Issues: Group II Written Notice (unsatisfactory job performance), Group II Written Notice (failure to follow instructions), and Termination (due to accumulation); Hearing Date: 12/15/10; Decision Issued: 12/20/10; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 9463, 9464; Outcome: No Relief – Agency Upheld.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9463 / 9664

Hearing Date: December 15, 2010
Decision Issued: December 20, 2010

PROCEDURAL HISTORY

On April 26, 2010, Grievant was issued a Group II Written Notice of disciplinary action for failing to respond to an individual's health need in a timely manner resulting from poor nursing judgment. On June 18, 2010, Grievant was issued a Group II Written Notice of disciplinary action for failing to comply with a physician's order. Grievant was removed from employment based upon the accumulation of disciplinary action.

Grievant timely filed grievances to challenge the Agency's actions. The outcomes of the Third Resolution Steps were not satisfactory to the Grievant and she requested a hearing. On October 29, 2010, the EDR Director issued Ruling No. 2011-2783, 2011-2784, 2011-2797 consolidating the two grievances for a single hearing. On November 8, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The Hearing Officer found just cause to extend the timeframe for issuing a decision in this matter due to the unavailability of a party. On December 15, 2010, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Representative
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notices?

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?

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 Department of Behavioral Health and Developmental Services employed Grievant as a Registered Nurse at one of its Facilities. She had been employed by the Agency for approximately two years prior to her removal effective June 18, 2010. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

On April 18, 2010 at 10 a.m., direct service staff observed Client A vomit a dark brown substance. Staff informed Grievant that Client A had vomited. Client A vomited a second time which Grievant observed. The vomit was a large brown substance. Grievant incorrectly concluded that the color of the vomit was due to a poly-vitamin which had been given to Client A. Grievant failed to give the individual a gastric occult blood test that would have determined the presence of gastrointestinal bleeding. At approximately 2:40 p.m., Client A vomited a large amount of dark brownish substance for the third time. Grievant notified the physician on-call. The doctor concluded that Client A should be taken to the hospital for evaluation. At approximately 5:25 p.m., Client A was transported to the hospital. A gastric occult test on Client A was performed by hospital staff. The test returned positive for blood.

Client B resides at the Facility and has a diagnosis of Chronic Constipation with redundant large colon with episodes of chronic ileus/pseuda obstruction -- internal hemorrhoids. He has a mega colon of the ascending colon. He has been hospitalized with bowel obstruction. Client B's primary care physician ordered that Client B he given a soap suds enema every Monday, Wednesday, and Friday.

Client B was scheduled to receive a soap suds enema on June 2, 2010 and June 11, 2010. On June 2, 2010, Grievant failed to give Client B a soap suds enema. She wrote in Client B's interdisciplinary notes, "did not do enema as client just had a [large bowel movement]." On June 11, 2010, Grievant failed to give Client B a soap suds enema because she had observed that he had a large bowel movement. In each instance, Grievant concluded that the soap suds enema was not necessary so she disregarded the doctor's order.

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."

Group II Written Notice for Failure to Perform Gastric Occult Blood Test

Inadequate or unsatisfactory job performance as a Group I offense. Grievant received academic and on-the-job training to enable her to determine what to do when a patient vomited a dark brown substance. The dark brown substance indicated the possibility that Client A was vomiting blood. Grievant should have known that it was important for her to determine whether Client A was vomiting blood and, if so, to immediately notify the on-call physician. Grievant assumed that the dark brown color was caused by a poly-vitamin Client A had taken prior to vomiting. The evidence showed a poly-vitamin could not have caused the dark brown color. By failing to perform the gastric occult blood test, Grievant's work performance was inadequate or unsatisfactory.

Attachment A to DHRM Policy 1.60 provides:

> *Note that in certain extreme circumstances, an offense listed as a Group II Notice may constitute a Group III offense. Agencies may consider any unique impact that a particular offense has on the agency. (For instance,

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

> the potential consequences of a security officer leaving a duty post without permission are likely considerably more serious than if a typical office worker leaves the worksite without permission.) Similarly, in rare circumstances, a Group I may constitute a Group II where the agency can show that a particular offense had an unusual and truly material adverse impact on the agency. Should any such elevated disciplinary action be challenged through the grievance procedure, management will be required to establish its legitimate, material business reason(s) for elevating the discipline above the levels set forth in the table above.

