

Issues: Group II Written Notice (fraternization) and Group II Written Notice (abuse of State time); Hearing Date: 10/27/10; Decision Issued: 11/01/10; Agency: DJJ; AHO: Jane E. Schroeder, Esq.; Case No. 9419; Outcome: Partial Relief.

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution
DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of Case Number 9419

Hearing Date: October 27, 2010
Decision Issued: November 1, 2010

PROCEDURAL HISTORY

The Grievant is employed as a licensed practical nurse (LPN) by a state agency which is a juvenile correctional center. On March 3, 2010, the agency issued two Group II Written Notices to the Grievant: The first Written Notice was issued for unsatisfactory performance and fraternization with patient/inmate/client. The second Written Notice was issued for failure to follow instructions and/or policy and abuse of state time. The Grievant initiated the Employee Grievance Procedure on April 1, 2010 to dispute the two Group Two Written Notices. The grievance was not resolved during the management resolution steps and the grievance was subsequently qualified for hearing on July 26, 2010. On September 27, 2010, the hearing officer was assigned to hear the case.

Two telephonic pre-hearing conference were held. The first telephonic pre-hearing conference was held on October 8, 2010. The hearing date was set for October 27, 2010. A second telephonic pre-hearing conference was held on October 21, 2010. At that time, the Grievant requested more time to prepare for the hearing. This request was denied. The hearing was held on October 27, 2010. Twelve witnesses testified. The agency's entire exhibit notebook was entered into evidence without objection. During the hearing, two additional exhibits from the agency were entered into evidence. The Agency's exhibits are identified as Exhibits 1-19. The Grievant offered no exhibits.

APPEARANCES

Grievant

Agency Representative

Witnesses for Agency:

Superintendent

Head nurse

Assistant Superintendent (for programs)

Social Worker*

Compliance Safety Officer

Psychologist

*This witness was called by both parties.

Witnesses for Grievant:

Assistant Shift Commander
Head Nurse at adult correctional center
Staff nurse
Instructional assistant
Recreation Therapist
Grievant

ISSUES

Whether the first Group II Written Notice given on March 5, 2010, for unsatisfactory performance and fraternization with patient /resident/client should be affirmed or rescinded. For the first Group II Written Notice, the agency alleges that on 1/21/2010, 1/25/ 2010, 2/17/2010, and 2/26/2010, the Grievant was observed in both security cameras and in pictures having inappropriate touching and hugging of resident population. The agency further alleges that the Grievant was observed hugging and holding an inappropriate conversation with a resident where profanity was used.

Whether the second Group II Written Notice given on March 5, 2010 for failure to follow instructions and/or policy and abuse of state time should be affirmed or rescinded. For the second Group II Written Notice, the Agency alleges that on 2/10/10, the Grievant was observed in the gymnasium for non work related matters from 11:24 a.m. to 12:52 p.m., and on 2/26/10, the Grievant was again viewed in the gym from 16:06 to 16:45.

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. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. (Grievance Procedure Manual)

FINDINGS OF FACT

The First Written Notice: Unsatisfactory performance and fraternization with patient /resident/client

The Grievant worked for the agency as a Licensed Practical Nurse (LPN) for 13 years. As an employee of a correctional center, the Grievant had on-going training, including courses in Behavior Management, Safety and Security, and Sex Offenders (Exhibit 12). The Grievant also completed Federal Prison Rape Elimination Act (PREA)

training, which emphasizes the importance of avoiding undue familiarity with residents and the need to avoid physical contact.

The social worker at the agency took three pictures of the Grievant with residents in the gym in January, 2010 (Exhibit 5). In two of the three pictures, a resident has his arm around the Grievant. The Grievant testified that she did not reprimand the resident for the contact, but did move away from the resident. Videos of the gym on 2/26/10 showed the Grievant being embraced by residents.

The compliance safety officer testified that he saw the Grievant hug residents on more than one occasion and overhear the Grievant using profanity when talking to a resident. According to the compliance safety officer, allowing touching by residents is not allowed, as it sends the wrong message. The psychologist testified that the sex offender residents will engage in “grooming” someone by making them feel comfortable with more and more contact. Looking at the pictures of the Grievant and the sex offender residents touching the Grievant, the psychologist stated that the Grievant was smiling and allowing physical contact. This could be grooming activity by the resident and seen as an opportunity to go further. This contact is inappropriate physical contact and outside of the staff member boundaries.

The Second Written Notice: Failure to follow instructions and/or policy and abuse of state time

As seen in a video (Exhibit 6) the Grievant was in the in gym on 2/10/10 from 11:24 a.m. to 12:52 p.m., a total of 88 minutes. While the Superintendent testified that the Grievant should not have been in the gym without authorization, she stated there was no written policy. In fact, the grievant and other nurses went to the gym regularly, if not daily, to pass out medications to the residents.

The Grievant was interested in helping the basketball team of the residents. She had, in fact, help coach basketball in her private life, including helping with her son’s team. She had, under the supervision of the recreational therapist, been helping with the basketball team at the correctional center on her lunch hour. As part of her duties she sometimes did physical therapy with the residents, including members of the basketball team.

