

Issues: Group II Written Notice (failure to follow instructions and policy) and Termination (due to accumulation); Hearing Date: 10/13/10; Decision Issued: 10/15/10; Agency: DBHDS; AHO: William S. Davidson, Esq.; Case No. 9420; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA  
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION  
DIVISION OF HEARINGS  
DECISION OF HEARING OFFICER  
In Re: Case No: 9420

Hearing Date: October 13, 2010  
Decision Issued: October 15, 2010

**PROCEDURAL HISTORY**

The Grievant was issued a Group II Written Notice on July 14, 2010 for:

[Grievant] failed to follow instructions on 7/7/10 by not performing dressing change in a timely manner. On 7/2/10, [Grievant] failed to follow policy by leaving the unit without notifying charge nurse and charting before administering medication, then delaying administration of same medication to a resident.<sup>1</sup>

Pursuant to the Group II Written Notice, and other accumulated active Notices, the Grievant was terminated on July 15, 2010.<sup>2</sup> On July 26, 2010, the Grievant timely filed a grievance to challenge the Agency's actions.<sup>3</sup> On September 13, 2010, the Department of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. On October 13, 2010, a hearing was held at the Agency's location.

**APPEARANCES**

Agency Representative  
Advocate for Agency  
Grievant  
Witnesses

**ISSUE**

1. Did the Grievant fail to follow instructions regarding performing a dressing change in a timely manner?
2. Did the Grievant fail to follow Agency policy by leaving her unit without notifying her charge nurse and charting before the administration of medication?

**AUTHORITY OF HEARING OFFICER**

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<sup>1</sup> Agency Exhibit 1, Tab 1, Page 1  
<sup>2</sup> Agency Exhibit 1, Tab 1, Page 1  
<sup>3</sup> Agency Exhibit 1, Tab 1, Page 4

Code Section 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code Section 2.2-3005.1 provides that the Hearing Officer may order appropriate remedies including alteration of the Agency's disciplinary action. Implicit in the Hearing Officer's statutory authority is the ability to independently determine whether the employee's alleged conduct, if otherwise properly before the Hearing Officer, justified termination. The Court of Appeals of Virginia in Tatum v. VA Dept of Agriculture & Consumer Servs., 41VA. App. 110, 123, 582 S.E. 2d 452, 458 (2003) held in part as follows:

While the Hearing Officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy...the Hearing Officer reviews the facts de novo...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action. Thus the Hearing Officer may make a decision as to the appropriate sanction, independent of the Agency's decision.

### **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 sometimes characterized as requiring that facts to be established more probably than not occurred, or that they were more likely than not to have happened.<sup>4</sup> However, proof must go beyond conjecture.<sup>5</sup> In other words, there must be more than a possibility or a mere speculation.<sup>6</sup>

### **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 Agency provided the Hearing Officer with a notebook containing seven (7) tabbed sections and that notebook was accepted in its entirety as Agency Exhibit 1.

The Grievant did not provide the Hearing Officer with any documentary evidence.

While the Group II Written Notice was issued to the Grievant on July 14, 2010, the Agency provided her, on July 12, 2010, with a Notice of Intent to issue corrective action under

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<sup>4</sup> Ross Laboratories v. Barbour, 13 Va. App. 373, 377, 412 S.E. 2d 205, 208 1991

<sup>5</sup> Southall, Adm'r v. Reams, Inc., 198 Va. 545, 95 S.E. 2d 145 (1956)

<sup>6</sup> Humphries v. N.N.S.B., Etc., Co., 183 Va. 466, 32 S.E. 2d 689 (1945)

the Standards of Conduct. In that Notice of Intent, the Grievant was put on Notice that she was being charged with:

Failed to follow instructions on 7-7-10 by not performing dressing change in a timely manner. On 7/2/10, [Grievant] failed to follow policy by leaving the unit without notifying charge nurse and charting before medication, then delaying administration of same medication to a resident.<sup>7</sup>

On July 2, 2010, the Grievant was instructed to provide a breathing treatment for Patient M. Such treatments must be given on a timely basis as their effectiveness is diminished if they are not given at the proper time. The charge nurse on the third floor where this patient was located was Nurse A. If the Grievant was going to leave the unit, she had a duty to notify the charge nurse of that fact.<sup>8</sup> The charge nurse testified that at approximately 11:45 a.m. on the morning of July 2, 2010, she passed by the patient's room while she was making her rounds and noticed that he was not receiving the breathing treatment. At approximately 12:00 p.m., she checked in on the patient and again saw that he had not received his treatment and could not find the Grievant on the floor. The Grievant had initialed the Medical Administration Record ("MAR") indicating that the treatment had been given. At approximately 12:30 p.m., the charge nurse found the Grievant and questioned her about this. The Grievant stated that she had left the floor and had asked a fellow employee to administer the breathing treatment. At that point the charge nurse asked the Grievant to check with that fellow employee to see if the treatment had been given and, if not, to immediately give it. At 12:45 p.m., the charge nurse saw the Grievant giving the patient the breathing treatment.

In her written response to this charge, the Grievant admitted that she did not notify the charge nurse that she was leaving.<sup>9</sup> The Grievant indicated that she could not find the charge nurse to notify her. However, she offered no excuse for not notifying someone who was in a responsible position. In that same document, the Grievant stated that she did not sign the MAR. However, at the hearing she did not produce the MAR to verify that she had not signed or initialed it.

The Grievant called as a witness the fellow employee who she stated she had asked to give the breathing treatment on her behalf. That employee stated that she had no recollection of the Grievant asking her to give such a breathing treatment. From the documentary evidence presented to the Hearing Officer, the testimony of Agency witnesses, and the testimony of the Grievant's witnesses, it is clear to the Hearing Officer that the patient was not given the breathing treatment in a timely manner, that the Grievant did not notify the proper chain of authority that she was leaving the floor, and that the Grievant initialed a document indicating that she had in fact given the treatment when she had not.

On July 7, 2010, the Grievant was instructed to perform a dressing change for another patient. The Hearing Officer heard testimony that the Grievant was instructed to have this task

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<sup>7</sup> Agency Exhibit 1, Tab 1, Page 3

<sup>8</sup> Agency Exhibit 1, Tab 5, Pages 18-19

<sup>9</sup> Agency Exhibit 1, Tab 3, Page 1

completed in order that this patient could take part in a 1:00 p.m. conference which would involve people from out of state being a part of this conference. The Agency witnesses and documentary evidence would indicate that the Grievant may have been made aware of this time deadline as early as 9:30 a.m. on the morning of July 7, 2010.<sup>10</sup> The Grievant testified that she did not know about this until approximately 11:45 a.m. on the morning of July 7, 2010. In her own written statement, the Grievant acknowledged, from talking to aides on the floor sometime after 10:00 a.m. on that morning, that there was a time deadline. The Grievant called as a witness a fellow employee who testified that she and the Grievant were in the break room when a registered nurse came to the break room and told the Grievant that she could perform the treatment for this patient at 12:30 p.m.<sup>11</sup> This same witness testified that the Grievant was told that the treatment had to be done prior to the 1:00 p.m. meeting.

As it turns out, the Grievant waited until the very last minute to perform the treatment and then could not find the necessary supplies in a timely fashion to complete the task at hand. The treatment was performed after 1:00 p.m., thus delaying the conference that the patient had with family, doctors and other professionals.

In considering the documentary evidence presented and the oral testimony, the Hearing Officer finds that it is very clear that the Grievant knew that there was a deadline of 1:00 p.m. regarding this patient and that she waited until the very last moment to perform her task and then could not get it done in a timely fashion.

On April 22, 2009, the Grievant was issued a Group II Written Notice which remains active until April 22, 2012.<sup>12</sup> On March 26, 2010, the Grievant was issued a Group I Written Notice which remains active until March 26, 2012.<sup>13</sup>

A combination of two (2) active Group II Written Notices normally results in termination.<sup>14</sup>

### **MITIGATION**

*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...”<sup>15</sup> 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, (3) the

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<sup>10</sup> Agency Exhibit 1, Tab 4, Page 6

<sup>11</sup> Agency Exhibit 1, Tab 2, Page 4

<sup>12</sup> Agency Exhibit 1, Tab 6, Page 1

<sup>13</sup> Agency Exhibit 1, Tab 6, Page 2

<sup>14</sup> Agency Exhibit 1, Tab 7, Page 8

<sup>15</sup> Va. Code § 2.2-3005

disciplinary action was free of improper motive, (4) the length of time that the Grievant has been employed by the Agency, and (5) whether or not the Grievant has been a valued employee during the time of his/her employment at the Agency. The Grievant offered no grounds whatsoever for mitigation in this matter and the Hearing Officer can find no grounds for mitigation.

### **DECISION**

For reasons stated herein, the Hearing Officer finds that the Agency has borne its burden of proof regarding this matter and upholds the Agency's position to terminate the Grievant.

### **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 14<sup>th</sup> Street, 12<sup>th</sup> 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 Street, Suite 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 your appeal 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 a review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.<sup>16</sup> 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.<sup>17</sup>

[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]

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William S. Davidson  
Hearing Officer

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<sup>16</sup>An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. Virginia Department of State *Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

<sup>17</sup>Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.