

Issue: Group II Written Notice (failure to follow policy); Hearing Date: 11/09/11;
Decision Issued: 11/10/11; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.;
Case No. 9702; Outcome: No Relief – Agency Upheld; **Administrative Review:**
AHO Reconsideration Request received 11/15/11; AHO Reconsideration
Decision issued 11/17/11; Outcome: Original decision affirmed; Administrative
Review: AHO Reconsideration Request on 11/15/11 Reconsideration Decision
received 11/18/11; AHO response issued 11/29/11; Outcome: No jurisdiction to
reconsider; Administrative Review: EDR Ruling Request received 11/18/11;
EDR Ruling No. 2012-3180 issued 01/09/12; Outcome: AHO’s decision affirmed;
Administrative Review: DHRM Ruling Request received 11/18/11; DHRM ruling
issued 01/25/12; Outcome: AHO’s decision affirmed.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9702

Hearing Date: November 9, 2011
Decision Issued: November 10, 2011

PROCEDURAL HISTORY

On August 9, 2011, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow policy.

On August 9, 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 25, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 9, 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 Licensed Practical Nurse at one of its Facilities. Grievant had prior active disciplinary action. On May 6, 2011, Grievant received a Group I Written Notice for violation of policy.

Grievant was responsible for administering medication to patients. The Agency used a preprinted form known as a Medication Administration Record (MAR) for each patient receiving medication. For each medication to be given to a patient, the MAR form showed a blank space under each date for a particular time period. When Grievant gave medication to a patient on a particular date, she was expected to write her initials in the blank space under the date the medication was given. On days Grievant did not give medication to a patient, she was expected to write a circle in the blank space under the date medication was not given to the patient. The Agency refers to this process as charting.

The Supervisor conducted a Medication Variance Investigation and reviewed the MARs for patients within Grievant's responsibility. The Supervisor observed that Grievant often failed to write in her initials or write a circle in the blank spaces for the dates of April 23 and April 24, 2011. The Supervisor made copies of the MARs that showed blank spaces for the dates of April 23 and April 24, 2011. On April 27, 2011, the Supervisor presented Grievant with a Notice of Improvement Needed/Substandard Performance stating:

Description of specific performance deficiencies and improvements needed; Failure to implement quality nursing care to patient population. The License Practical Nurses' Employee Work Profile identifies transcribing physician's orders and administering medications as a Core responsibility. [Grievant] fails to follow established medication policies and procedures which results in charting errors. On April 23, 2011 and April 24, 2011 a total of 47 medications (45 routine and 2 PRN) were not charted according to policy and procedure. The expectation is that physician's orders will be transcribed and medications administered in accordance to establish policies and procedures.¹

Patient MARs remain accessible to nurses for approximately three months. After Grievant received the Notice of Improvement Needed/Substandard Performance, she located the MARs with blank entries and wrote in her initials. In July 2011, the Agency compared the patient MARs showing Grievant's initials with the copies made by the Supervisor prior to April 27, 2011. The Agency concluded that Grievant had written her initials in the patient MARs after the errors had been identified to Grievant.

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."

Grievant was aware of her obligation to document immediately each time she gave a patient medication. Agency Policy 280-14, Medication Administration, Section 2(e) provides:

Administered medication is documented on the MAR as soon as the medication is given and before going to the next patient.

Grievant wrote in her initials on several patient MARs for the dates of April 23 and 24, 2011. The effect of Grievant's action was to give the appearance that Grievant had given medication to patients on April 23 and 24th and immediately documented that she had given the medication. Grievant had not actually documented the administration of medication as required by policy. Grievant falsified the patient MARs.

¹ Agency Exhibit 4.

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

Falsification of records is a Group III offense.³ The Agency considered Grievant's behavior to be contrary to Policy 280-14 and issued a Group II Written Notice for failure to comply with policy. Grievant's failure to comply with Policy 280-14 was an essential element to establish Grievant's falsification of records. Accordingly, the Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

Grievant denied that she wrote her initials in the blank spaces in the MARs. She argued that she did not have sufficient time or opportunity to write her initials on the MARs after the Supervisor gave Grievant the Notice of Improvement Needed/Substandard Performance on April 27, 2011.

