

Issue: Group II Written Notice (unsatisfactory performance, failure to follow instructions); Hearing Date: 11/15/11; Decision Issued: 11/16/11; Agency: DJJ; AHO: Carl Wilson Schmidt, Esq.; Case No. 9700; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9700

Hearing Date: November 15, 2011
Decision Issued: November 16, 2011

PROCEDURAL HISTORY

On May 17, 2011, Grievant was issued a Group II Written Notice of disciplinary action for unsatisfactory job performance and failure to follow policy.

On June 16, 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 October 24, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 15, 2011, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Representative
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 Juvenile Justice employs Grievant as a Corrections Nurse–LPN at one of its Facilities. She has been employed by the Agency for approximately two years. The objective of Grievant's position is to "provide Medical Services to youth at [Facility]."¹ No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

Grievant was responsible for dispensing prescription medication to residents at the Facility. She received training as a nursing school student and during her orientation training at the Facility regarding the procedures to follow to dispense medication. She was aware of the five rights. In other words, the right medication must be given to the right patient, at the right time, in the right dosage, and via the right route (e.g., taken orally, etc.).

In order to determine whether she was giving medication to the right patient, Grievant received training that she should ask the name of a resident and have the resident confirm his name.

On April 27, 2011, Grievant and Officer B were in the dayroom with a group of residents who were lined up for "pill call". Grievant did not know Resident L or Resident H. Grievant called out the name of Resident L. Resident H approached Grievant. Grievant did not ask Resident H if he was Resident L. Grievant gave Resident H 30 mg

¹ Agency Exhibit 7.

of Vyvanse. The medication had been prescribed for Resident L and not for Resident H. Immediately after Resident H returned to the dorm area, Resident L stepped forward. Officer B heard Resident L say that his name was Resident L. Grievant informed Resident H of the medication error. She informed him of the correct color of his morning medicine dosage and advised him of the protocol to follow. Resident H was admitted to the infirmary pursuant to a doctor's orders. Grievant informed Facility managers that she had given medication to the wrong resident.

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."

"[U]nsatisfactory work performance" is a Group I offense.³ In order to prove unsatisfactory work performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

Grievant received training at the Facility regarding the proper protocol to dispense medication to residents. She knew or should have known to ask the resident his name and have the resident confirm his name. On April 27, 2011, Grievant failed to ask Resident H if his name was Resident L. Grievant assumed that by calling out the name of Resident L to the group that only Resident L would approach her at that time. Grievant knew or should have known that residents often attempted to exchange medication among themselves. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice. 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. In this case, Resident H was given Vyvanse which is a central nervous system stimulant. It affects chemicals in the brain and nerves that contribute to hyperactivity and impulse control. Vyvanse is a drug of abuse and can be habit forming. Using Vyvanse improperly can cause death or serious side effects on the heart. By giving the wrong medication to Resident H, Grievant placed Resident H's health in jeopardy, required the Agency to devote additional resources to monitor Resident H's health, and potentially exposed the Agency to civil liability. The Agency has presented sufficient basis to elevate the disciplinary action from a Group I to a Group II Written Notice.

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

³ See Attachment A, DHRM Policy 1.60.

Grievant argued that when Resident H approached her, she asked Resident H if he was Resident L and that Resident H nodded “yes”. The evidence does not support this assertion. Grievant made this claim for the first time at the hearing. Grievant wrote in her incident report that, “When I called Resident L up to take his meds, Resident H stepped up instead.” After discovering the error, Grievant’s reaction was to educate Resident H regarding the color of the proper medication for him to take. She did not scold him for lying. If Resident H had lied to Grievant about his identify, it would have been unnecessary for Grievant to educate Resident H regarding the color of medication he was supposed to take to avoid mistakes in the future.

Grievant argued that if the Agency had better policies in place, the error could have been avoided. For example, if the Agency had included photos of residents in the Medication Administration Records for each resident, it would have made it easier for Grievant to identify Resident L. Although adding photos of residents might have helped Grievant avoid the error, Grievant’s behavior must be measured based on the facts as they existed on April 27, 2011. On April 27, 2011, Grievant was expected to ask the resident his name before dispensing medication. She failed to do so thereby justifying the issuance of disciplinary action.

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 action.

DECISION

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

APPEAL RIGHTS

⁴ Va. Code § 2.2-3005.

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.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].

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

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer