

Issue: Group II Written Notice with Suspension (non-therapeutic interaction with a patient); Hearing Date: 02/23/11; Decision Issued: 02/28/11; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 9515; Outcome: No Relief – Agency Upheld; **Administrative Review: AHO Reconsideration Request received 03/15/11; Reconsideration Decision issued 03/18/11; Outcome: Original decision affirmed; Administrative Review: EDR Ruling Request received 03/15/11; EDR Ruling No. 2011-2929 issued 05/19/11; Outcome: AHO’s decision affirmed.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9515

Hearing Date: February 23, 2011
Decision Issued: February 28, 2011

PROCEDURAL HISTORY

On December 6, 2010, Grievant was issued a Group II Written Notice of disciplinary action with a 10 workday suspension for a non-therapeutic interaction with a patient.

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 February 2, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 23, 2011, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Representatives
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 Certified Nurse Aide at one of its Facilities. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

When a patient has behavior that is difficult to manage, the Agency will sometimes place that patient in a "one-to-one relationship" with an employee. For example, a patient who poses a risk to himself or herself or to others may be placed in a one-to-one relationship with employee at the Facility. The Agency teaches its employees that they should be within arm's reach of a patient and be in a position to observe the patient as part of the one-to-one relationship.

The Client was admitted to the Facility on August 27, 2010 in accordance with a Temporary Detention Order. He had been an inmate at a local jail. He may have suffered a nervous breakdown before incarceration. The Client showed bizarre behavior during the crime he was alleged to have committed and was arrested on

August 15, 2010. The client was not eating, he was drinking, pacing around, plugging the toilet and saying bizarre statements to staff. His Axis I diagnosis was Psychotic Disorder, NOS.

On October 14, 2010, Grievant was working in a one-to-one relationship with the Client. The Client was lying horizontally in his bed and was asleep. Grievant sat on the Client's bed and placed her right leg and foot on the bed. The door to the Client's room was ajar. Ms. P was able to see inside the room and observed Grievant. Ms. P realized Grievant's behavior was inappropriate and walked down to speak with the Registered Nurse. Ms. P said "come look at this" to the Registered Nurse. The Registered Nurse walked down to the Client's room and looked into the room. The Registered Nurse observed Grievant lying horizontally on the Client's bed on top of the bedcovers. Both of her feet were on the Client's bed and she was positioned next to the Client's side. Grievant was awake but the Client was asleep. The Registered Nurse entered the room. Grievant seemed startled to see the Registered Nurse. The Registered Nurse questioned the appropriateness of Grievant's behavior. Grievant explained that she was in the Client's bed because she was "just trying to calm him down and to get him to sleep."

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."

Human Resources Policy RI 050-20 sets forth the Agency's policy governing Staff and Resident Interaction and Boundaries. This policy provides:

All hospital staff will conduct themselves in a professional manner at all times in accordance with the cited DI's, policies, and within the standards of practice for their discipline. Staff will continue this professional interaction with residents for the entire period that the resident is hospitalized and for as long as the staff is employed, or by any service (volunteer or otherwise) at the [Facility]. All professional staff will follow the respective Code of Ethical Conduct Standards, licensing board regulations and/or [Facility] Credentialing/Privileging standards concerning interaction with residents. ***

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

Behaviors considered inappropriate and to be unacceptable in a professional interaction between hospital staff and residents include, but are not limited to:

