

Issues: Management Actions (assignment of duties), Demotion and Transfer; Hearing Date: 04/20/12; Decision Issued: 04/29/12; Agency: DBHDS; AHO: Jane E. Schroeder, Esq.; Case No.9793; Outcome: No Relief – Agency Upheld;  
**Administrative Review: EDR Admin Review request received 05/10/12; EDR Ruling No. 2012-3350 issued 07/13/12; Outcome: Remanded to AHO; Remand Decision issued 08/06/12; Outcome: Original decision affirmed; Administrative Review: EDR Admin Review request on Remand Decision received 08/14/12; EDR Ruling No. 2013-3410 issued 09/26/12; Outcome: AHO's decision affirmed.**

**COMMONWEALTH OF VIRGINIA**  
*Department of Employment Dispute Resolution*  
**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In the matter of Case Number 9793

Hearing Date: April 20, 2012

Decision Issued: April 29, 2012

**PROCEDURAL HISTORY**

The Grievant was employed as a Medical Technician ("Med Tech") at the agency. On September 29, 2011, the agency removed the Grievant from the Med Tech program, demoted her to Direct Support Professional (DSP), and transferred her to another home on the same agency campus. The Grievant initiated the Employee Grievance Procedure on October 27, 2011 to dispute the removal from the Med Tech program, the demotion and the transfer. The grievance was not resolved during the management resolution steps and the grievance was subsequently qualified for hearing on February 7, 2012. On March 26, 2012, the hearing officer was assigned to hear the case.

Telephonic pre-hearing conferences were held on March 28, and April 18, 2012. The hearing was on April 20, 2012. Nine witnesses, including the grievant, testified. Two potential witnesses for the Grievant were unavailable on the date of the hearing. The proffer by the attorney for the Grievant that the testimony would be redundant was accepted by the hearing officer. The agency's and grievant's exhibits were entered into evidence without objection. The Agency's exhibits are identified as Exhibits Agency A-V. The Grievant's exhibits are identified as Exhibits Grievant 1-5. The nine hour hearing was recorded on a digital recorder and stored on seven compact disks ("CD 1- 7").

**APPEARANCES**

Grievant  
Counsel for Grievant  
Agency Representative

Witnesses for Agency:  
#1 Team Leader  
#2 Health Care Coordinator  
#3 Director of Residential Services

Witness for Grievant:

- #4 Grievant
- #5 Registered Nurse
- #6 Med Tech A
- #7 Med Tech B
- #8 Director of Program Compliance
- #9 Shift Supervisor

### **ISSUES**

Whether to uphold, reduce, or rescind the Grievant's removal from the Med Tech Program, her demotion from Med Tech Program to Direct Support Professional, her transfer from Home 7A to Home 5A, and her subsequent lost wages.

### **BURDEN OF PROOF**

In disciplinary actions and dismissals for unsatisfactory performance, the agency must present its evidence first and the burden of proof is on the Agency to show by a preponderance of the evidence that its action against the Grievant was warranted and appropriate under the circumstances. In all other actions, the employee must present her evidence first and the burden of proof is on the employee to prove her claim by a preponderance of the evidence. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. (Grievance Procedure Manual). In this case, the Grievant's counsel said he considered this case to be a disciplinary action. Although the hearing officer reserved the right to determine whether this was a disciplinary action, the parties agreed that the agency would present evidence first.

### **FINDINGS OF FACT**

1. The Grievant began working at the agency in 2002 as a Direct Support Professional. In 2005, she was trained to give medication and became a Medication Aide. She was promoted to Med Tech in 2009. She continued as a Med Tech until she was removed from the Med Tech Program in September, 2011, and she has worked since then as a Direct Support Professional.<sup>1</sup>
2. Personnel at the agency authorized to administer medication to the residents include: Med Tech Staff, Medication Eligible Staff (this includes Medication Aides), Licensed Practical Nurses, Registered Nurses, Physicians, and Dentists.<sup>2</sup>

---

<sup>1</sup>Testimony of Grievant

<sup>2</sup>Agency Exhibit A, page 1

3. The Virginia Board of Nursing defines a Med Tech as “an unlicensed person who has successfully completed an education program approved by the Board of Nursing to administer drugs in accordance with a physician’s instructions pertaining to dosage, frequency and manner of administration, and in accordance with regulations promulgated by the Board of Pharmacy related to security and record keeping, when drugs would normally self-administered.”<sup>3</sup>
4. Staff at the agency is taught to administer medication through an initial training, and periodic refresher courses. In addition, a written Medication Administration Policy, which is periodically updated, is kept on site at the agency in each building’s medication room in a binder along with other policies and instructions regarding medication administration.<sup>4</sup>
5. The Grievant completed the initial training in 2005, and signed a document that acknowledge that her medication administering privileges could be “revoked for violation of procedure and /or accruing six (6) medication errors in a six (6) month period.”<sup>5</sup>
6. In addition, the Grievant attended periodic refresher courses, including training sessions on August 8, 2007, September 25, 2009, March 24, 2010, and August 3, 2011, at which she signed attendance sheets.<sup>6</sup> in her testimony, the Grievant admitted going to some refresher courses, but did not recall when those occurred.
7. The Medication Administration Policy outlines the policies and procedures to ensure the accurate administration and documentation of medications.<sup>7</sup>
8. The agency maintains a medication variance system to report problems with medication administration. When a variance is discovered, a Medication Variance Report Form is filled out by agency personnel. The form is given to a member of the nursing staff who logs in the information to a computer database and assigns a number to the variance.<sup>8</sup>
9. The agency has a Clinical Review Team that meets to review the medication variances. The members of the team in September, 2011 were the Chief Nurse Executive, Health Care Coordinator, Program Compliance Director and the Residential Services Director. (A fifth position, Medication Program Nurse Coordinator, was not filled at the time). According to the Agency Instruction 6430, dated June 7, 2011, a majority of the members of the team are required for decision making. On page 3 of this document, it states: “The members of the Clinical Review Team have the authority to revoke the (Agency

---

<sup>3</sup>Agency Exhibit B, page 1

<sup>4</sup>Agency Exhibit A, Testimony of Witnesses 1, 2, 3, 4, 5, 7

<sup>5</sup>Agency Exhibit 5

<sup>7</sup>Agency Exhibit K, page 3

<sup>8</sup>Agency Exhibit G, page 1

Personnel's) Medication Technician qualification for unsatisfactory medication administration performance.”<sup>9</sup>

10. The nursing department uses the variance to teach personnel correct procedure and to counsel employees.<sup>10</sup>
11. On January 11, 2011, the Grievant was given a verbal counseling by the Health Care Coordinator after a medication variance by the Grievant. At that time, the Education Tracking Form filled and signed by both the Health Care Coordinator and the Grievant, indicates that the Health Care Coordinator reviewed the Medication Administration Policy (Revised 8/25/10) with the Grievant.<sup>11</sup>
12. The Grievant testified that her signatures were on the Education Tracking Form dated 1/11/11, but denies that the medication policy was reviewed with her.<sup>12</sup> In the Grievance Form A, Attachment D, the Grievant denies seeing the Medication Administration Policy prior to her demotion in September, 2011.<sup>13</sup> It is the finding of this hearing officer that the Grievant had been made aware of the current Medication Administration Policy on several occasions prior to her demotion including during the verbal counseling in January, 2011.
13. In addition to the verbal counseling in January, 2011, the Grievant received variances as noted on the following forms:
  - a. 3/1/11 Education Tracking Form: Not following procedure when medication not available<sup>14</sup>
  - b. 4/1/11 Medication Variance Report Form: followed a discontinued order<sup>15</sup>
  - c. 7/9/11 Corrective Action Protocol: administering medication to individuals in the dining room
  - d. 7/18/11 Extra Dose Accountability Form: failure to reorder medication<sup>16</sup>
  - e. 8/10/11 Education Tracking Form: Check med cart after passing meds. Compare MAR and label before administering<sup>17</sup>

---

<sup>9</sup>Agency Exhibit D

<sup>10</sup>Agency Exhibit G

<sup>11</sup>Agency Exhibit L, page 1

<sup>12</sup>Testimony of Grievant

<sup>13</sup>Agency Exhibit V, page 19

<sup>14</sup>Agency Exhibit L, page 12

<sup>15</sup>Agency Exhibit N

<sup>16</sup>Agency Exhibit O, page 4

<sup>17</sup>Agency Exhibit M

- f. 8/10/11 Education Tracking Form: Reorder bulk meds when 1/3 empty<sup>18</sup>
  - g. 9/8/11 Corrective Action Protocol: pre-pouring medication<sup>19</sup>
  - h. 9/16/11 Corrective Action Protocol: pre-pouring medication<sup>20</sup>
14. On September 16, 2011, the Team Leader, after observing the Grievant pre-pouring meds and giving meds to more than one individual at a time, suspended the Grievant from administering medication until she met with the Health Care Coordinator.<sup>21</sup> On September 28, 2011, the Health Care Coordinator suspended the Grievant from administering medication and gave the Grievant one day to present any mitigating circumstances that would warrant the continuation in the Medication Administration Program.<sup>22</sup>
  15. On September 29, the Grievant responded in a memo. In the memo, she admitted violating policies and procedures by pre-pouring meds and giving meds to more than one person at a time. She stated it was a common practice among med techs.<sup>23</sup>
  16. The testimony of two other med techs, the night shift supervisor, the registered nurse, and the team leader was that pre-pouring medication and giving meds to more than one person at a time was against the agency's policies, and was not a common practice among med techs and other medication eligible personnel.<sup>24</sup>
  17. The Registered Nurse testified that he recalls discuss variances with the Grievant on August 10, 2011 when there was a problem with the proper charting of meds, a missing dose of meds, and a failure to reorder meds as stated in policy. He also recalled counseling the Grievant in March, 2011 regarding her failure to notify a nurse when a medication was not available.<sup>25</sup>
  18. The Health Care Coordinator consulted with the Director of Residential Services and the Chief Nurse Executive and all three agreed with the decision to revoke the Grievant's med tech qualification because of unsatisfactory medication administration performance.

---

<sup>18</sup>Agency Exhibit O

<sup>19</sup>Agency Exhibit Q

<sup>20</sup>Agency Exhibit R

<sup>21</sup>Agency, Exhibit R

<sup>22</sup>Agency Exhibit V, page 7

<sup>23</sup>Agency Exhibit V, page 8

<sup>24</sup>Testimony of Witnesses 1,2,3,5,6,7,8,9

<sup>25</sup>Testimony of Registered Nurse, Agency Exhibits L, page 12, M and O

Since the decision was made by three of the four members of the Clinical Review Team, it was a majority opinion of the Clinical Review Team<sup>26</sup>

19. Note: The fourth member of the Clinical Review Team, the Director of Program Compliance, testified that she had been part of the Clinical Review Team for two and a half years, but she did not participate in the discussion regarding the removal of the Grievant's med tech privileges. She also did not correctly name the members of the team (she included the pharmacist and the doctor who are not on the team). Incredibly, she testified that she was unaware that the Clinical Review Team had the authority to revoke a med tech's qualification.<sup>27</sup>
20. On September 29, 2011, the Health Care Coordinator revoked the Grievant's medication administration privileges.<sup>28</sup> on the same day, the Director of Residential Services informed the Grievant that she was demoted to a Direct Support Professional (DSP). Since there was no opening for a DSP at her present job location, she was assigned as a DSP at another location on the same campus.<sup>29</sup>

### **APPLICABLE LAW AND OPINION**

The Virginia Personnel Act, VA Code § 2.2-2900 et. seq., establishes the procedures and policies applicable to employment in Virginia. It includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provisions for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid government interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653,656 (1989).

VA Code § 2.2-3000(A) provides:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints. To that end, employees shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management. To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employee disputes that may arise between state

---

<sup>26</sup>Testimony of Director of Residential Services and Health Care Coordinator

<sup>27</sup>Testimony of Director of Program Compliance

<sup>29</sup>Agency Exhibit v, page 10, Testimony of Director of Residential Services

agencies and those employees who have access to the procedure under § 2.2-3001.

The agency has a group of policies and instructions to establish procedures for administration and documentation of medications and the review of medication variances. The Medication Administration Policy (Revised Date 8/25/10) that was in effect at the time of the Grievant's demotion clearly outlines the procedures for the administration and documentation of medications.

Under section XI. Preparing Medications, Rule 1. states: "Medication shall be prepared for administration just prior to their administration. Pre-pouring of medication is not allowed." Rule 3. states: "Medications shall be prepared for only one person at a time."<sup>30</sup>

The Grievant, in writing and her testimony admits that she violated the Medication Administration Policies. Her excuse that everyone does it was not substantiated by the evidence. In any case, the violations of the policies pose a potential risk to the residents receiving the medication.

The Grievant signed an acknowledgment that she could lose her medication administration privileges for violation of policy, and that lose would result in a reduction in pay and reassignment to another position.

The Clinical Review Team of the agency has the authority to revoke the med tech qualification for unsatisfactory performance. In this case, the majority (three out of four) of the team reviewed the violations by the Grievant and decided to revoke the Grievant's med tech qualification. This action by the Clinical Review Team is not viewed by the hearing officer as a disciplinary action. It is an action that is a power given to the Clinical Review Team to ensure the safety of the individuals in the agency's care. Given the Grievant's admissions that she violated the medication administration policies, the number of violations, and the repeat violations after being counseled, the revocation of the Grievant's med tech qualification by the Clinical Review Team was appropriate.

### **DECISION**

The decision of the Clinical Review Team to revoke the med tech privileges of the Grievant is upheld. The Grievant's removal from the Med Tech Program is upheld. Her demotion from Med Tech Program to Direct Support Professional and subsequent transfer from Home 7A to Home 5A are upheld. Her subsequent lost wages are therefore not due to be returned to her. The hearing officer finds there are no aggravating or mitigating circumstances that are pertinent to the decision.

---

<sup>30</sup>Agency Exhibit K, page 5



## APPEAL RIGHTS

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

**Administrative Review:** This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.
2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing office to revise the decision to conform it to written policy. Requests should be made to the Director of the Department of Human Resources Management, 101 N. 14<sup>th</sup> Street, 12<sup>th</sup> Floor, Richmond, Virginia 23219 or faxed to (804) 371-7401.
3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the EDR Director, 600 East Main, Suite 301, Richmond, VA 23219 or faxed to (804) 786-0111.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar** days of the **date of the original hearing decision**. (Note: the 15-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days). A copy of each appeal must be provided to the other party.

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.

April 29, 2012

---

Jane E. Schroeder, Hearing Officer

**COMMONWEALTH OF VIRGINIA**  
*Department of Employment Dispute Resolution*  
DIVISION OF HEARINGS

**ADDENDUM TO DECISION OF HEARING OFFICER**

**UPON REMAND OF THE DECISION AFTER ADMINISTRATIVE REVIEW**

In the matter of EDR Ruling No. 2012-3350

Case Remanded: July 13, 2012

Addendum Issued: August 6, 2012

**ISSUES TO BE ADDRESSED UPON REMAND**

**ISSUE 1. *Failure to Properly Review the Management Actions as Disciplinary, Classify the Level of Discipline, and Consider Mitigating Circumstances***

The hearing officer held that the agency's revocation of the grievant's med tech qualification was not a disciplinary action. However, the hearing decision is silent as to whether the grievant's subsequent removal from the Med Tech Program, demotion to the DSP position, and transfer to a new location were taken primarily for disciplinary reasons because of the grievant's revoked medication administration privileges....

EDR remands the decision for further consideration by the hearing officer to consider the totality of the management actions and determine whether the action was taken primarily for disciplinary reasons against the grievant. If the hearing officer finds the agency's actions as disciplinary, then the hearing officer must apply the framework for determining whether the discipline was warranted and appropriate, and whether the actions were consistent with law and policy and if mitigating and/or aggravating circumstances existed.

**RECONSIDERATION OF ISSUE 1**

As I previously held, the agency's revocation of the grievant's med tech qualification was not a disciplinary action. Revocation of med tech qualification by the Clinical Review Team of the agency is a power given to the Clinical Review Team to ensure the safety of the individuals in the agency's care. In this case, the grievant admitted in writing and her testimony that she violated the Medication Administration Policies.

