

Issue: Formal Performance Improvement Counseling Form with termination (serious misconduct); Hearing Date: 08/30/10; Decision Issued: 09/14/10; Agency: UVA Health System; AHO: Carl Wilson Schmidt, Esq.; Case No. 9382; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9382

Hearing Date: August 30, 2010
Decision Issued: September 14, 2010

PROCEDURAL HISTORY

On April 23, 2010, Grievant was issued a Formal Performance Improvement Counseling Form with removal for giving the wrong medication to a patient and attempting to hide the error.

On May 7, 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 July 26, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 30, 2010, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's Counsel
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Formal Performance 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 (e.g., properly characterized)?
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?
5. Whether the Agency retaliated against Grievant.

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 III prior to her removal effective April 23, 2010. She began working in the emergency department in October 2009. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

The Agency has a medication dispensing machine that nurses use to transfer medicine into syringes to be injected in patients. The machine dispenses medication in units of 2 mg. If the patient requires an injection of less than 2 mg, the nurse injects the appropriate amount in the patient and then "wastes" the excess amount while being observed by another employee. Records are maintained of the amount of medication dispensed and wasted.

Dilaudid is a medication that must be injected in a patient only in accordance with a doctor's order.

At 3:39 p.m., Grievant removed 2 mg of Dilaudid from the medication dispensing machine into a syringe. She injected Patient P with .5 mg of Dilaudid.

Grievant mistakenly¹ injected Patient D with .25 mg of Dilaudid. Patient D did not have a Doctor's order authorizing the injection of Dilaudid.

At 6:57 p.m., Grievant wasted 1.25 mg of Dilaudid.

At 6:57 p.m., the Doctor canceled an order for .25 mg of Dilaudid for Patient P. The Doctor ordered .5 mg of Dilaudid for Patient P.

At 7:07 p.m., Grievant removed 2 mg of Dilaudid from the medication dispensing machine into a syringe. She wasted 1.75 mg.

At 7:30 p.m., Grievant records that she administered .5 mg of Dilaudid to Patient P.

Grievant injected .25 mg of Dilaudid into Patient P instead of the .5 mg ordered by the Doctor.

On April 14, 2010 at approximately 7:15 p.m.², Grievant approached a registered nurse, Ms. M, and said, "S—t, you're not going to believe what I just did! Ms. M asked "What?" Grievant said that she "just gave that medicine to the wrong patient". Grievant added, "don't say anything to anyone." After considering the significant of Grievant's comment, Ms. M decided to report the matter to the Shift Manager. She did so at approximately 11:30 p.m. on April 14, 2010.

At 7:33 p.m., Patient P left the emergency department and returned home.

On April 21, 2010, the Interim Director contacted Patient D and asked about her interaction with Grievant on April 14, 2010. Patient D did not have much recollection of the interaction but then mention to her husband the nature of the telephone call she received from the Interim Director. The Husband called the Interim Director. The Interim Director described the call as follows:

About five minutes later the husband called me back. He explained that his wife just told him what I was calling for and he wanted to add some information as he was present during most of her ED visit. He actually arrived about the time she received the ativan and fentanyl. He states that after they had been there a while and not too long before she was discharged, a nurse named [Grievant's first name] came in and was doing something with the IV. She then left the room and came back a few minutes later. The patient (his wife) asked [Grievant's first name] what medication she had just received because she could feel "something".

¹ The Agency has a written policy that requires nurses to properly identify a patient prior to giving that patient a controlled drug. Grievant did not comply with that policy.

² The actual time was most likely before 6:57 p.m. Ms. M, however, recalled that time as approximately 7:15 p.m.

The husband said I think she just flush the line. [Grievant's first name] said "no, I just gave her Dilaudid." The husband questioned why they changed it from fentanyl she had received before. He stated that it seemed to him that [Grievant's first name] got a little flustered and said something about talking to a different doctor and left the room. He thought it was a little odd but didn't think much more about it at all until his wife explained the reason for my call.

