the Hearing Officer with a notebook containing seven (7) tab sections and that notebook was accepted in its entirety, as Agency Exhibit 1. The Grievant provided the Hearing Officer a notebook containing thirteen (13) tab sections and that notebook was accepted, in its entirety, with the exception of the sixth (6th) page of Tab 9, as Grievant's Exhibit 1. The sixth (6th) page of Tab 9 was not accepted into evidence.

The facts in this matter were essentially undisputed. The Grievant was the Shift Commander for this institution on May 15, 2007. At approximately 1:30 a.m., he was presented with what he believed to be a medical emergency. A detainee was having difficulty breathing and this was accompanied with shortness of breath and a tightness in his chest. The Grievant questioned the detainee regarding asthma and was told by the detainee that he had asthma but his last attack was more than three (3) years prior.

The Grievant called a nurse who was on duty at that time at the institution's sister facility. The Grievant described to the nurse the information that he had regarding the detainee and the fact that the detainee had, in the past, used an Albutirol inhaler. The Grievant also informed the nurse that this institution had on hand extra inhalers. The nurse was asked if she felt that it would be acceptable to allow the detainee to use an inhaler and the nurse stated that she thought such use would be acceptable. The detainee was allowed to use an inhaler and his symptoms were relieved.

The following night a nearly identical situation occurred with the same detainee and Dr. H, the Institutional Physician, was contacted. Dr. H was notified of the same fact pattern as the prior night and Dr. H authorized the use of the Albutirol inhaler and, indeed, the next morning saw the detainee and issued a prescription for an Albutirol inhaler.

Policy IOD 721(4)(7) states as follows:

All persons injured in an accident will receive immediate medical examination and treatment. In the event of a medical emergency when there is not an Institutional Nurse on duty or after normal working hours, the Shift Commander shall attempt to notify the Institutional Physician. If unable to reach the Institutional Physician, the Shift Commander will have the detainee transported to the Hospital Emergency Room. The means of transportation will be at the discretion of the Shift Commander. Until medical personnel arrives, appropriate emergency care using universal precautions shall be provided by non-medical staff who are First-Aid and CPR Certified.¹

¹ Agency Exhibit 1, Tab 5, Page 3

There is no dispute that the Grievant did not contact the Institutional Physician. There is also no dispute that the detainee was not transported to the Hospital Emergency Room.

The facts are clear that the Grievant did what he thought was appropriate at the time by contacting a nurse who was located at a sister facility less than 200 yards from where the Grievant and the detainee were located. There was some issue raised that the nurse thought that she had been led to believe that there was an existing prescription for the Albuterol for the detainee, however, all testimony to that fact was multiple hearsay as the nurse did not testify before the Hearing Officer nor did anyone else who had spoken to the nurse.

MITIGATION

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...”² 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 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.

DECISION

For reasons stated herein, the Hearing Officer finds that the Grievant did violate policy and that a Group I Written Notice was appropriate. The Hearing Officer further finds that the Agency mitigated this offense inasmuch as it could have been a Group II Written Notice.

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.

²Va. Code § 2.2-3005

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 Street, 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 Street, 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 15 calendar days of the date the decision was issued. You must give a copy of your appeal 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 a review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.³ 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.⁴

[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]

William S. Davidson
Hearing Officer

³An 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).

⁴Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.