

Issues: Group I Written Notice (unsatisfactory performance), Group II Written Notice (failure to follow policy), and Termination (due to accumulation); Hearing Date: 01/04/11; Decision Issued: 01/07/11; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 9470, 9471; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9470 / 9471

Hearing Date: January 4, 2011
Decision Issued: January 7, 2011

PROCEDURAL HISTORY

On September 2, 2010, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory job performance. On September 2, 2010, Grievant was issued a Group II Written Notice with a three work day suspension for failure to follow policy.

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 December 1, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 4, 2011, 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 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 Residential Program Specialist at one of its Facilities. Grievant reports to the Supervisor who reports to the Psychologist. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

The Psychologist instructed staff, including Grievant, not to interrupt the Psychologist when the Psychologist was conducting group therapy sessions with patients at the Facility.

On August 17, 2010, the Psychologist was conducting a group therapy session with patients at the Facility. Several patients were gathered around a table in the middle of the room. Although the door was closed, a window in the door allowed employees standing outside of the room to look inside and see all areas of the room. The window was approximately 2' x 3'.

Grievant learned that Patient 1 had low blood pressure and needed to be seen by the Nurse. Grievant incorrectly assumed that Patient 1 was experiencing a medical emergency. Grievant began looking for Patient 1 but could not find him. The Supervisor assisted Grievant with trying to find Patient 1. Grievant approached the room where the Psychologist was conducting group therapy. Grievant asked the Supervisor if the Supervisor had checked the room to see if Patient 1 was inside. The Supervisor told Grievant that she had checked the room and that Patient 1 was not

inside the room. Grievant said she would go inside the room. The Supervisor instructed Grievant not to go inside the room and reminded Grievant that the Psychologist had instructed staff not to interrupt group therapy sessions. Grievant disregarded that instruction, opened the door to the room, and walked inside. The Psychologist instructed Grievant to leave. Grievant said she needed to find Patient 1 because he had low blood pressure and it was a medical emergency.

In July 2009, Grievant was counseled by Mr. J, in part:

Based on our discussion today, I do not believe that patients are giving you money. We need to be very careful to keep our role with our patients very clear. You should not exchange any money with any of our residents or [patients]. This sets up a potentially confusing scenario for them. Additionally, it is not okay to purchase a soda (50/50) with the patient. Although I believe that you did not technically purchase a soda for a patient, nor they purchase a soda for you, sharing a soda creates confusion for the patient. Both of these behaviors constituted a boundary violation. It may lead them to think that you are their friend as opposed to a staff member.¹

The Facility has a room referred to by staff as the Canteen. Food and beverage vending machines are located inside the Canteen. An employee monitors activity in the Canteen to ensure that patients did not steal food or cause disruption in the Canteen.

In August 2010, Grievant walked into the Canteen, took money out of her pocket and placed it in a vending machine. Patient 2 followed Grievant into the Canteen. Grievant told Patient 2 that she could select whatever she wanted from the vending machine. Patient 2 made a selection and received the item from the vending machine.

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.”² 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.”

¹ Agency Exhibit 12.

² The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

Group I Written Notice for Unsatisfactory Performance.

Failure to follow a supervisor's instruction is a Group II offense.³ Grievant was instructed by the Psychologist not to interrupt her group therapy sessions. Grievant was instructed by the Supervisor not to enter the room where the Psychologist was conducting a group therapy session on August 17, 2010. Grievant disregarded the instruction of the Psychologist and the Supervisor and interrupted the group therapy session. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice. The Agency mitigated the disciplinary action to a Group I Written Notice for unsatisfactory job performance. The Group I Written Notice must be upheld.

Grievant argued that it was necessary for her to enter the room and interrupt the group therapy session because the Patient was experiencing a medical emergency and his health was a priority. The evidence showed that the Patient was not experiencing a medical emergency. A medical professional with whom Grievant spoke regarding the Patient's low blood pressure did not take any action or make any statements that would have conveyed to Grievant that the Patient was experiencing a medical emergency. Grievant falsely assumed that the Patient was experiencing a medical emergency.

Group II Written Notice for Failure to Follow Written Policy.

Grievant received training regarding her obligation to maintain "professional boundaries" with patients at the Facility. Grievant was counseled not to share personal information with patients or take actions that would show relationships other than relationships necessary for patient treatment. In July 2009, Mr. J counseled Grievant that it was not okay to purchase a soda with a patient. Facility Policy 308(QM)02-06 provides, "Staff who have or have had a professional relationship with a patient that involves access to information about or the exertion of control over the provisions of services must not: ... [e]ngage in favoritism or provide personal favors for patients." In August 2010, Grievant put her money into a vending machine to purchase an item for Patient 2. Her action showed favoritism towards Patient 2 because she did not engage in similar behavior towards other patients at the Facility. Her action served as a personal favor for Patient 2. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow written policy. Upon the issuance of a Group II Written Notice, an agency may suspend an employee for up to 10 workdays. Accordingly, Grievant's three work day suspension must be upheld.

Grievant argued that she did not have any recollection of purchasing an item from a vending machine for Patient 2. The Agency has presented sufficient evidence to show that Grievant purchased an item for Patient 2. The Resident Program Specialist was monitoring the Canteen on the day Grievant and Patient 2 entered the room. He was located approximately six to ten feet away from the vending machine and observed

³ See, Attachment A, DHRM Policy 1.60.

Grievant put money into the machine and tell Patient 2 she could select any item she wished. He observed Patient 2 receive the item purchased with Grievant's money. His testimony during the hearing was credible.

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...."⁴ 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 actions.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action is **upheld**. The Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with suspension 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

⁴ Va. Code § 2.2-3005.

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.⁵

[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].

Carl Wilson Schmidt, Esq.
Hearing Officer

⁵ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.