

Issue: Group I Written Notice (unsatisfactory job performance); Hearing Date: 10/06/08; Decision Issued: 02/23/09; Agency: DMHMRSAS; AHO: Carl Wilson Schmidt, Esq.; Case No. 8930; Outcome: No Relief – Agency Upheld in Full; **Administrative Review to AHO**: Request to extend deadline received 03/11/09; AHO response issued 03/11/09 – no jurisdiction; AHO Reconsideration Request received 03/13/09; Reconsideration Decision issued 03/17/09 – untimely, request denied; Second Reconsideration Decision issued 04/01/09; Outcome: Original decision affirmed; **Administrative Review to EDR**: Request to extend deadline received 03/11/09; EDR Ruling #2009-2255 issued 03/27/09 – extension granted; EDR AR Request received 03/13/09; EDR Ruling #2009-2256 issued 04/14/09; Outcome: AHO’s decision affirmed; **Administrative Review to DHRM**: DHRM AR Request received 03/13/09; DHRM Ruling issued 04/15/09; Outcome: AHO’s decision affirmed.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8930

Hearing Date: October 6, 2008
Decision Issued: February 23, 2009

PROCEDURAL HISTORY

On April 2, 2008, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory job performance. On May 1, 2008, 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 August 21, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 6, 2008, 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 Substance Abuse Services employs Grievant as a Human Services Care Specialist at one of its Facilities. The purpose of his position is:

Supervise, coordinate, train, monitor and evaluate staff activities on assigned shift to ensure client’s health, safety, and habilitation needs are met through appropriate care, teaching and training procedures. HIPPA Level Two Access – Complete Access to PHI only for client’s served/assigned. Utilization of information will be in accordance with HIPPA regulations regarding use limitations, disclosure and requests of PHI.¹

Grievant’s Employee Work Profile describes one of his duties as:

Writes required review, CRS entries, adaptive skill assessment, and staffing as directed by supervisor.²

Grievant began working for the Agency in 1992.

Documenting activities of clients is an important function of the Agency. Other staff, such as social workers, rely on the notes in order to determine if the Agency is

¹ Agency Exhibit 6.

² Agency Exhibit 6.

providing adequate services to clients or to determine whether clients' training should be changed. Adequate documentation is also a "regulatory requirement" of the Agency.

On January 24, 2007, Grievant received a Notice of Improvement Needed/Substandard Performance with an improvement plan stating:

Monthly ID note must be entered for each resident by the end of the following month.

Monthly progress review reports must be entered for each resident by the end of the following month.³

On October 1, 2007, Grievant received a Notice of Improvement Needed/Substandard Performance for failure to make entries on a timely basis. The Notice stated, "[p]lease understand that in the event this is not corrected or another offense occurs, you will be subject to further corrective action in the form of a Written Notice." An improvement plan was included as follows:

Monthly ID notes must be entered for each individual by the end of the following month.

Monthly progress review reports must be entered for each resident by the end of the following month.⁴

Grievant was responsible for documenting the activities and status of at least six clients living at the Facility. In December 2007, January 2008, and February 2008, Grievant failed to make entries on a timely basis as required.

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."⁵ 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." Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal."

"Inadequate or unsatisfactory work performance" is a Group I offense. In order to prove inadequate or unsatisfactory work performance, the Agency must establish that

³ Agency Exhibit 4.

⁴ Agency Exhibit 5.

⁵ The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

Grievant was expected to complete his December 2007 inter-disciplinary (ID) notes and progress notes in January 2008. Instead, he completed them March 7, 2008. He was expected to complete his January 2008 ID and progress notes in February 2008. Instead, he completed them on March 11, 2008.⁶ Grievant was expected to complete his February 2008 ID and progress notes in March 2008. He completed them on April 8, 2008. Grievant did not perform his duties as required thereby justifying the issuance of a Group I Written Notice for inadequate or unsatisfactory job performance.

Grievant contends his disciplinary action was not progressive discipline. The Agency is not required to engage in progressive discipline. It did so in this case by giving Grievant two written notices of improvement needed/substandard performance.

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....”⁷ 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.

Grievant was absent from work for Family Medical Leave. His absence is not a mitigating factor. Grievant worked 21 days in January 2008, 7 days in February 2008, and 10 days in March 2008. Staffing was adequate at the Facility while Grievant worked. A majority of clients for whom Grievant is responsible are away from the living area for several hours each day. Grievant had adequate time to complete the documentation during the days he was at work.⁸ In addition, several staff offered to

⁶ Grievant was absent from work for part of February 2008 due to Family Medical Leave. Grievant was at work for at least seven days prior to the end of February 2008 and could have completed the notes during that time period.

