

Issue: Formal Performance Improvement Counseling Form with Termination (serious misconduct); Hearing Date: 06/18/10; Decision Issued: 06/28/10; Agency: UVA Health System; AHO: Carl Wilson Schmidt, Esq.; Case No. 9328; Outcome: No Relief – Agency Upheld; **Administrative Review: EDR Ruling Request received 07/12/10; Outcome pending.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9328

Hearing Date: June 18, 2010
Decision Issued: June 28, 2010

PROCEDURAL HISTORY

On February 24, 2010, Grievant was issued a Formal Performance Improvement Counseling Form with removal for serious misconduct.

On March 22, 2010, 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 May 10, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. Upon the motion of the party, the Hearing Officer found just cause to extend the time frame for issuing the decision in this appeal. On June 18, 2010, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Counsel
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Formal Improvement Counseling Form?
2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy?
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 University of Virginia Health System employed Grievant as a Registered Nurse Clinician II. She began working for the Agency full-time in August 2008 until her removal from employment February 24, 2010. Grievant worked in the Pediatric Intensive Care Unit. The Job Summary in her Job Description stated:

Capable clinician, focused on expanding knowledge and skills. Consistently provides effective direct care, as part of the interdisciplinary team, to a variety of complex patients. Manages care and implements treatment plans at a refined skill level in collaboration with patients, their families, physicians, and other members of the healthcare team. Seeks as well as provides feedback for improved clinical practice. Assumes a beginning leadership role but seeks mentoring in this process.¹

On February 15, 2010, Ms. G, a Registered Nurse, was working in the Pediatric Intensive Care Unit of the Agency. After her shift began, the Baby was admitted as a patient under her care. The Baby suffered from shaken baby syndrome. The Social Worker told Ms. G that only the great aunt and uncle of the Baby were allowed to visit

¹ Agency Exhibit 5.

unsupervised. She said the Baby's mother and father could visit if the great aunt and uncle were present.

The Agency kept Patient's Progress Notes in patient charts located within a short distance of patient rooms. On February 15, 2010 at 12:30 p.m., the Social Worker wrote in the Patient's Progress Notes for the Baby:

[Social Worker] met with [patient's] father & paternal aunt & uncle. [Patient] is currently in the custody of [the Department of Social Services] from previous admission of 1-14-10 period. Dad reports [Department of Social Service] placed [patient] with his aunt and uncle, however dad & mother of baby can only visit when supervised by aunt & uncle. [PM] is the great aunt and primary caregiver. [Department of Social Services] office closed today due to holiday. [Social Worker] will contact [Department of Social Services] in the morning. [Social Worker] secured room at [location] for dad & foster parents for their stay. Investigation is still going on per dad. Dad has been very cooperative with [Social Worker] & appears to be appropriate & caring when with [patient].

At 2 p.m. the Social Worker wrote, in part:

[Patient] is in custody of [Child Protective Services] until investigation is completed. *** [Patient's] parents may visit if supervised but not together. Dad has visitation on Wednesdays & [every other] weekend. Mother has all other time. Great aunt [PM] and her husband had been designated as foster care placement and may supervise visitation of [patient].

When Grievant began her shift in the evening at February 15, 2010, Grievant was assigned the Baby and met with Ms. G to obtain a report on the patient's status. Ms. G told Grievant what she had been told by the Social Worker namely that the parents could only visit the Baby if the great aunt and uncle were present. Ms. G told Grievant that the Social Worker had written the restrictions in the progress notes of the Baby's chart. Grievant had been assigned responsibility for a second patient and met with the registered nurse who cared for that patient during the prior shift.