- Implementing restrictions for any resident that are not in the approved program rules ordered for an individual by the attending physician;
- Giving or loaning money or goods to residents;
- Taking residents off grounds or meeting the resident off grounds for any reason other than those approved by the physician for the treatment of the resident documented in the treatment plan;
- Using profanity, vulgarity, and/or abusive language with anyone at any time while working;
- Selling, giving, and/or purchasing items for and from residents, except through accepted hospital channels;
- Accepting gifts for personal services for personal favors from residents with their families;
- Addressing residents by “pet” names, or in affectionate terms, e.g. honey, darling, sweetie, or similar slang references, unless it is the expressed preference of the resident;
- Using words, tone, body language, and or other action done deliberately or repeatedly to provoke, antagonize, or upset a resident;
- Stereotyping a resident based on the individual’s culture and background for diagnosis;
- Taunting, i.e., staff consuming foods/beverages before residents, talking about food, activities, or entitlements residents can not share;
- Staff use of cell phones while on the unit or in the vicinity of residents (except in the event of a resident emergency), disclosure to a resident of personal telephone numbers, or allowing residents to use a personal cell phone;
- Staff discussion/disclosure of personal information in the vicinity of residents;
- Staff disclosure of personal information/correspondence regarding other staff members and/or residents in any format (e-mail/paper hard copy/verbal) to residents;
- Staff contacting residents outside of normal work hours, unless cleared with the staff person’s direct supervisor and included specifically in all involved residents’ treatment plans.

Failure to follow written policy is a Group II offense.² The offense of lying on a patient’s bed while a patient sleeps is not enumerated as an offense under the Agency’s

² See Attachment, DHRM Policy 1.60.

policy. The policy, however, is not all-inclusive. Based on the testimony of the witnesses, there exists a sufficient basis for the Hearing Officer to conclude that Grievant knew or should have known that lying horizontally on a patient's bed while the patient slept was a non-therapeutic interaction contrary to the Agency's policy. Grievant was in a one-to-one relationship with the Client. She was expected to remain within a short distance of the Client and be in a position to observe him for his safety and for her safety. The Client had demonstrated unpredictable, irrational, and sometimes violent behavior. By placing herself next to the Client in a horizontal position, Grievant was unable to protect herself in the event the Client awoke and became violent. Grievant had received training entitled Therapeutic Options of Virginia. None of that training would have supported her lying on the bed next to a sleeping patient. The negative reaction of Ms. P and the Registered Nurse when they observed Grievant shows that Grievant's behavior was not consistent with the Agency's norms. There is sufficient evidence to support the conclusion that Grievant's behavior was contrary to Agency policy governing the interactions between employees and patients. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice. Upon the issuance of a Group II Written Notice, the Agency may suspend an employee for up to 10 work days. Accordingly, Grievant's suspension must be upheld.

Grievant argued that it was a common practice at the Facility for staff to sit on a patient's bed. For example, an employee might sit on a patient's bed in order to feed, clean, and give medication to a patient. This argument is unpersuasive. Grievant was in a one-to-one relationship. She was not feeding, cleaning, or giving medication to the Client. Grievant was not merely sitting on the bed, she laid down in a horizontal position on the bed and was positioned next to the Client.

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..."³ 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.

Grievant contends the disciplinary action should be mitigated because the Agency inconsistently disciplined its employees. She argues that the two employees who observed Grievant's behavior did not immediately report that behavior to Agency managers as required by Departmental Instruction 201 governing Client Abuse. The

³ *Va. Code § 2.2-3005.*

two employees were not disciplined by the Agency. This argument is untenable. Grievant is not similarly situated with the two employees. Grievant was disciplined for a non-therapeutic interaction. She was not disciplined for failing to report client abuse. In addition, the Agency's investigation showed that Grievant did not engage in client abuse under Departmental Instruction 201 and, thus, the duty to report to client abuse did not arise. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

DECISION

For the reasons stated herein, 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

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.⁴

[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

⁴ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 9515-R

Reconsideration Decision Issued: March 18, 2011

RECONSIDERATION DECISION

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. “[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis ...” to grant the request.

Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the hearing ended. However, the fact that a party discovered the evidence after the hearing does not necessarily make it “newly discovered.” Rather, the party must show that:

- (1) the evidence is newly discovered since the date of the Hearing Decision;
- (2) due diligence on the part of the party seeking reconsideration to discover the new evidence has been exercised;
- (3) the evidence is not merely cumulative or impeaching;
- (4) the evidence is material;
- and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the Hearing Decision to be amended.

The request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. The requesting party simply restates the arguments and evidence presented at the hearing. For this reason, the request for reconsideration is **denied**.

APPEAL RIGHTS

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.

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer