

Issue: Non-Disciplinary Termination (loss of certification); Hearing Date: 05/29/09;
Decision Issued: 06/01/09; Agency: DMHMRSAS; AHO: Carl Wilson Schmidt, Esq.;
Case No. 9082; 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 Number: 9082

Hearing Date: May 29, 2009
Decision Issued: June 1, 2009

PROCEDURAL HISTORY

On June 11, 2008, the Agency removed Grievant from employment because she lost her certification to distribute medication. On July 11, 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 she requested a hearing. On April 28, 2009, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 29, 2009, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Representative
Witnesses

ISSUES

1. Whether the Agency removed Grievant from employment in accordance with State policy?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its removal of 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 employed Grievant as a Medication Assistant at one of its Facilities. The purpose of her position was:

Performs medication administration duties as assigned, insuring medications and treatments are administered as prescribed and scheduled, that required documentation is completed correctly, and that proper procedures are followed for the acquisition, utilization, storage and security of medications and medical supplies. Responsible for documenting and reporting any change in physical, mental and emotional conditions to appropriate medical personnel. When not administering medications, will contribute to and maintain an environment that is enriching, homelike, and nurturing for persons with mental retardation. In conjunction with the Interdisciplinary Team, teaches and trains the clients to be as independent as possible in the performance of routine daily activities using teaching and training techniques. Provide individual clients with skilled, trained intervention in all areas of daily living and toward the establishment level of independence through residential and clinically prescribed active treatment modalities. Establish supportive and social relationships with clientele in a nurturing, homelike environment.

The Agency permits employees who were not registered nurses to distribute medication to clients under the authority of a licensed nurse. The Agency has created a Review Committee which provides training to employees and upon completion of that training authorizes employees to administer medication to clients. If the Review Committee removes an employee’s authority to administer medication, that employee is no longer permitted to distribute medication to clients.

Grievant worked as a Direct Support Professional at the Facility until she suffered a work related injury in 2003. Grievant had passed the Agency’s Medication Administration Training Class and was promoted to the position of Medication Assistant.¹

¹ Grievant did not have a direct reporting relationship to members of the Review Committee.

On May 15, 2008, Grievant administered the medication, MiraLax, to a client by mixing it with yogurt. The doctor's order for the client stated that the medication should be dissolved in water and given to the client. When the Agency learned of Grievant's mistake, the Review Committee decided to remove Grievant's authority to administer medication. She could no longer perform the duties of a Medication Technician and the agency removed her from employment.

CONCLUSIONS OF POLICY

DHRM Policy 1.60 Section H sets forth the provisions relating to removal of an employee due to circumstances which prevent the employee from performing his or her job. This section provides:

An employee unable to meet the working conditions of his or her employment due to circumstances such as those listed below may be removed under this section. Reasons include:

- loss of driver's license that is required for performance of the job;
- incarceration for an extended period;
- failure to obtain license or certification required for the job;
- loss of license or certification required for the job;
- inability to perform the essential functions of the job after reasonable accommodation (if required) has been considered;
- failure to successfully pass an agency's background investigation; or
- conviction of a misdemeanor crime of domestic violence for employees whose jobs require: (a) carrying a firearm; or (b) authorization to carry a firearm.

Prior to such removal, the appointing authority and/or Human Resource Office shall gather full documentation supporting such action and notify the employee, verbally or in writing, of the reasons for such a removal, giving the employee a reasonable opportunity to respond to the charges. Final notification of removal should be via memorandum or letter, not by a Written Notice form.

Employees may challenge removals through the Employee Grievance Procedure, and may direct questions regarding this procedure to the Department of Employment Dispute Resolution.

Agencies may, based on mitigating circumstances, demote or transfer and reduce the employee's duties with a minimum 5% reduction in salary, or transfer them to an equivalent position without a reduction in salary as an alternative to termination.

Grievant's position as Meditation Technician required that she be certified to administer medication clients at the Facility. Grievant's certification was removed by the Review Committee in response to Grievant's failure to comply with a doctor's order.² Once Grievant lost her certification, she was no longer eligible to work as a Medication Technician at the Facility. DHRM Policy 1.60(H) permits the Agency to remove an employee unable to meet the working condition of his or her employment due to the loss of a certification required of the employee's job. Accordingly, Grievant's removal as a Medication Technician is supported by policy.

The Agency was authorized but not required by DHRM Policy 1.60(H) to demote or transfer Grievant to another position. The Human Resource Manager attempted to locate a position in which Grievant could be placed, but no positions were available. Accordingly, the Agency was authorized to remove Grievant from employment at the Facility.

Grievant contends that the Review Committee incorrectly removed her certificate to administer medication to clients. She argues that it was appropriate for her to add yogurt to the MiraLax to make the substance more appealing to the client. This argument fails. The evidence showed that employees working as Medication Technicians were expected to follow the doctor's orders as written and without modification. The doctor's order specifically states that the MiraLax is to be mixed with water and given to the client. It does not authorize the adding of yogurt or a thickener to the medication. The decision of the Review Committee is supported by the evidence.

Grievant argued that other employees were permitted to mix yogurt with MiraLax prior to giving the medication to the client, yet none of them received harsh treatment by the Agency. If the Hearing Officer assumes for the sake of argument that Grievant's assertion is true, it does not affect the outcome of this case. No credible evidence was presented to show that the Agency Managers were aware of this inconsistent treatment.

Grievant contends that the Agency should have placed her in her former position of Direct Support Professional. This argument is untenable. Grievant sustained work-related injuries in 2003 restricting the weight she could lift. An essential job requirement of the Direct Support Professional position is the ability to lift 20 to 50 pounds regularly. Grievant's doctor's restrictions prohibited her from lifting between 21 and 50 pounds on any occasion. Grievant could no longer meet all of the essential functions of her former position and, thus, the Agency was not obligated to return her to a Direct Support Professional position.

² Facility Instruction 6430 authorizes the Review Committee "to revoke the ... Medication Aide qualification for unsatisfactory medication administration performance."

DECISION

For the reasons stated herein, the Agency's removal of Grievant unemployment 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.³

[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

³ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.