February 10, 2010 was a snow day. The Grievant was the only nurse on duty. There were no medical clinics on that day. After she had completed her duties at the medical department and had no patients to attend to, she went to the gym where the basketball team was practicing. She had alerted security that she was going there, and had a radio so she could be contacted if needed. There was no written policy prohibited her from watching the team practice. A previous memo (Exhibit 8) from the head nurse had noted that it was permissible for the Grievant to leave medical when medical was not receiving patients or was finished for the day. While at the gym, she assisted one of the team members on the sidelines practice his physical therapy exercises.

On February 26, 2010, the Grievant and another nurse on duty carried out the 4:00 p.m. pill pass duties as they normally did. The nurses usually split the assignment, each

covering two buildings. Both headed to the gym first to see if any of the residents from their respective lists were at the gym instead of in their resident buildings. The other nurse testified that when they arrived in the gym, the residents in the gym, members of the basketball team, were involved in a meeting. The nurses had been previously instructed not to interrupt meetings to pass out pills. The other nurse decided not to wait around, but to go to her two assigned buildings to pass out pills and come back later. The Grievant stayed. Contrary to the superintendent and head nurse's testimonies, the Grievant did have work-related reasons to go to the gym.

The recreational therapist was conducting the team meeting. The basketball team captain had gotten in trouble and was in solitary confinement. The recreational therapist had called the meeting to help the team to understand the consequences of their actions and to give them a pep talk. He had asked the Grievant to help in the meeting to give encouragement to the residents. After the meeting, the Grievant passed out the pills to the residents who were on her list and then she left to finish her pill pass duties in the other buildings.

The head nurse on duty on February 26 was scheduled to leave at 4:00 p.m. She did not leave at that time, but waited to be relieved by one of the nurses coming back from pill pass. Although she was aware that the Grievant sometimes helped with the basketball team on her lunch hour, the Grievant did not ask the head nurse if she could attend the basketball meeting that day. The head nurse left that day around 5:30 p.m. when one of the two nurses returned from pill pass.

APPLICABLE LAW AND OPINION

The Virginia Personnel Act, VA Code § 2.2-2900 et. seq., establishes the procedures and policies applicable to employment in Virginia. It includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides provisions 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 government interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653,656 (1989).

VA Code § 2.2-3000(A) provides:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints. To that end, employees shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management. To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employee disputes that may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

The Department of Human Resource Management has produced a Policies and Procedures Manual which include:

Policy Number 1.60: Standards of Conduct.

Policy 1.60 provides a set of rules governing the professional conduct and acceptable standards for work performance of employees. The Standards 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.

Offenses are grouped by levels, from Group I to Group II.. Group I Offenses generally includes offenses that have a relatively minor impact on agency business operations but still require management intervention. Group II Offenses include acts of misconduct of a more serious nature that significantly impact agency operations. Group III Offenses generally include acts of misconduct of a most serious nature that severely impact agency operations.

The superintendent issued the first Group II Written Notice to the Grievant for unsatisfactory performance and fraternization with patient /resident/client. The Agency alleges that the Grievant had inappropriate touching and hugging of residents and held an inappropriate conversation with a resident where profanity was used by the Grievant. The evidence shows that the Grievant allowed the residents to hug her and that she occasionally hugged them. The policy prohibiting such contact is consistent with the safety needs in a correctional center and the policy was well-known to the Grievant. I find that the Grievant engaged in the conduct described in the first Written Notice, that the behavior constituted misconduct, and the agency's discipline was consistent with law and policy. The agency's discipline of a Group II Written Notice did not exceed the limits of reasonableness. The agency took into consideration the mitigating circumstances of the Grievant's work history and longevity to support the discipline imposed. I find that consideration reasonable under the circumstances.

The superintendent issued the second Group II Written Notice to the Grievant for failure to follow instructions and/or policy and abuse of state time. For the second Group II Written Notice, the Agency alleges that on 2/10/10, the Grievant was observed in the gymnasium for non work related matters from 11:24 a.m. to 12:52 p.m., and on 2/26/10, the Grievant was again viewed in the gym from 16:06 to 16:45. Since 2/10/10 was a snow day, the routine was different. There was no medical clinic conducted. The Grievant was the only nurse. There was no supervisor for the Grievant to inform that she was going to the gym. The Grievant had a radio and was available for any duties that arose. On 2/26/10, the Grievant had gone to the gym at the scheduled time to pass out pills. She stayed for the meeting in progress, then passed out pills to the residents and left. There is not a preponderance of evidence that the Grievant violated any written policy or abused state time by being in the gym on either occasion. I find that the

Grievant was in the gym on the days and times specified in the written notice, but the Grievant's behavior did not constitute misconduct. Therefore, I find that the agency's discipline for the second Group II Written Notice was not consistent with law and policy.

DECISION

The Agency has sustained its burden of proof for the first Group II Written Notice given to the Grievant on March 8, 2010 for unsatisfactory performance and fraternization with patient /resident/client. This first Group II Written Notice is hereby sustained. The Agency has not sustained its burden of proof for the second Group II Written Notice given to the Grievant on March 8, 2010 for failure to follow instructions and/or policy and abuse of state time by the agency. This second Group II Written Notice is hereby rescinded.

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 made to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia 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, 600 East Main, Suite 301, Richmond, VA 23219 or faxed to (804) 786-0111.

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 contradictory 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.

November 1, 2010

Jane E. Schroeder, Hearing Officer