

Issue: Group II Written Notice (unsatisfactory performance and failure to follow instructions/policy); Hearing Date: 09/07/11; Decision Issued: 09/21/11; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 9640; Outcome: Partial Relief.



**COMMONWEALTH of VIRGINIA**  
*Department of Employment Dispute Resolution*

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 9640**

Hearing Date: September 7, 2011  
Decision Issued: September 21, 2011

**PROCEDURAL HISTORY**

On April 12, 2011 Grievant was issued a Group II Written Notice of disciplinary action for failure to follow instructions/policy and unsatisfactory performance.

On April 14, 2011, 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 July 5, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The Hearing Officer found just cause to extend the time frame for issuing a decision in this case due to the unavailability of a party. On September 7, 2011, a hearing was held at the Agency's office.

**APPEARANCES**

Grievant  
Grievant's Counsel  
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 Registered Nurse II at one of its Facilities. Grievant has been employed by the Agency for approximately 18 years. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant reported to, Ms. F, the Assistant Nursing Executive. The Nurse reported to Grievant. Ms. A also reported to Grievant.

On February 3, 2011, the Nurse served as the Medication Administration Nurse for the Resident. The Resident was scheduled to receive one dose of medication at 6 p.m. and another dose at 8 p.m. Instead of giving the proper doses at the correct times, the Nurse gave two doses of medication to the Resident at 4:30 p.m. The medications should not have been given to the Resident together and should not have been given to the Resident prior to mealtime. The Nurse did not follow the medication administration policy. As a result of the Nurse's error, the Resident became unresponsive to verbal and tactile stimuli and had to be transported by a rescue squad to the local Hospital Emergency Room.

Ms. A learned of the Nurse's mistake and told Grievant on February 4, 2011. Grievant spoke with the Nurse and counseled the Nurse regarding her inappropriate

behavior. Grievant also arranged for the Nurse to receive additional training regarding medication administration. The Nurse subsequently completed the training.

The Agency has a Medication Administration Policy to ensure that “[o]nly medications that are ordered by the physician or dentist will be administered to patients.”<sup>1</sup> Under this policy, “all errors in the administration of medications are reported and investigated according to [Facility Name] Policy Statement 450–55, Medication variations.” The Agency has a separate policy, Departmental Instruction 201, intended to address potential client abuse. Employees receive annual training regarding Departmental Instruction 201 and are expected to recognize potential client abuse and report it directly to the Facility Director without regard to the opinions or influence of any other employees.

On February 4, 2011, Grievant discussed the incident with the Assistant Nursing Executive. The Assistant Nursing Executive concluded that the Nurse’s behavior was not client abuse but rather was a medication variation that should be addressed under the Agency’s medication variation policies. Grievant agreed with the decision and did not report the Nurse’s behavior to the Facility Director as potential client abuse.

On February 23, 2011, Grievant sent the Nurse a memorandum regarding the subject “Failure to follow [Facility] policy# 280 – 14; medication administration and documentation falsification.” Grievant recounted the incident involving the Nurse and stated “in view of the serious impact of your action, a Standards of Conduct Written Group III is recommended.”<sup>2</sup>

The Facility’s practice is for the Human Resource Director to review proposed disciplinary action before it is issued. On March 31, 2011, the Human Resource Director reviewed the facts of the proposed disciplined and concluded that the matter was likely client abuse. She recognized that no client abuse investigation had been conducted so she reported the matter to the Director’s office in accordance with Departmental Instruction 201. The Agency investigated the Nurse’s actions and concluded that she had engaged in client abuse.

When the Facility Director learned that the Nurse’s actions had not been reported immediately to him as possible client abuse, he became concerned. He testified that the 41 day delay in reporting the client abuse could have put other patients at risk and affected his ability to take disciplinary action against the Nurse.

Following the Agency’s investigation, the Agency issued a Group II to Grievant. The Agency issued a Group I to the Assistant Nursing Executive. The Agency did not issue a written notice to Ms. A.

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<sup>1</sup> Agency Exhibit 6.

<sup>2</sup> Agency Exhibit 6.

## 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.”<sup>3</sup> 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.”

Under the Agency’s judgment, failure to report client abuse can be a Group III offense. Failure to follow policy is a Group II offense. Unsatisfactory job performance is a Group I offense.

Departmental Instruction (“DI”) 201 defines<sup>4</sup> client abuse as:

Abuse means any act or failure to act by an employee or other person responsible for the care of an individual that was performed or was failed to be performed knowingly, recklessly or intentionally, and that caused or might have caused physical or psychological harm, injury or death to a person receiving care or treatment for mental illness, mental retardation or substance abuse.

On February 3, 2011, the Nurse engaged in client abuse because at 4:30 p.m. she gave the Resident medication that was scheduled to be given to the Resident at 6 p.m. and 8 p.m. The Residents suffered physical harm. Grievant learned of the incident on February 4, 2011. She recognized that the Nurse’s behavior was inappropriate. Based on Grievant’s training with respect to Departmental Instruction 201, Grievant should have known that the Nurse’s behavior could have constituted client abuse. Grievant failed to report possible client abuse to the Facility Director thereby justifying the issuance of disciplinary action against her. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice with respect to its case in chief.

The Agency argued that Grievant’s 41 day delay undermined its ability to take disciplinary action against the Nurse. Other than making the assertion, the Agency has not provided any of the details regarding how its ability to take disciplinary action against the Nurse was affected by the delay. No evidence was presented that Grievant had been advised regarding what the Agency considered a reasonable time to complete processing a potential disciplinary action.

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<sup>3</sup> The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

<sup>4</sup> See, Va. Code § 37.1-1 and 12 VAC 35-115-30.

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>5</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, and (3) the disciplinary action was free of improper motive.

The Agency has inconsistently applied disciplinary action. Ms. A reported the incident to Grievant who reported the incident to the Assistant Nursing Executive. Under Departmental Instruction 201, all three employees were obligated to report the incident to the Facility Director. None did so. The Agency did not take disciplinary action against Ms. A. The Agency issued the Assistant Nursing Executive a Group I Written Notice. Although the Agency did not take disciplinary action against Ms. A, it could argue that disciplinary action was appropriate for Grievant because Grievant was a supervisor who held greater authority and had greater experience to hold her to a higher standard. The difficulty with this argument is that the Assistant Nursing Executive was a supervisor who held greater authority than did Grievant and presumably should hold better judgment as to whether the Nurse’s behavior was client abuse. Under this reasoning, the Agency should have given the Assistant Nursing Executive at least a Group II Written Notice. By giving the Assistant Nursing Executive a Group I Written Notice, the Agency inconsistently applied disciplinary action. The disciplinary action taken against Grievant must be reduced to a Group I Written Notice.

Grievant discussed the incident with the Assistant Nursing Executive. The Assistant Nursing Executive told Grievant that the matter did not need to be reported to the Facility Director as possible client abuse. Grievant had a duty to make an independent decision regarding whether to report the incident to the Facility Director. Although Grievant was expected to follow the instructions of her supervisor, Grievant has not presented sufficient evidence to show that the Assistant Nursing Executive’s influence on Grievant was significant enough to a bridge her independent duty to report. Accordingly, there is no basis to further mitigate the disciplinary action based on Grievant’s discussions with the Assistant Nursing Executive.

## DECISION

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<sup>5</sup> Va. Code § 2.2-3005.

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

### **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> St., 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 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.<sup>6</sup>

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<sup>6</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

[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