

Issue: Group I Written Notice (failure to follow instructions/policy) and Termination (due to accumulation); Hearing Date: 02/22/13; Decision Issued: 03/01/13; Agency: DBHDS; AHO: Teron Galloway Lee, Esq.; Case No. 10022; Outcome: No Relief – Agency Upheld.

## **DECISION OF HEARING OFFICER**

**In the matter of**

**Case Number: 10022**

**Hearing Date: February 22, 2013**

**Decision Issued: March 1, 2013**

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### **SUMMARY OF DECISION**

The Agency had found Grievant failed to follow instructions/policy because Grievant did not properly store harmful chemicals after being previously counseled to do so. The Agency then issued Grievant a Group I Written Notice and terminated her due to Grievant having accumulated active Group III and I Written Notices. The Hearing Officer determined that Grievant engaged in the conduct alleged, it was misconduct, and the discipline was warranted. Thus, the Hearing Officer upheld the Agency's discipline.

### **HISTORY**

On January 7, 2013, the Agency issued Grievant a Group I Written Notice for failing to follow policy. Grievant was terminated due to the accumulation of several active Group Notices. On or about January 9, 2013, Grievant timely filed her grievance to challenge the Agency's action. On January 23, 2013, the Office of Employment Dispute Resolution ("EDR") assigned the undersigned as the hearing officer to this appeal. A prehearing conference ("PHC") was held on February 4, 2013, and then a scheduling order was issued that set the hearing date for February 15, 2013. This date was rescheduled for February 22, 2013.

On the date of the hearing and prior to commencing it, the parties were given an opportunity to present matters of concern to the Hearing Office. None were presented. The hearing officer also admitted the Agency's Exhibits 1 through 13 and Hearing Officer's Exhibits 1 through 5, to which no objections were made. Grievant was given an opportunity to submit exhibits but declined to do so.

At the hearing both parties were given the opportunity to make opening and closing statements and to call witnesses. Each party was provided the opportunity to cross examine any witness presented by the opposing party.

During the proceeding, the Agency was represented by its advocate and the Grievant represented herself.

### **APPEARANCES**

Advocate for Agency

Witness for the Agency (1 witness)

Grievant

Witnesses for Grievant (1 witness, Grievant)

**ISSUE**

Was the discipline warranted and appropriate under the 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 Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual (“GPM”) § 5.8(2). 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 all the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

1. The Agency is a hospital and cares for the mentally ill. (A Exh. 9, pp. 24-25).
2. Until her termination, the Agency had employed Grievant as a housekeeper since December 2005. (A Exh. 7). Grievant worked the 7:30 a.m. to 4:00 p.m. shift - the cleaning shift – at the Agency. Grievant’s duties required her to, among other things, clean patients’ rooms. Grievant routinely used hazardous chemicals/cleaning products in performing her job duties. Grievant’s job necessitated her using a cart on which cleaning products she used during her shift were located. The cart could be locked to safely keep patients from having access to harmful chemicals used by a housekeeper. (Testimony of Agency Witness; A Exh. 13).
3. On December 28, 2012, Grievant worked the cleaning shift from 7:30 a.m. to 4:00 p.m. in the geriatric section of the hospital. During that period, a nurse found a washroom aerosol spray by Lysol unattended in a patient’s room. On December 28, 2012, Grievant had been assigned to clean the room where the spray was found. In fact, Grievant admits to cleaning this room on December 28, 2012. Further, on that day no one else was designated to use Grievant’s housekeeping cart. (Testimonies of Agency Witness and Grievant; A Exhs. 9, 12).
4. The unattended spray incident was reported to the head nurse in charge. After providing Grievant with due process under the Standards of Conduct Policy No. 1.60, Grievant’s supervisor issued Grievant a Group I Written Notice. The notice described the offense as “[f]ailure to follow instructions and/or policy. Failed to properly store harmful chemicals after receiving a strong verbal warning.” (A Exh. 1).
5. Agency policy requires a housekeeper to keep cleaning fluids away from patients. All cleaning supplies are required to be placed back in the cart. Further, Agency policy insists a housekeeper keep his/her housekeeping cart with cleaning chemicals/fluids

locked for safety reasons. (Testimony of Agency Witness; A Exhs. 7, 9, 11 at p. 3, 13).

