

Issues: Step 3 Performance Improvement Counseling (dispensing medication without authorization), Step 4 Performance Improvement Counseling (unable to meet performance expectations), and Termination; Hearing Date: 03/21/12; Decision Issued: 04/03/12; Agency: UVA Medical Center; AHO: Carl Wilson Schmidt, Esq.; Case No. 9775, 9776; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9775 / 9776

Hearing Date: March 21, 2012
Decision Issued: April 3, 2012

PROCEDURAL HISTORY

On December 5, 2011, Grievant was issued a Formal Performance Counseling Form, Step 3 of disciplinary action for administering medication without having physician's orders to do so. On January 10, 2012, the Agency revised the Formal Performance Counseling Form.

On December 30, 2011, Grievant was issued a Formal Performance Counseling Form, Step 4 of disciplinary action with removal for failure to meet performance expectations.

On January 3, 2012, 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 February 10, 2012, the EDR Director issued Ruling No. 2012-3283, 2012-3284 consolidating the grievances for a single hearing. On February 21, 2012, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 21, 2012, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's Counsel

Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the two Formal Performance Improvement Counseling forms?
2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy?
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:

University of Virginia Health System employed Grievant as a Registered Nurse, Clinician III. Grievant's Job Summary stated:

An experienced and highly skilled clinician. Utilizes an interdisciplinary approach to patient care services delivery across the continuum of care. Manages care and implements treatment plans at a highly developed skill level in collaboration with patients, their families, physicians, and other members of the healthcare team. Exhibits leadership characteristics consistently and autonomously. Is learning to negotiate the healthcare system to maximize the delivery of quality care and to minimize cost of patient care services.¹

¹ Agency Exhibit 11.

Grievant reported to the Supervisor who reported to the Manager. No evidence of prior active disciplinary action was introduced during the hearing. Grievant received an Overall Summary of "Fully Meets Expectations" on her 2010-2011 performance evaluation.²

Grievant had been providing pediatric care with the Agency for over 27 years. She was licensed by the Commonwealth of Virginia as a Nurse Practitioner. Prior to March 18, 2005, Grievant worked with the Agency's Professional Clinical Staff as a Nurse Practitioner. As a Nurse Practitioner she had the authority to prescribe certain medications for outpatients based on her medical judgment. On July 12, 2005, the Chair of the Credentials Committee sent Grievant a letter about her resignation from that position and stated:

In accordance with the Clinical Staff By-Laws and Medical Center policy, your hospital clinical privileges were automatically terminated on that date.³

The Agency provided services to a nine year old male Patient who had suffered a traumatic brain injury. The Patient was scheduled to receive medications at specific times of the day. The medications were prescribed by a physician.

On November 27, 2011, Grievant was assigned responsibility to care for the Patient. During her care of the Patient, Grievant observed the Patient and concluded that the Patient should receive a stimulant laxative. The Patient was not in a state of emergency. Grievant administered a stimulant laxative to the Patient without first obtaining an order from a physician.

On December 2, 2011, the Patient's medical record was amended to show that medication was given by Grievant to the Patient on November 27, 2011.

On December 5, 2011, Grievant received a Formal Performance Counseling Form, Step 3 placing her on a Performance Warning from December 5, 2011 through March 5, 2012. Grievant was advised that "All performance expectations for the job must be met during this Performance Warning Period. Failure to meet performance expectations will result in termination." Grievant's Performance Improvement plan required:

Perform nursing care duties (assessments, treatments, medications, and unit support functions) in a timely and efficient manner with completion of work at the end of the shift. [Grievant] should model clinical behaviors

² Grievant Exhibit 5.

³ Agency Exhibit 13.

associated with the clinician III leader including managing a full assignment, admissions, discharges, and unit clinical leader support.⁴

On November 30, 2011, December 5, 2011, and December 6, 2011, Grievant met with the Manager to discuss Grievant's work performance. The Manager drafted a document summarizing their discussions. The document listed Grievant's expectations to include, "provide timely care to patients assigned at [the Facility], as many as 4 patients with shift management responsibilities, as in the intermediate care nursing standard, including assessments, treatments, and medication administration. Documentation of such will be completed within her assigned shift except in extenuating circumstances."⁵

The Agency was obligated to pay Grievant if Grievant worked hours in excess of her scheduled shift. On December 9, 2011, Grievant exceeded her shift by 1.5 hours. On December 11 2011, Grievant worked 45 minutes after her shift ended. On December 12, 2011, Grievant worked 35 minutes after her shift ended.

CONCLUSIONS OF POLICY

Medical Center Human Resources Policy Number 701 sets forth the Agency's Employee Standards of Performance. Employee performance issues are addressed through a process of progressive performance improvement counseling. This process consists of four steps: (1) informal counseling, (2) formal performance improvement counseling, (3) performance warning and/or suspension, and (4) termination. In some cases, the Agency may bypass steps 1 and 2.

Formal Performance Improvement Counseling, Step 3

Medical Center Policy number 259 governs Medical Management by Agency employees. Under this policy, "medication" includes "prescription and over the counter products, diagnostic agents, and complementary and alternative products." The policy requires:

Medication shall be administered in accordance with the following standards:

Correct patient, correct medication, correct dose, correct time, correct route.⁶

⁴ Agency Exhibit 3.

⁵ Agency Exhibit 12.

⁶ Agency Exhibit 5.

Grievant failed to comply with Policy 259. The Patient did not have an order to receive the laxative at the time Grievant administered it. The absence of an order means the Grievant did not give the drug to the correct patient.⁷ She did not give the correct medication because the Patient was not authorized to receive the drug. The correct dose would be zero in the absence of an order to administer a drug.

Medical Center Human Resources Policy number 701 governs Employee Standards of Performance. This Policy establishes four Steps. Step 1 is Informal Counseling. Step 2 is Formal Performance Improvement Counseling. Step 3 is Performance Warning and/or Suspension. Step 4 is termination. The Agency is not always required to issue a Step 1 or a Step 2 prior to issuing a Step 3. Examples of an employee's behavior that constitutes a "first offense serious misconduct" that may warrant issuance of a performance warning and suspension without previous progressive counseling includes but is not limited to "[a]ny intentional misconduct that materially interferes with the Medical Center's performance of its responsibilities."

In the Agency's judgment, Grievant engaged in intentional misconduct that materially interfered with the performance of its responsibilities. Grievant argued that the Agency should not have characterized her actions as a Step 3 because she had not yet received a Step 1 or a Step 2 Formal Performance Improvement Counseling.

The Agency has established that Grievant intentionally gave a drug to the Patient. Grievant's behavior was misconduct because it was prohibited by policy. The Agency was responsible for providing services to patients as defined by and authorized by doctors and nurse practitioners acting within the scope of their authority. The Agency's ability to control what medications are given to patients is a fundamental function of rendering competent patient care. By acting outside the scope of her authority as a Clinician III, Grievant undermined the Agencies ability to control the services rendered to the Patient. The Agency has presented sufficient evidence to support its judgment that the Grievant's behavior rose to the level of a Step 3 offense as a first offense. The Agency was authorized to place Grievant on a 90 day Performance Warning.

Grievant was licensed by the Commonwealth of Virginia as a Practical Nurse. She had the authority within the scope of her license to prescribe the stimulant laxative. Grievant observed the Patient's circumstances and concluded the Patient should receive a stimulant laxative. Grievant relied upon her judgment based on her experience as a Nurse Practitioner prior to 2005. Grievant's judgment regarding the Patient's need for medication likely was correct.⁸ Grievant, however, did not have the authority to implement her conclusions regarding the need for medication. The Patient

⁷ Grievant did not have authority from the Agency to issue an order to authorize her medication administration.

⁸ Grievant was supervised by Dr. S from 1984 to 2005. Dr. S "was very comfortable with [Grievant] managing pediatric bowel care" during that time period without a physician's order based on her judgment. See, Grievant Exhibit 12.

was not in a state of emergency. Grievant could have contacted a physician working at the Facility and asked the physician to issue an order authorizing the medication. The fact that the Patient was not harmed by Grievant's behavior does not excuse her failure to comply with the boundaries of her position as a Clinician III.

Formal Performance Improvement Counseling Step 4.

The Manager met with Grievant on November 30, 2011, December 5, 2011, and December 6, 2011 to discuss Grievant's work performance. The Manager instructed Grievant to perform her nursing care duties in a timely and efficient manner with completion of work at the end of the shift. On December 9, 2011, December 11, 2011, and December 12, 2011, Grievant did not complete her work duties by the end of her shift.⁹ She had to work overtime hours for which the Agency was obligated to provide her with additional compensation. Grievant was subject to a Performance Warning requiring that she meet all of the performance expectations of her job during the Performance Warning Period including the performance expectation to complete her work by the end of her regular shift. Grievant failed to meet all of her performance expectations thereby justifying the issuance of disciplinary action. Upon the issuance of a Formal Performance Counseling Form, Step 4, the Agency was authorized to remove Grievant from employment.

Mitigation

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...."¹⁰ 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

⁹ Grievant's regular workload would include caring for up to four patients. On December 9, 2011, December 11, 2011, and December 12, 2011, Grievant cared for three patients. Grievant's workload did not require her to work beyond the end of her scheduled shift.

¹⁰ Va. Code § 2.2-3005.

For the reasons stated herein, the Agency's issuance to the Grievant of a Formal Improvement Counseling Form, Step 3 with Performance Warning is **upheld**. The Agency's issuance to the Grievant of a Formal Improvement Counseling Form, Step 4 with removal 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.¹¹

[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

¹¹ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.