

Issue: Group II Written Notice with Suspension (failure to follow instructions); Hearing Date: 03/05/10; Decision Issued: 03/10/10; Agency: DBHDS; AHO: Frank G. Aschmann, Esq.; Case No.9266; Outcome: Full Relief.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION

DIVISION OF HEARINGS
DECISION OF HEARING OFFICER

In the matter of: Case No. 9266

Hearing Date: March 5, 2010
Decision Issued: March 10, 2010

PROCEDURAL ISSUE

Grievant raised the issue that the Agency did not consider her response to its intent to issue (a Written Group II Notice) letter and had predetermined to take the disciplinary action which is the subject of this hearing. This issue is not properly before this Hearing Officer. Any procedural violation in the preliminary stages of the process are cured by the event of a full due process hearing, as has been conducted in this matter, which affords the Grievant legally sufficient due process, an opportunity to present her case and be heard.

APPEARANCES

Grievant
One Grievant Witness
Agency Presenter
Agency Representative/Witness
Agency Recorder Operator

ISSUE

Did the Grievant violate Agency policy on October 17-18, 2009 by failing to follow a supervisor's instructions and failure to follow written guidelines by changing the format of the Assignment Sheet after being instructed not to alter the form such as to warrant the issuance of a Group II Written Notice and suspension of employment for five days as disciplinary action by the Agency?

FINDINGS OF FACT

The Grievant is employed by the Agency as a nurse who works on the night shift. Grievant received a letter of commendation on October 1, 2009. Grievant is responsible for preparation of Assignment Sheets. An Assignment Sheet is an official Agency form. The form is used on a daily basis to assist Agency staff in performing their duties. The form is detailed and must be kept accurate to assign duties to staff so they can safely and effectively provide services to patients. At times the Assignment Sheet must be changed to reflect new assignments or duties which may come into effect during the period covered by the current Assignment Sheet.

Effective September 1, 2009, a new Assignment Sheet form was put into use in the Agency facility where the Grievant works. The goal of the new form was to promote uniformity and consistency of the form in the facility. Previously, the Assignments Sheets had many formats and varied from one preparer to the next. Some were done with a computer and some were hand written. The Grievant had used a computer generated Assignment Sheet which she was trained to prepare by a staff member at the time she came to the facility. The Grievant was dissatisfied with the new form, she did not like the design, thought it excluded needed items, was burdensome to fill out, at times illegible and wanted an electronic version. The Grievant thought a staff member was working on an electronic version of the form but found out the staff member had stopped trying to produce an electronic version in late September 2009. Since the form has been in use minor changes have been made. These changes require the approval of the Unit Manager. The form has not worked perfectly. Sometimes information requires more space than is provided in a particular section of the form and the information has been written in an adjacent section. At times a section of the form is used for notes and purposes other than what it is designated to be used for. Section titles have also been changed at times to more accurately reflect the status of care.

The facility staff was notified that the new form would be put into use and on August 17, 2009 a memorandum with guidelines for use of the new form was issued. The guidelines specifically prohibited having more than one Assignment Sheet on a unit and altering any aspect of the format/design of the form. Training was given to the staff and the Grievant acknowledged receiving training on August 27, 2009.

On September 1, 2009, the new form was used by the Grievant. The Grievant filled out the central portion of the form by taping a computer printed piece of paper containing the required information to the form. On September 23, 26, 27, 30 and October 1, 2, 6, 7, 10, 11, 12, 13, 14, 17, 18, 2009, the Grievant used the same cut and tape method for filling out the form. On October 14, 2009, the Grievant had two copies of the form on the unit, one hand written and one done in the cut and tape method.

On October 15, 2009, the Grievant's supervisor sent an email to the Grievant after being informed that there had been two Assignment Sheets on the unit during the night shift. The Grievant's supervisor reviewed past Assignment Sheets prepared by the Grievant and discovered she had been using the cut and tape method for preparing the forms during the last two months. The email noted the event of October 14, 2009, where two Assignment Sheets were found on the unit, one being cut and tape and the other hand written. The email noted having two Assignment Sheets was a violation of the guidelines. Additionally, the Grievant was informed that she was not to alter any form of the facility.

Also on October 15, 2009, the Grievant's supervisor sent an email to several staff members noting the incident on October 14, 2009, and asking the staff members to report on the Grievant's use of the form. This email was not sent to the Grievant. On October 19, 2009, one of the staff members sent an email to the Grievant's supervisor notifying him that the Grievant was using the cut and tape method for preparing the form. This staff member did not testify at the hearing but the email was admitted into evidence. The email reports that the staff member confronted the Grievant about using the cut and tape method and the Grievant responded by

saying the email she had received did not say anything that indicated she could not use the cut and tape method. The Grievant further stated it was a faster method and an electronic version should be made available. The Grievant did not stop working and proceeded to complete the form with the cut and tape method. The Grievant's recollection of the confrontation was that the staff member approached her and said, "I thought you were not suppose to do that." The Grievant then responded that the email she received had not told her she could not use the cut and tape method to which the staff member replied, "I don't know."

On October 22, 2009, the Grievant was given a letter notifying her that the Agency intended to issue a Group II Written Notice and a five day suspension. The letter states that on October 17-18, 2009, the Grievant changed the format of the Assignment Sheet despite instruction by her supervisor and in violation of the written policy prohibiting altering the form. The Grievant was given until 7am the next morning to submit a response.

On October 23, 2009, the Grievant submitted a response and approximately one half hour later she received a Group II Written Notice with a five day suspension. The written notice was issued for failure to follow a supervisor's instructions and failure to follow written guidelines when on October 17-18, 2009, the Grievant altered the Assignment Sheet form despite instruction from her supervisor and written directions.