6. Grievant attended numerous monthly staff meetings and had received ongoing training regarding cleaning procedures and safety policies. (A Exhs. 7, 9)

7. Prior to the December 28, 2012 incident, on at least three occasions, Grievant had received counseling and/or verbal warnings for leaving chemicals in patients' rooms and/or leaving chemicals on top of her housekeeping cart unattended. One counseling session occurred early December 2012. (A Exhs. 4, 9). Grievant's conduct was in violation of the Agency policy. (Testimony of Agency Witness; A Exh. 13).

8. At the time Grievant received the Group I Written Notice, she had an active Group III Written Notice.

### **DETERMINATIONS AND OPINION**

The General Assembly enacted the *Virginia Personnel Act*, VA. Code §2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides 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/her rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in, and responsibility to, its employees and workplace. *Murray v. Stokes*, 237 VA. 653, 656 (1989).

*Va. Code* § 2.2-3000 (A) sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints... To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.<sup>1</sup>

To establish procedures on Standards of Conduct and Performances for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the *Code of Virginia*, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60. The Standards of Conduct provide a set of rules governing the

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<sup>1</sup> Grievance Procedural Manual §5.8

professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

Under the Standards of Conduct, Group I offenses are categorized as those that are less severe in nature, but warrant formal discipline; Group II offenses are more than minor in nature or repeat offenses. Further an offense is appropriately identified as a Group II offense when it significantly impacts business operations/constitute neglect of duty or violation of a policy/procedure. Group III offenses include misconduct of such a severe degree that an initial occurrence normally warrants termination. *See* Standards of Conduct Policy 1.60, at pp. 8,9.

On January 7, 2013, management issued Grievant a Group I Written Notice for the reason previously noted here. Further, Grievant was terminated due to the accumulation of active Written Notices. Accordingly, the Hearing Officer examines the evidence to determine if the Agency has met its burden.

#### **I. Analysis of Issue before the Hearing Officer**

##### **Issue: Whether the discipline was warranted and appropriate under the circumstances?**

##### **A. Did the employee engage in the behavior described in the Group I Written Notice and did that behavior constitute misconduct?**

The undisputed facts demonstrate that on December 28, 2012, a cleaning spray by Lysol was found unattended in a patient's room. The discovery occurred during the cleaning shift, the time period Grievant worked on December 28, 2012. Moreover, the evidence shows that housekeeping only occurred during the shift Grievant worked; she had been assigned to clean the room where the product was found; and Grievant's cart with cleaning supplies had only been assigned to her on that day.

Grievant argues that other employees had access to a closet that stored cleaning supplies. Therefore, she contends someone else could have obtained the cleaning product from the closet and left it in the patient's room.

In her careful deliberation, the Hearing Officer has considered Grievant's assertion and finds it unpersuasive. This is so because Grievant's claim is not practical as she does not offer an explanation regarding why another employee would need to bring a cleaning product in the relevant patient's room when only Grievant was assigned to clean it. Also, during her testimony, Grievant admitted cleaning the room. As her testimony continued, Grievant stated that she did not think she left the spray out. She then followed up by saying that she knew the product was put away. Having had an opportunity to observe the demeanor of this witness, the Hearing Officer finds her initial testimony indicating doubt about Grievant properly storing the product was more credible. Thus,

this testimony also weakens Grievant's claim that someone else could have left the spray in the patient's room.

To be fair to Grievant, the Hearing Officer does note that there is no evidence of someone actually observing Grievant leaving the cleaning product in the patient's room. But the preponderance of the evidence, including the undisputed facts set forth above, persuades the Hearing Officer that Grievant engaged in the conduct.