The Grievant signed an acknowledgment that she could lose her medication administration privileges for violation of policy, and that loss would result in a reduction in pay and reassignment to another position. When the Clinical Review Team revoked the grievant's med tech qualification, the agency removed the grievant from the med tech program. This removal from the program was not a disciplinary measure, but as a natural consequence of the loss of the med tech qualification. The job of a med tech is to dispense the medication. If one has lost the ability to give medications, then one cannot perform the main function of the job. In this case the grievant was given another position, one that does not include medication administration. This reassignment to another position was not a disciplinary measure. It was a position that the grievant could fulfill without med tech privileges. That position was not available in the building where the grievant had been working. The agency assigned her to the adjacent building where there was an opening. Again, I do not view this transfer to the next building as a disciplinary measure.

Reviewing totality of the management actions including the loss of med tech privileges, the removal from the Med Tech Program, demotion to the DSP position, and transfer to a new location, I find that the actions were not taken primarily for disciplinary reasons.

## **ISSUE 2: DUE PROCESS**

ISSUE 2: The grievant alleges that the hearing officer "erroneously failed to make any specific findings of fact in the Hearing Decision as to whether or not this Due Process memo provided adequate and sufficient notification to Grievant of the charge(s) against her." Specifically, she asserts the agency's due process notification "did not contain an adequate or sufficient explanation or the evidence the Agency was using against her," nor did it contain "specific details of the wrongdoing," "any dates of the alleged wrong doing," or identifiable violated policies.... In this case, the grievant did not receive a Written Notice, but she did receive three informal discipline and/or verbal counseling memos which she alleges were primarily issued for disciplinary reasons. As such, the grievant asserts the memos were inadequate notice of agency's alleged charges against her....

It appears at first blush that the grievant may not have been fully informed of the specific date, time period, or surrounding circumstances for which she was charged with the multiple variances. Furthermore, the hearing decision did not squarely address whether the grievant received adequate notice of her charges.

Accordingly, this Office remands this decision for further clarification of whether the grievant had adequate notice of the charges set forth by the agency when it revoked

her medication administration eligibility status, demoted the grievant to a lower position, and transferred her to a different location.

## **RECONSIDERATION OF ISSUE 2**

As stated in Fact 5, the grievant acknowledged that her medication administering privileges could be revoked for

1. violation of procedure and/or
2. accruing six medication errors in a six month period.

The grievant had received verbal counseling and variances for several procedural violations.

However, the revocation in this case was based on the first prong, not on the second prong. The violation of procedure occurred on September 16, 2011 when the grievant was observed pre-pouring medications. She was notified that day of that day that she was suspended from administering meds based on the observation that day of that specific offense. On September 28, the Health Care Coordinator gave the grievant written notice of the specific problem of pre-pouring meds. The grievant responded in writing that day. In her response, she admitting violating policies by pre-pouring meds. The decision had footnotes referring to exhibits that included the written notification and response.

The grievant's due process rights were not violated in this case. She received adequate notice of the specific charge against her on a specific date. She was given an opportunity to respond. In her response, she admitted violating the specific charge against her.

## **RECONSIDER DECISION UPON REMAND**

The decision of the Clinical Review Team to revoke the med tech privileges of the Grievant is upheld. The Grievant's removal from the Med Tech Program is upheld. Her demotion from Med Tech Program to Direct Support Professional and subsequent transfer from Home 7A to Home 5A are upheld. The totality of the management actions were not taken primarily for disciplinary reasons against the grievant. Her subsequent lost wages are not due to be returned to her.

The grievant was giving adequate notice of the specific charge against her. Her due process rights were not violated.

## APPEAL RIGHTS

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject administrative and judicial review.

Both parties may request an administrative review of this reconsidered decision on any other new matter addressed in the reconsideration decision (i.e., any matters not previously part of the original decision). Any such requests must be **received** by the administrative reviewer **within 15 calendar days** of the date of the issuance of the reconsideration decision.

A hearing officer's original decision becomes a final hearing decision once all timely requests for administrative review have been decided. Within 30 calendar days of a final hearing decision, either party may appeal the final decision to the circuit court in the jurisdiction in which the grievance arose. Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.

August 6, 2012

---

Jane E. Schroeder, Hearing Officer