Grievant went to see the Baby at approximately 7:45 p.m. and observed the great aunt and uncle at the Baby's bedside. Grievant knew that the Baby had a history of being a shaken baby. Based on her experience, she knew that a father, mother, or mother's boyfriend were often the person who caused the trauma to the child. Grievant did not read the Social Worker's notes during her shift. At approximately 10 p.m., the Baby's father arrived and the great aunt and uncle were getting ready to leave. They asked if the father could stay. This question was a "red flag" for Grievant. Based on her experience, it was an issue that needed to be addressed so Grievant asked the father and the great uncle if there were visitation restrictions. The father did not answer. The great uncle asked Grievant if she was going to be there after he left. Grievant said she would be there. The great uncle said that there were no issues that he was

concerned about. The great uncle left and the father remained in the Baby's room until 7 a.m. the following morning. During that time period, Grievant left the father alone with the Baby approximately every two hours when she walked to another room to attend to her second patient. Grievant could not observe the father when she was attending to the second patient.

At 7 a.m. on February 16, 2010, Grievant met with Ms. O, a Registered Nurse, and gave Ms. O a report of the Baby's status. Grievant told Ms. O that the father was not allowed to stay unsupervised with the Baby and that the great aunt and uncle were there to supervise if the father was with the Baby. Grievant told Ms. O that the Social Worker had written a progress note in the Baby's chart. The father was in the Baby's room at that time without the great aunt and uncle being present. Ms. O was concerned that she would be unable to supervise the father and attend to her second patient at the same time. Ms. O notified the Supervisor of her concerns.

CONCLUSIONS OF POLICY

Policy 701 sets forth the Agency's Standards of Performance for its employees. Progressive performance improvement counseling steps include an information counseling (Step One), formal written performance improvement counseling (Step Two), suspension and/or performance warning (Step Three) and ultimately termination (Step Four). Depending upon the employee's overall work record, serious misconduct issues that may result in termination without prior progressive performance improvement counseling include but are not limited to, "[w]illful violation or neglect of safety/security rules."

The Social Worker established a visitation rule for the safety and security of the Baby. The Agency adopted that rule and its staff including Grievant were obligated to implement that rule. Grievant was aware of the rule because she had been told by Ms. G that the father could not have unsupervised visitation with the Baby. During her shift ending on February 16, 2010, Grievant left the father alone with the Baby in the Baby's room unsupervised while she attended to her second patient. By doing so, Grievant violated the Agency's rule for the safety and security of the Baby. Accordingly, the Agency has presented sufficient evidence to support the issuance of a Formal Improvement Counseling Formal with removal for serious misconduct.

Grievant argued that she did not leave the father alone with the Baby because she stayed outside the room watching the father and child sleep. This argument fails. Grievant was obligated to provide services to a second patient and did so throughout her shift. Grievant left the Baby's room and walked to the other patient's room to provide services to that patient. When Grievant was in the second patient's room, she was unable to observe the father and the Baby. If the father had wished to harm the Baby, he could have done so without being observed by Grievant.

Grievant argued that she did not know that there were restrictions on the father's ability to remain with the Baby unobserved. She stated that she did not read the Social Worker's notes in the Baby's chart because she was too busy that evening. This argument is untenable. It was not necessary for Grievant to have read the Baby's Patient's Progress Notes to learn of the visitation restriction. Grievant was told of the restrictions and of the existence of Patient's Project Notes by Ms. G when Grievant began her shift. Grievant knew the nature of the restrictions because she repeated the restrictions to Ms. O when Ms. O began her shift and assumed responsibility for the Baby.

Grievant argued that the Agency did not consider lesser punishment than removal. Given the severity of Grievant's actions, it was not necessary for the Agency to consider a lesser level of discipline. By failing to supervise the father, Grievant placed the Agency at risk of civil liability in the event the father had caused injury to the Baby. Grievant argued that she had been singled out for discipline because of prior concerns about her work performance by regulatory authorities. No credible evidence was presented to support this assertion. The Hearing Officer does not believe the Agency took action against Grievant for any reason other than her behavior.

Grievant argued that the Social Worker's notes did not require that the father be supervised at all times. When the Social Worker's notes are considered as a whole with emphasis on her entry at 2 p.m., it is clear that the father could not visit with the Baby unless someone supervised him.

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. In light of this standard, 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 Formal Improvement Counseling Form with removal is **upheld**.

² *Va. Code § 2.2-3005.*

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

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

[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