A basis exists to elevate Grievant's inadequate or unsatisfactory job performance from a Group I offense to a Group II offense. Had Grievant performed the gastric occult blood test and it showed that Client A had vomited a substance containing blood, Grievant would have been obligated to quickly notify the on-call physician so that an appropriate medical decision could be made regarding whether to admit Client A to the hospital. Grievant's failure to perform the gastric occult blood test may have delayed Client A's admission to the hospital on April 18, 2010 thereby causing hardship to Client A. In addition, an employee who fails to timely perform medical tests places the Agency at risk of liability from a patient suffering adverse consequences because of the delay in receiving treatment. Grievant's failure to perform a gastric occult blood test placed the Agency at risk of unnecessary liability. Accordingly, the Agency has presented sufficient evidence to support the issuance of a Group II Written Notice to Grievant regarding her failure to perform a gastric occult blood test.

Grievant contends that she performed a gastric occult blood test but that the results were inconclusive. This assertion is not credible. Grievant wrote in Client A's interdisciplinary notes numerous details regarding her observations of and interaction with Client A. She did not write that she performed a gastric occult blood test and that the results were inconclusive. Any entry-level nurse would have known the importance of documenting when a patient received a medical test. Grievant's failure to document a significant event, such as the taking of a gastric occult blood test, shows that Grievant did not give the test to Client A.

Group II Written Notice for Failure to Follow a Doctor's Order

Grievant received academic and on-the-job training informing her of her obligation to follow doctor's orders with respect to patient care. She knew or should have known of the Agency's expectation that she comply with a standing doctor's order regardless of whether she agreed with the order. She knew or should have known that if she disagreed with a doctor's order, she should have contacted the doctor to determine whether the doctor wished to change the order. On June 2, 2010 and June 11, 2010, Grievant disregarded the order of Client B’s doctor to give Client B a soap suds enema. Her actions constituted inadequate or unsatisfactory job performance, a Group I offense.

There exists a basis to elevate Grievant's inadequate or unsatisfactory job performance from a Group I offense to a Group II offense. Grievant's failure to comply with the doctor's order resulted in Client B receiving inadequate patient care. It also exposed the Agency to liability for failing to provide adequate care to a client. In addition, Grievant's behavior was similar to failure to follow a supervisor's instructions, a Group II offense. Although Client B's doctor was not in Grievant's chain of command, the doctor's order had similar weight and authority to that of an instruction from Grievant's supervisor. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

Grievant argued that she had the authority to exercise her nursing judgment to determine whether the soap suds enema should have been given. Because Client B had had large bowel movements, it was unnecessary to give the enema. Grievant's argument fails. No credible evidence was presented to show that Grievant had the authority to override a doctor's order. At the top of the order, an Agency employee wrote in large type, "Enema Must Be Given! (Not an Option)."

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 either of the two disciplinary actions and Grievant's removal.

Upon the accumulation of two active Group II Written Notices of disciplinary action, an employee may be removed. Accordingly, Grievant's removal must be upheld.

Retaliation

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;[3] (2) suffered a

[2] Va. Code § 2.2-3005.

[3] 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.

materially adverse action[4]; 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.[5]

Grievant engaged in protected activity. She filed a complaint against the Supervisor. Grievant suffered a materially adverse action because she was disciplined and removed from employment. Grievant has not established any connection between her protected activity and the materially adverse action she suffered. The Supervisor denied retaliating against Grievant when issuing the written notices. The Supervisor's denial was credible. Grievant received disciplinary action because of her treatment of two clients and not because she filed a complaint against the Supervisor. The Agency did not take disciplinary action against Grievant as a pretext for retaliation.

DECISION

For the reasons stated herein, the Agency's issuance on April 26, 2010 to the Grievant of a Group II Written Notice of disciplinary action is **upheld**. The Agency's issuance on June 18, 2010 to the Grievant of a Group II Written Notice of disciplinary action is **upheld**. Grievant's removal based on the accumulation of disciplinary action 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.

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[4] 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.

[5] 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).

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.[6]

[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

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Carl Wilson Schmidt, Esq.
Hearing Officer

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