CONCLUSIONS OF POLICY

In accordance with Medical Center Policy 701, an employee who engages in serious misconduct may be removed without first receiving a performance warning. Policy 701 lists several examples of behavior constituting serious misconduct but that list is not all-inclusive.

In this case, the Agency has presented sufficient evidence to support its assertion that Grievant engaged in serious misconduct. The Agency established that Grievant incorrectly injected Patient D with .25 mg of Dilaudid and then attempted to cover up her mistake. Upon a finding of serious misconduct, the Agency may remove an employee. Accordingly, Grievant's removal must be upheld.

Grievant denies that she incorrectly injected Patient D with .25 mg of Dilaudid. The Agency's assertion that Grievant injected the wrong patient with .25 mg of Dilaudid is supported for several reasons. First, Grievant confessed to Ms. M that she had given the wrong medication to a patient. Grievant argued that Ms. M's testimony was not credible. The Hearing Officer finds that Ms. M's testimony was credible based on her demeanor during the hearing. In addition, Ms. M's behavior of reporting her concern to the Shift Supervisor is consistent with someone who had been informed by Grievant of a medication error. Second, Patient D's husband recalled Grievant telling him that she had given Patient D Dilaudid. Third, Grievant admitted that she attached the syringe containing Dilaudid to the intravenous line connected to Patient D. Grievant asserted that she realized her mistake and then removed the syringe before injecting the Dilaudid into Patient D. Grievant's admission that she completed the first part of the act of injection (attaching the syringe) is consistent with the Agency's allegation that she completed the first as well as the second part of the act of injection (transferring the medication from the syringe into the intravenous tube). Fourth, if Grievant had given only .5 mg of Dilaudid to Patient P, it would have been logical for Grievant to have wasted 1.5 mg of Dilaudid at 6:57 p.m. When these factors are considered as a whole, the Agency has presented sufficient evidence to support its assertion that Grievant incorrectly injected .25 mg of Dilaudid into the wrong patient, Patient D.

Grievant attempted to cover up her mistake. This point is established by two reasons. First, Grievant asked Ms. M not to tell anyone about Grievant's mistake. Second, after the Doctor increased the amount of the second injection intended for Patient P from .25 mg to .5 mg of Dilaudid, Grievant injected Patient P with only .25 mg.

As a result, the Agency's medical records system appeared to show that Patient P had received Dilaudid in accordance with the Doctor's orders.

The effect of Grievant's mistake and cover-up was that the Agency was unable to timely inform Patient D that she had received the wrong medication and to provide Patient D with appropriate medical services to someone who had received the wrong medication.

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..."³ 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.

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;⁴ (2) suffered a materially adverse action⁵; and (3) a causal link exists between the adverse action and the protected activity; in other words, management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, retaliation is not established unless the Grievant's evidence shows by a preponderance of the evidence that the Agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual.⁶

³ *Va. Code § 2.2-3005.*

⁴ See *Va. Code § 2.2-3004(A)(v)* and (vi). The following activities are protected activities under the grievance procedure: participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

⁵ On July 19, 2006, in Ruling Nos., 2005-1064, 2006-1169, and 2006-1283, the EDR Director adopted the "materially adverse" standard for qualification decisions based on retaliation. A materially adverse action is an action which well might have dissuaded a reasonable worker from engaging in a protected activity.

⁶ This framework is established by the EDR Director. See, EDR Ruling No. 2007-1530, Page 5, (Feb. 2, 2007) and EDR Ruling No. 2007-1561 and 1587, Page 5, (June 25, 2007).

Grievant argued that Ms. M retaliated against Grievant because Grievant failed to support Ms. M's position after Ms. M had made a mistake as part of her work duties. The Hearing Officer will assume for the sake of argument that Grievant's behavior was a protected activity. Grievant has suffered a materially adverse action because she received the disciplinary action. Grievant has not established a causal link between the adverse action and the protected activity. The Agency took disciplinary action against Grievant because it believed she engaged in misbehavior. The Agency did not take disciplinary action against Grievant as a pretext or excuse for retaliation.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Formal Performance Improvement Counseling Form for serious misconduct with removal 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.⁷

[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

⁷ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.