⁷ *Va. Code § 2.2-3005.*

⁸ The Program Manager testified that the average client inter-disciplinary notes could be completed in 10 to 15 minutes. The average monthly progress notes could be completed in less than five minutes per client. Grievant had six clients for whom reports were due each month. In other words, Grievant could have completed his documentation duties in approximately two hours per month.

help Grievant complete the notes but he refused the assistance. If Grievant had accepted the assistance he might have completed the notes on a timely basis.

Grievant contends the disciplinary action was unfair and unwarranted. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice. Grievant was aware of his reporting obligations and failed to timely meet those obligations.

Grievant argued he was working in a hostile work environment with ineffective communication. No credible evidence was presented to support this assertion.

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 I Written Notice of disciplinary action for unsatisfactory job performance 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
600 East Main St. STE 301
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.⁹

[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

⁹ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

March 11, 2009

**In re: REQUEST FOR EXTENSION IN APPEAL DEADLINE
Grievance Hearing v DMHMRSAS
Case No. 8930**

Dear :

The Grievance Procedure Manual does not authorize hearing officers to extend time frames for submitting reconsideration requests to hearing officers. I cannot grant your request.

Very truly yours,

Carl Wilson Schmidt, Esq.
Hearing Officer

c: Claudia T. Farr, Director, EDR



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8930-R

Reconsideration Decision Issued: March 17, 2009

RECONSIDERATION DECISION

A request for reconsideration must be received by the Hearing Officer within fifteen calendar days of the original hearing decision. The original hearing decision in this case was issued on February 23, 2008. Grievant's request for reconsideration dated March 13, 2009 is more than fifteen calendar days after the date the original hearing decision.¹⁰ The Hearing Officer lacks jurisdiction to address the merits of Grievant's request for reconsideration because the time period for his appeal has passed. Accordingly, the request for reconsideration is **denied**.

APPEAL RIGHTS

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

¹⁰ On March 11, 2009, Grievant requested an extension of the time period to file a request for reconsideration. The Hearing Officer sent Grievant a letter dated March 11, 2009 notifying the Grievant that the Hearing Officer lacked the authority to extend the time period for appeal.

circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

Carl Wilson Schmidt, Esq.
Hearing Officer



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8930-R2

Reconsideration Decision Issued: April 1, 2009

RECONSIDERATION DECISION

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. “[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis ...” to grant the request.

Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the hearing ended. However, the fact that a party discovered the evidence after the hearing does not necessarily make it “newly discovered.” Rather, the party must show that:

- (1) the evidence is newly discovered since the date of the Hearing Decision;
- (2) due diligence on the part of the party seeking reconsideration to discover the new evidence has been exercised;
- (3) the evidence is not merely cumulative or impeaching;
- (4) the evidence is material; and
- (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the Hearing Decision to be amended.

Grievant seeks reconsideration for several reasons, (1) he is a dedicated employee, (2) he does not agree with the outcome of the original Hearing Decision, (3) he and his family were in crisis since December 2007, (4) he believes the Agency’s witnesses gave conflicting testimony as to how much time was required to complete the paperwork in question (5) he was not behind in his work until the tragedy with his family in January 2008, and (6) Grievant contends he did not have adequate time to complete assignments. All of these reasons were either presented by Grievant during the hearing or could have been presented during the hearing. Grievant has not presented any new

evidence to support his position in this grievance. He has not identified any errors of law or policy. For this reason, the request for reconsideration is **denied**.

APPEAL RIGHTS

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

3. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
4. 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 agency shall request and receive prior approval of the Director before filing a notice of appeal.

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

April 15, 2009

RE: **Grievance v. Department of Mental Health Mental Retardation and Substance Abuse Services**
Case No. 8930

Dear :

The agency head of the Department of Human Resource Management, Ms. Sara Redding Wilson, has asked that I respond to your request for an administrative review of the hearing officer's decision in the above referenced case. Please note that, pursuant to the Grievance Procedure Manual, §7.2(a), either party to the grievance may file for an administrative review within 15 calendar days from the date the decision was issued if the requesting party believes the hearing decision is inconsistent with either state policy or agency policy. That party may request the Director of the Department of Human Resource Management (DHRM) to review the decision. In each instance where such a request for an administrative review is made, the party making the request must identify with which human resource policy, either state or agency, the hearing decision is inconsistent. In our opinion, your request does not identify any such policy, so we must respectfully decline to honor your request for us to conduct such a review.

Sincerely,

Ernest G. Spratley