

Issue: Group II Written Notice (failure to follow policy); Hearing Date: 09/30/10;
Decision Issued: 10/05/10; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.;
Case No. 9389; Outcome: Full Relief.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9389

Hearing Date: September 30, 2010
Decision Issued: October 5, 2010

PROCEDURAL HISTORY

On June 2, 2010, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow the best professional nursing procedure for a thorough nursing assessment.

On June 2, 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 August 16, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The Hearing Officer found just cause to extend the time frame for this appeal due to the unavailability of a party. On September 30, 2010, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
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 Behavioral Health and Developmental Services employs Grievant as a Registered Nurse II at one of its Facilities. Grievant had no active prior disciplinary action.

The Individual was a 56-year-old male with a profound intellectual disability and had the following significant health problems for which he received treatment/support:

- Hepatitis B Carrier
- Dysphagia
- Weight instability
- History of acute pancreatitis
- Hypertension
- Degenerative disc changes
- Unsteady gait
- Hypomagnesemia
- History of GE Reflux
- Recurring headaches
- Drooling
- Constipation
- Hypothyroidism
- Potential for Osteoporosis

Bipolar I Disorder
Incontinence
Low Vitamin D level
Glaucoma
Sinus Tachycardia
Frequent Falls
Dystonia-leaning backwards on ambulation
Lesion right kidney
Persistent TD

Grievant was working the "weekend shift" at the Facility on February 20, 2010. She was responsible for monitoring individuals in three buildings. If she had been working Monday through Friday, she would have been responsible for providing services to individuals living in one building. Grievant received a call from a Direct Service Associate who was providing services to the Individual. The Direct Service Associate asked Grievant to evaluate the Individual's condition.

When Grievant arrived at the Building, the Direct Service Associate showed Grievant what the Individual had coughed up. It was clear mucus with a small amount of dark red blood with sputum. They also found a tiny amount of brown blood when they wiped the Individual's nose. Grievant looked to see if the Individual had any active bleeding from his mouth and observed none. Because the blood found was brown and not bright red, Grievant concluded that some time had passed since the Individual first bled.

Grievant checked the Individual's vital signs and assessed him. The Individual's temperature was 98.2°. His pulse was 120 and Respiration was 20. His blood pressure was 120/90. The Individual's lungs were clear. Grievant could not hear wheezing sounds or anything else that would indicate the Individual was having difficulty breathing. Grievant attempted to get an O2 saturation reading. This would involve placing a clip on the Individual's fingertip. The Individual did not like being assessed and he resisted. Grievant was unable to determine the O2 saturation reading. Grievant knew the Individual and had provided services to him in the past. She was familiar with when he was normal and when he was not feeling well. She observed him and considered his vital signs. She concluded that the Individual was not ill. He appeared fine to her. Grievant instructed the Direct Service Associate to notify her if the Individual again coughed up blood. Grievant concluded that it was unnecessary to check the Individual again unless she was contacted by the Direct Service Associate.

On February 20, 2010 at 8:47 a.m., the Direct Service Associate wrote in the Individual's Interdisciplinary Notes:

[The Individual] is coughing up blood. Also [the Individual] has a yellow green discharge from nostril mixed with blood. [The Individual] is checked by [Grievant] and appears to be doing fine. Keep eye on [the Individual].

On February 20, 2010 at 9:10 a.m., Grievant wrote in the Individual's Interdisciplinary Notes:

[The Individual] is alert. Sitting up in recliner. T-98.2, P-120, R-20, BP 120/90, O2-UTO. He is uncooperative for vital signs but staff helped to obtain. No active bleeding noted from mouth. Abdomen is soft -- bowel sounds heard all 4 quads. Lungs clear to auscultation. Notify nurse of any further coughing up blood.

The Agency uses a Graphic Flow Sheet for Ill Residents ("Ill Flow Sheet") to track the status of individuals who are ill. Grievant did not begin an Ill Float Sheet for the Individual on February 20, 2010.