On November 5, 2009, the Grievant was given a memorandum which told her to only have one Assignment Sheet on the unit, to hand write it in pencil and not to use the computer to prepare any aspect of the form.

Grievant's Group II Written Notice and five day suspension are the subject of the hearing.

APPLICABLE LAW AND OPINION

The General assembly enacted the Virginia Personnel Act, Code of Virginia §2.2-2900 et seq., establishing the procedures and policies applicable to employment with the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. Murray v. Stokes, 237 Va. 653 (1989).

Code of Virginia §2.2-3000 et seq. sets forth the Commonwealth's grievance procedure. State employees are covered by this procedure unless otherwise exempt. Code of Virginia §2.2-3001A. In disciplinary actions, the Agency must show by a preponderance of the evidence that the disciplinary action was warranted and appropriate under the circumstances. Department of Employment Dispute Resolution Grievance Procedure Manual, §5.8 (2).

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Code of Virginia §2.2-1201, the Department of Human Resource Management promulgated Standards of Conduct Policy number 1.60. The

Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards of Conduct serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action. The Agency uses these Standards of Conduct and has cited Chapter 14, Group II Offenses, 1. Failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with established written policy to include failure to report an arrest or criminal conviction to his or her supervisor as required. A single Group II offense may result in a suspension up to ten workdays and stays active for three years from the date issued.

The Agency presented clear evidence that on October 14, 2009, the Grievant had two Assignment Sheets on the unit in violation of the guidelines which were presented to her with the August 17, 2009 memorandum. However, the letter of intent to issue and the Group II Written Notice issued in this matter do not charge the Grievant with this conduct as an offense. The Grievant is charge solely with failing to follow a supervisor's instructions and written policy on October 17-18, 2009, for altering the Assignment Sheet form. Thus this evidence is irrelevant and that act by the Grievant can not form the basis to support the Agency's personnel action.

There is no dispute between the Grievant and the Agency that the Grievant used a cut and tape method to complete the Assignment Sheet on October 17-18, 2009. The basic facts of the central issue in this matter are therefor agreed. The Grievant presented evidence both in documentary form and through testimony which makes it clear she was not happy with the new form and wanted a more efficient method to complete the form other than hand writing it. When an electronic version was not forthcoming she used a cut and tape method. She used this method at least 16 times in September and October including the charged dates. The Agency takes the position that the cut and tape method is altering the form. The Grievant takes the position that she did not alter the form but only used a more efficient method to fill out the form.

The guidelines for the Assignment Sheets was presented by the Agency and described as the "dos and don'ts" of how to use the new form. The guidelines state what information is to go in which section of the form. The guidelines clearly state that the format/design of the form may not be altered. What is missing from the guidelines is the detail of how to fill out the form which has become central to this case. There is no specification whether pencil or pen should be used. There is no specification whether the form should be typed, handwritten or can be filled out with a computer. There is no definition of what to "alter" means.

The Agency presented no evidence which indicated the training in August presented any more information to the Grievant than is in the guidelines themselves. The email from the Grievant's supervisor on October 15, 2009, uses this same language, simply repeating that no alteration of the form is permitted, without any further explanation of what that means. In the October 19, 2009 confrontation with a staff member, the staff member reports in the same language stating that she told the Grievant not to alter the form. The October 22, 2009 letter notifying the Grievant that discipline is pending uses the same language stating the personnel action is for altering the form. The Group II Written Notice uses this same language.

The Grievant testified that when the October 22, 2009 letter was presented to her she was told that the cut and tape method was considered altering the form for the first time. The Agency did not present rebuttal evidence to this statement. Once told she did not use the method again. It is not until the memorandum of November 5, 2009 that there is any written communication which specifically states that the form is to be filled out by hand and not done in any way with a computer.

While it appears the Grievant was somewhat belligerent and persistent in her desire for an electronic version and a more efficient way to fill out the form, the Agency's evidence does not show that the Grievant was given any clear direction not to use the computer to fill out the form or told directly that her cut and tape method would be deemed altering the form until after the decision had been made to discipline her. Had the November 5, 2009 memorandum been sent to the Grievant on October 15, 2009 when the incident first came to the supervisor's attention this entire matter could have been avoided.

When the Assignment Sheets completed by the Grievant are examined all the information is in the proper sections as specified by the guidelines. The Grievant has used the specified form and every section of the form is in its designed location. Thus the format of the form is the same as an original blank form. To the extent the information in the middle of the form extends into other areas of the form, it is no different than the hand written forms done by other staff which do the same thing. The Grievant's supervisor stated he did not consider the extension of information into other areas of the form an alteration of the form. It was the cut and tape method itself which was deemed an alteration of the form.

Therefore, this Hearing Officer finds that the Grievant did not alter the format/design of the Assignment Sheet form by using the cut and tape method but rather filled it out with a method which was subsequently deemed unacceptable to her supervisor. Thus the Grievant did not fail to follow the written policy. The Grievant was not given clear direction not to use the cut and tape method to fill out the form until after she was disciplined and therefore did not fail to follow her supervisor's instructions.

DECISION

The Agency presented insufficient evidence to show the personnel action was justified.

ORDER

For the above stated reasons the Agency is hereby ordered to remove the Group II
Written

Notice and suspension from the Grievant's personnel file and pay all back pay due as a result of this decision.

APPEAL RIGHTS

As the Grievance 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 is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th 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, Main Street Centre, 600 East Main Street, Suite 301, Richmond, VA 23219 or faxed to (804) 786-0100.

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. (Note: the 15-day period, in which the appeal must occur, begins with the date of issuance of the decision, not receipt of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days). 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 contrary 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.

Frank G. Aschmann
Hearing Officer