The Agency has established that Grievant wrote her initials in the MARs after April 27, 2011. The Supervisor testified that she was familiar with Grievant's handwriting and that the MARs showed Grievant's initials for the dates of April 23 and April 24, 2011 and that those initials had to have been written after April 27, 2011. In addition, the Agency maintained a Nursing Master Sheet. Grievant signed her signature and initials on that sheet. The handwritten initials on the Nursing Master Sheet are consistent with the handwritten initials on the MARs for the dates of April 23 and April 24, 2011. Grievant did not offer any evidence as to who might have signed her initials on her behalf. Based on these considerations, there is sufficient evidence for the Hearing Officer to conclude that Grievant wrote her initials in the blank spaces of the patient MARs for the dates of April 23 and April 24, 2011.

The Agency has established that Grievant had sufficient opportunity to write her initials on the MARs after receiving the Notice of Improvement Needed/Substandard Performance. The Agency's evidence included copies of the MARs made on or about April 28, 2011. These copies showed Grievant's initials. Grievant had access to the MARs after she received the Notice of Improvement Needed/Substandard Performance. She likely wrote her initials on the MARs within less than a day of receiving the Notice of Improvement Needed/Substandard Performance on April 27, 2011.

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

³ See, Attachment A, DHRM Policy 1.60.

⁴ *Va. Code § 2.2-3005.*

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.

Grievant argued that the Agency treated her unfairly and contrary to Executive Directive 1. She presented no evidence that would support that assertion. There is no basis for the Hearing Officer to conclude that the Agency acted contrary to Executive Directive 1.

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

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].

S/Carl Wilson Schmidt

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.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 9702-R

Reconsideration Decision Issued: November 17, 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 states the arguments and evidence she presented or could have presented at the hearing but failed to do so. 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



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

November 29, 2011

[Grievant]

**In re: SECOND RECONSIDERATION REQUEST OF HEARING OFFICER'S DECISION
Grievance Hearing of [Grievant] v DBHDS
Case No. 9702**

A reconsideration decision was issued in this grievance on November 17, 2011. I no longer have jurisdiction over this matter and will take no further action at this time.

Sincerely,

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

CWS/mh

c: Claudia T. Farr, Director, EDR
Dick Roberts (via email)
Edie L. Rogan (via email)
Grace M. DiLiberto (via email)

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of
The Department of Behavioral Health and
Developmental Services

January 25, 2012

The grievant has requested an administrative review of the hearing officer's decision in Case No. 9702. For the reasons stated below, we will not interfere with the application of this hearing decision. The agency head of the Department of Human Resource Management (DHRM), Ms. Sara R. Wilson, has directed that I conduct this administrative review.

In his PROCEDURAL HISTORY, the hearing officer wrote, in relevant part, the following:

On August 9, 2011, Grievant was issued a Group II Written Notice of disciplinary action for failure-to follow policy.

On August 9, 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 25, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 9, 2011, a hearing was held at the Agency's office.

In his FINDINGS OF FACT, the hearing officer wrote, in relevant part, the following:

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 Licensed Practical Nurse at one of its Facilities. Grievant had prior active disciplinary action. On May 6, 2011, Grievant received a Group I Written Notice for violation of policy.

Grievant was responsible for administering medication to patients. The Agency used a preprinted form known as a Medication Administration Record (MAR) for each patient receiving medication. For each medication to be given to a patient, the MAR form showed a blank space under each date for a particular time period. When Grievant gave medication to a patient on a particular date, she was expected to write her initials in the blank space under the date the medication was given. On days Grievant did not give medication to a patient, she was expected to write a circle in the blank space under the date medication was not given to the patient. The Agency refers to this process as charting.

The Supervisor conducted a Medication Variance Investigation and

reviewed the MARs for patients within Grievant's responsibility. The Supervisor observed that Grievant often failed to write in her initials or write a circle in the blank spaces for the dates of April 23 and April 24, 2011. The Supervisor made copies of the MARs that showed blank spaces for the dates of April 23 and April 24, 2011. On April 27, 2011, the Supervisor presented Grievant with a Notice of Improvement Needed/Substandard Performance stating:

Description of specific performance deficiencies and improvements needed; Failure to implement quality nursing care to patient population. The License Practical Nurses' Employee Work Profile identifies transcribing physician's orders and administering medications as a Core responsibility. [Grievant] fails to follow established medication policies and procedures which results in charting errors. On April 23, 2011 and April 24, 2011 a total of 47 medications (45 routine and 2 PRN) were not charted according to policy and procedure. The expectation is that physician's orders will be transcribed and medications administered in accordance to establish policies and procedures."