Grievant did not check on the Individual again later on February 20, 2010 or February 21, 2010 because the Individual did not appear ill to her when she assessed him in the morning of February 20, 2010.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action."¹ Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

The Agency argued that Grievant should have called the Facility's physician because the Individual had coughed up blood. The Agency relied upon its Nursing Guidelines which state, in part:

These parameters serve as general benchmarks for the population served. However, these guidelines do not replace the professional judgment of the nurse regarding earlier notification. ***

Respirations	Age	Resting Rate	Average	
Activate EMS in all critical situations	Adult	12 – 20	18	New onset wheezing, stridor, uncontrollable cough, hemoptysis, or significant

¹ The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

				change in breath sounds. Unexplained change and respiratory rate, rhythm and/or depth. Respirations > than 28 or < 10 breath/minute 2 times within a 15 minute period of time.
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The Agency asserted that the Individual may have had hemoptysis because he was coughing up blood. Based on the evidence presented, in order for there to be hemoptysis, the blood must come from the lungs. Grievant evaluated the Individual and concluded that his lungs were clear. Based on her judgment, Grievant concluded that the blood did not originate from the Individual's lungs but most likely was from the Individual's nasal passages. Because the blood was not bright red ("fresh blood"), Grievant concluded it would be appropriate to have the direct service staff continue to observe the Individual and notify her if he coughed up blood again. The Agency has not presented sufficient evidence to counter Grievant's judgment. Grievant's decisionmaking appears grounded in her experience, her knowledge of the Individual, and is logical. The Agency has not established that the Nursing Guidelines or other professional standards would have required Grievant to notify the Facility's physician based on the unlikely possibility of hemoptysis.

The Agency argued that Grievant should have created an Illness Flow Sheet. The evidence showed that Grievant examined the Individual on February 20, 2010 and concluded that he was not ill. There was no basis for Grievant to begin an Illness Flow Sheet. The Agency has not presented sufficient evidence to establish that the Individual was ill at the time Grievant evaluated him. Possibly the Individual was ill prior to that time, but when Grievant observe the Individual he was no longer ill.

The Agency argued that Grievant should have visited the Individual again later in the afternoon of February 20, 2010 and some time on February 21, 2010 to determine whether the Individual's symptoms continued. This argument fails. On February 20, 2010, Grievant made an assessment of the Individual and concluded that he was not ill. It was not necessary for Grievant to visit the Individual again on February 20, 2010 and February 21, 2010. Grievant had instructed the direct care staff to notify her if the Individual's physical condition changed. Since the Individual's condition did not change, no one contacted Grievant to ask her to visit the Individual.

The Agency presented a Confidential Nurse Peer Review Document drafted by a nursing expert who concluded that:

All of the Registered Nurses involved in the assessment of [the Individual] ([Grievant, Ms. M and Ms. B) are neglectful of their duties to assess, plan and evaluate acute signs and symptoms of illness. ***

In this situation, it was the responsibility of the first responding nurse, [Grievant] (Weekend Coverage Staff) on 2/20/2010 to determine the severity of the "raspiness in breathing". It was especially important for [Grievant] to perform a comprehensive respiratory assessment as she was assuming weekend coverage nursing responsibilities. The phrase "raspiness in breathing" requires an immediate full assessment ***

[Grievant] failed to provide another physical assessment before the end of her shift and to require the next shift of nurses to provide physical assessments. This was important as [the Individual] appeared: "Anxious".

The problem with the expert's opinion regarding Grievant is that it states facts that did not exist at the time of Grievant's assessment. For example, the Individual did not have "raspiness in breathing" when Grievant examined him. The Individual's raspiness in breathing occurred several days later while under the care of other nurses. In addition, the Individual did not appear to be "Anxious" when Grievant examined him on February 20, 2010.

The Agency has not presented sufficient evidence to support the issuance of a Group II Written Notice. The Agency's action must be reversed.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is **rescinded**.

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.²

[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

² Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.