

Issue: Group II Written Notice (unsatisfactory performance), and Termination (due to accumulation); Hearing Date: 02/08/13; Decision Issued: 02/15/13; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10010; Outcome: No Relief – Agency Upheld; **Administrative Review: DHRM Ruling Request received 03/11/13; DHRM response issued 03/18/13; Outcome: Untimely – request denied.**



# ***COMMONWEALTH of VIRGINIA***

## ***Department of Human Resource Management***

### **OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

#### **DECISION OF HEARING OFFICER**

In re:

**Case Number: 10010**

Hearing Date: February 8, 2013  
Decision Issued: February 15, 2013

#### **PROCEDURAL HISTORY**

On December 11, 2012, Grievant was issued a Group II Written Notice of disciplinary action for unsatisfactory work performance. Grievant was removed from employment based on the accumulation of disciplinary action.

On December 12, 2012, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On January 9, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 8, 2013, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
Agency Party Designee  
Agency's 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 employed Grievant as a Registered Nurse II at one of its facilities. The purpose of her position was:

Utilizing knowledge base and experience, provides age-specific quality nursing care to adult psychiatric patients through the nursing process in accordance with hospital policy and procedures and standards of nursing practice. Evaluates, supervises, documents and provides guidance in performance of staff.<sup>1</sup>

Grievant had prior active disciplinary action. On May 27, 2011, Grievant received a Group I Written Notice for unsatisfactory work performance. On October 20, 2011, Grievant received a Group I Written Notice for unsatisfactory work performance. On July 24, 2012, Grievant received a Group II Written Notice for failure to follow written policy.

Patients must receive medication in accordance with their doctors' orders. Grievant was expected to know which medications she was to dispense and when to dispense those medications to satisfy the terms of each patient's doctor's orders.

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<sup>1</sup> Agency Exhibit 4.

On November 6, 2012, Grievant dispensed medication to Patient D at 1:50 p.m. She dispensed the same medication to Patient D at 3:55 p.m. The second dose was administered too soon following the first dose. Grievant gave Patient S antibiotic ointment instead of Lotrimin as prescribed by her doctor. Two patients were scheduled to receive medication at 9 p.m. Grievant did not dispense their medications until approximately 11 p.m.

## 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>2</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.”

Facility Policy L-7 governs Medication Administration Record (MAR). Under this policy, all nurses receive training and education and then demonstrate competency to use the MAR safely. In addition, the “nurse must always review the physician order sheet and ensure that the correct and legal patient name is on the order sheet and also on the MAR.” “All medications are to be administered in accordance with the instructions on the physician’s order and as directed by the pharmacist.” “Medications are given in a timely manner within one hour of the scheduled time.”<sup>3</sup>

Facility Policy L-6 governs Medication Events. A medication event is “any preventable event that may cause or lead to inappropriate medication use or patient harm while the medication is in the control of the health care professional.” “Disciplinary action may be instituted in situations of blatant, irresponsible patterns or errors, which have remained uncorrected and/or pose a health hazard to patients.”

“[U]nsatisfactory work performance” is a Group I offense.<sup>4</sup> 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.

On November 6, 2012, Grievant administered medication to Patient D contrary to her doctor’s order because Grievant administered a second dose prior to the time ordered. Grievant administered medication to Patient S contrary to her doctor’s order because Grievant administered the wrong medication. Grievant administered

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<sup>2</sup> The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

<sup>3</sup> Agency Exhibit 3.

<sup>4</sup> See Attachment A, DHRM Policy 1.60.

medication to two other patients after the time ordered by their doctors. By failing to comply with the patients' doctors' orders, Grievant acted contrary to Facility Policy L-7. By having so many errors in one day, Grievant established a pattern of errors constituting a Medication Event under Facility Policy L-6 thereby justifying the taking of disciplinary action. Grievant's work performance was unsatisfactory to the Agency. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice for unsatisfactory work performance.

An agency may issue a Group II Written Notice (and suspend without pay for up to ten workdays) if the employee has an active Group I Written Notice for the same offense in his or her personnel file. Grievant had a prior active Group I Written Notice for unsatisfactory work performance. Thus, the Agency may elevate the Group I Written Notice to a Group II Written Notice.

Upon the accumulation of two Group II Written Notices, an agency may remove an employee. Grievant has accumulated two Group II Written Notices and, thus, the Agency's decision to remove Grievant from employment must be upheld.

Grievant argued that she had been instructed by Ms. W to administer the medication to Patient D shortly after the first dose was administered. This argument has not been substantiated based on the facts presented. Ms. W did not testify that she had instructed Grievant to administer incorrectly the medication to Patient D. Grievant argued that she gave medication late because the patients refused to take the medication or were busy with other activities when the medication was supposed to be dispensed. If the Hearing Officer assumes for the sake of argument that Grievant had a sufficient reason to administer medication untimely, there remain sufficient facts with respect to the other patients to justify disciplinary action.

The Agency attempted to support Grievant's removal based on prior active disciplinary action from another State agency. When an employee leaves one State agency and begins working for another State agency, disciplinary action in the previous agency may not be used to support removal based on the accumulation 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 Human Resource Management ...."<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

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<sup>5</sup> 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.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is **upheld**. The Agency's decision to remove Grievant is **upheld** based upon the accumulation 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 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

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR 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:

Office of Employment Dispute Resolution  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto:EDR@dhrm.virginia.gov), or by fax to (804) 786-1606.

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 provide a copy of all of your appeals to the other party, EDR,

and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative 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>

[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

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

March 18, 2013

RE: **Grievance of [Grievant] v [DBHDS]**  
Case No. 10010

Dear [Grievant]:

The agency head of the Department of Human Resource Management, Ms. Sara Redding Wilson, has asked that I respond to your request for an administrative review of the hearing officer's decision in the above referenced case. Please note that, pursuant to the Grievance Procedure Manual, §7.2(a), either party to the grievance may request an administrative review within 15 calendar days from the date the decision was issued.

In the instant case, the above ruling was issued on February 15, 2013, and your request for an administrative review was received by this Department on March 11, 2013. Thus, we calculate that you exceeded the 15-day time period for submitting your request. You have offered no justifiable reason for exceeding the time period, so we cannot conduct the requested administrative review.

Sincerely,

Ernest G. Spratley

c: Sara R. Wilson, Director, DHRM  
Grace DiLiberto, DBHDS (email)  
Christopher Grab, Director, EDR (email)