Patient MARs remain accessible to nurses for approximately three months. After Grievant received the Notice of Improvement Needed/Substandard Performance, she located the MARs with blank entries and wrote in her initials. In July 2011, the Agency compared the patient MARs showing Grievant's initials with the copies made by the Supervisor prior to April 27, 2011. The Agency concluded that Grievant had written her initials in the patient MARs after the errors had been identified to Grievant.

In his CONCLUSIONS OF POLICY, the hearing officer wrote the following:

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." 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."

Grievant was aware of her obligation to document immediately each time she gave a patient medication. Agency Policy 280-14, Medication Administration, Section 2(e) provides:

Administered medication is documented on the MAR as soon as the medication is given and before going to the next patient.

Grievant wrote in her initials on several patient MARs for the dates of April 23 and 24, 2011. The effect of Grievant's action was to give the appearance that Grievant had given medication to patients on April 23 and 24 and immediately documented that she had given the medication. Grievant had not actually documented the administration of medication as required by policy. Grievant falsified the patient MARs.

Falsification of records is a Group III offense. The Agency considered Grievant's behavior to be contrary to Policy 280-14 and issued a Group II Written Notice for failure to comply with policy. Grievant's failure to comply with Policy 280-14 was an essential element to establish Grievant's falsification of records. Accordingly, the Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

Grievant denied that she wrote her initials in the blank spaces in the MARs. She argued that she did not have sufficient time or opportunity to write her initials on the MARs after the Supervisor gave Grievant the Notice of Improvement Needed/Substandard Performance on April 27, 2011.

The Agency has established that Grievant wrote her initials in the MARs after April 27, 2011. The Supervisor testified that she was familiar with Grievant's handwriting and that the MARs showed Grievant's initials for the dates of April 23 and April 24, 2011 and that those initials had to have been written after April 27, 2011. In addition, the Agency maintained a Nursing Master Sheet. Grievant signed her signature and initials on that sheet. The handwritten initials on the Nursing Master Sheet are consistent with the handwritten initials on the MARs for the dates of April 23 and April 24, 2011. Grievant did not offer any evidence as to who might have signed her initials on her behalf. Based on these considerations, there is sufficient evidence for the Hearing Officer to conclude that Grievant wrote her initials in the blank spaces of the patient MARs for the dates of April 23 and April 24, 2011.

The Agency has established that Grievant had sufficient opportunity to write her initials on the MARs after receiving the Notice of Improvement Needed/Substandard Performance. The Agency's evidence included copies of the MARs made on or about April 28, 2011. These copies showed Grievant's initials. Grievant had access to the MARs after she received the Notice of Improvement Needed/Substandard Performance. She likely wrote her initials on the MARs within less than a day of receiving the Notice of Improvement Needed/Substandard Performance on April 27, 2011.

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" 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 nonexclusive 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.

Grievant argued that the Agency treated her unfairly and contrary to Executive Directive 1. She presented no evidence that would support that assertion. There is no basis for the Hearing Officer to conclude that the Agency acted contrary to Executive Directive 1.

The hearing officer stated the following in his DECISION:

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

DISCUSSION

Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. By statute, the DHRM has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by DHRM or the agency in which the grievance is filed. The challenge must cite a particular mandate or provision in policy. This Department's authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

In his appeal to this Agency, the grievant requested an administrative review on the basis that the hearing decision is inconsistent with agency Policy No. 280-14, agency Policy No. 450-55, agency Policy No. 280-J and agency Policy No. 180-44. While the grievant referenced the aforementioned policies, according to the hearing decision, the only relevant policy is Policy No. 280-44 which deals with the obligation of the grievant to document on the MAR as soon as the medication is administered to a patient and before going on to the next patient. The grievant's performance regarding that task is the one for which the agency took disciplinary action.

Based on the above, DHRM concludes that the hearing officer did not violate any human resource management policy. Rather, it appears that the grievant is disagreeing with the hearing officer's assessment of the evidence and the conclusions he drew as a result of that assessment. Therefore, this Agency has no basis to interfere with the application of this decision.

Ernest G. Spratley
Assistant Director,
Office of Equal Employment Services