Next, the Hearing Officer examines if the behavior was misconduct. The evidence shows that Agency policy requires housekeepers to keep cleaning fluids away from patients. Moreover, the Agency policy insists that hazardous chemicals/ products not be left unattended. Further, policy mandates housekeepers keep their cleaning supplies locked in their carts when not in use. The evidence shows Grievant failed to follow these procedures and safety policies. Accordingly, her action was misconduct.

#### **B. Was the discipline consistent with policy and law?**

Patients housed at the Agency are mentally ill. Further, Grievant worked in the geriatric section of the hospital. Due to the patients' impaired mental status, which could be exasperated by their aged status, Grievant's failure to follow procedures to assure these patients do not have access to hazardous fluids could have likely lead to patient(s) harming themselves by improperly using the chemicals. Grievant had been counseled on several occasions about the identical misconduct. In fact the evidence shows that one such counseling session occurred days before the December 28, 2012 incident. Accordingly, the Hearing Officer finds the issuance of a formal Group I Written Notice was progressive discipline and consistent with policy. Moreover, at the time Grievant received the Group I notice, she had accumulated an active Group III Written Notice. Under the Standards of Conduct, the issuance of a Group III Written Notices alone normally warrants termination. Here, at the time Grievant received the Group I Written Notice, she had an active Group III Written Notice. Thus, the Hearing Officer finds the Agency's termination of Grievant due to the accumulation of an Active Group I and III notices was consistent with policy.

#### **II. Mitigation.**

Under statute, hearing officers have the power and duty to "[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with the rules established by the Office of Employment Dispute Resolution ["EDR"]."<sup>2</sup> EDR's *Rules for Conducting Grievance Hearings* provides that "a hearing officer is not a super-personnel officer"<sup>3</sup> therefore, "in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy."<sup>3</sup> More specifically, the *Rules* provide that in disciplinary, grievances, if the hearing officer finds that;

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<sup>2</sup> Va. Code § 2.2-3005 and (c)(6)

<sup>3</sup> *Rules for Conducting Grievance Hearings* VI(A)

- (i) the employee engaged in the behavior described in the Written Notice.
- (ii) the behavior constituted misconduct, and
- (iii) the agency's discipline was consistent with law and policy, the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.<sup>4</sup>

Thus, the issue of mitigation is only reached by a hearing officer if he or she first makes the three findings listed above. Further, if those findings are made, a hearing officer must uphold the discipline if it is within the limits of reasonableness.

The Hearing Officer has found that Grievant engaged in the behavior alleged, it was misconduct, and the Agency's discipline was consistent with law and policy. Next, a focus on whether the discipline was reasonable is undertaken.

Prior to her termination, Grievant had been employed by the Agency since 2005. During this period, Grievant had been trained on an ongoing basis regarding safety procedures and handling hazardous cleaning supplies. In spite of this, on several occasions, the Agency was required to counsel Grievant both verbally and in writing on for leaving hazardous cleaning fluids /supplies unattended in the patient area. On December 28, 2012, Grievant again failed to follow proper procedures and left a cleaning spray in a patient area unattended. Her conduct could have reasonably caused harm to a mentally ill and aged patient. Thus, the issuance of the formal Group I Written Notice was reasonable. The Hearing officer finds that termination due to the accumulation of an active Group I and III Written Notices was also reasonable.

Accordingly, having considered all of Grievant's arguments, any evidence submitted to support them, as well as all other evidence, the Hearing Officer is not persuaded that the Agency acted unreasonably.

### **DECISION**

Hence for the reasons stated here, the Hearing Officer upholds the Agency's discipline.

### **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:

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<sup>4</sup> *Rules for Conducting Grievance Hearings VI(B)*

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  
Departmental of Human Resource Management  
101 N. 14th 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 N. 14th 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>5</sup>

Entered this 1<sup>st</sup> day of March, 2013.

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Ternon Galloway Lee, Hearing Officer

cc: Agency Advocate  
Agency Representative  
Grievant  
Director of EDR

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<sup>5</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.