

Issue: Group II Written Notice (unsatisfactory performance); Hearing Date: 01/15/13;
Decision Issued: 02/06/13; Agency: VDH; AHO: Carl Wilson Schmidt, Esq.; Case
No. 9986; Outcome: Partial Relief.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 9986

Hearing Date: January 15, 2013

Decision Issued: February 6, 2013

PROCEDURAL HISTORY

On July 11, 2012, Grievant was issued a Group II Written Notice of disciplinary action for unsatisfactory performance because she failed to ensure standardization of patient medical records.

On August 10, 2012, 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 December 5, 2012, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 15, 2013, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
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 Virginia Department of Health employs Grievant as a Public Health Dentist A at one of its facilities. She began working for the Agency in 1975.

Grievant had prior active disciplinary action. She received a Group I Written Notice on February 16, 2012 for unsatisfactory performance because Grievant failed to make necessary changes with regards to scheduling dental patients.¹

Agency managers considered ongoing funding for Grievant's program to be uncertain. The Health Department Director told Grievant that she should attempt to maximize revenues for the program by treating patients who can pay for the services they receive through Medicaid or other reimbursement programs.

Grievant was responsible for entering accurate information into each patient's medical record to reflect the services provided to that patient. For example, if Grievant took x-rays of a patient's mouth, Grievant was responsible for noting in the patient's medical record that x-rays were taken. Grievant was also responsible for filling out the necessary forms so that a patient's Medicaid or dental insurance provider could be billed for the services rendered by Grievant.

¹ Agency Exhibit 4A.

On April 18 and April 19, 2012, the Dental Quality Assurance Manager conducted an audit of 76 records of Grievant's work provided to him by the Agency.² His review process included comparing a patient's medical record, billing forms, explanation of benefits (EOB), etc. to determine whether Grievant properly recorded the services she provided to each patient. He concluded as follows:

Total records reviewed: 76
 Total records without any progress note entry to corroborate EOB: 7
 Total records without progress note entries indicating x-rays were taken as billed per EOB, but x-rays were present: 20
 Total records with no evidence of x-rays taken, but billed per EOB: 2
 Total records without progress note entries indicating topical fluoride application or exam performed, but billed per EOB: 8 (in some instances graphic charting can corroborate)

Total number of procedures provided per progress notes, without billing per EOB:

D0120	2	(\$20.15)	value \$40.30
D0140	1	(\$24.83)	\$24.83
D0150	3	(\$31.31)	\$93.93
D0230	3	(\$11.18)	\$33.54
D1120	3	(\$33.52)	\$100.56
D1203	3	(\$20.79)	\$62.37

Impression:

Clinical care provided is appropriate.
 Records do not uniformly conform to recommended guidance and Dental Health Program (DHP) QA audit points provided per website above.
 Random acts of omission have occurred in recording progress notes and encounter completion on multiple occasions.
 Some tooth number transposition was noted in progress notes as relates to identical teeth in opposite quadrants. (not uncommon).
 Most [insurance company name] service denials, although clinically reasonable services, are related to frequency of service limitations within treatment time frame.
 [Insurance company name] denials for adults often related to very limited scope of services allowed by [insurance company name].
 I reviewed records provided to me from Nov. 2011 through Feb. 2012. I noticed record detail improving somewhat during that period.

² Grievant treated approximately 100 patients per month.

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.”³ 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.”

“[U]nsatisfactory work performance” is a Group I offense.⁴ 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.

The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice for unsatisfactory work performance. The Dental Quality Assurance Manager reviewed 76 records completed by Grievant. He found numerous mistakes such as failing to bill for x-rays taken and failing to document procedures given to patients. The number and degree of errors are sufficient for the Hearing Officer to conclude that Grievant’s work performance was unsatisfactory under the Standards of Conduct.

Grievant argued that no one is perfect and that she should not be held to a standard of perfection. She argued that the number and type of her errors were within reason. Although the Agency did not establish numeric thresholds for an acceptable error rate, there were enough Agency witnesses who believed Grievant’s error rate was significant for the Hearing Officer to conclude that Grievant’s error rate exceeded what would be an acceptable level.

Grievant argued that other staff reviewed her records and if they had brought the errors to her attention, she would have corrected them. This argument fails. Other employees were not responsible for reporting errors to Grievant. Doing so distracted them from their duties. Grievant was obligated to present accurate records without expecting other employees to identify her errors.

The Agency contends Grievant should receive a Group II Written Notice for unsatisfactory performance. Unsatisfactory work performance is a Group I offense, not a Group II offense. The question becomes what basis exists to elevate the disciplinary action from a Group I to a Group II offense.

³ The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

⁴ See Attachment A, DHRM Policy 1.60.

The Agency's written notice does not express an intent to elevate the Written Notice to a Group II because it represented a "same offense" for unsatisfactory performance. The Agency appears to rely on the "seriousness of this offense" to justify the disciplinary action.

The Agency argued Grievant acted contrary to policy thereby justifying the issuance of a Group II Written Notice. The Written Notice provides that Grievant violated the guidelines of the dental program and clinic standards by failing to ensure standardization of patient medical records. These guidelines are best categorized as an instruction manual rather than as Agency policy. For example, Agency Exhibit 6H is a nine page document entitled "Instructions for Completing Permanent Patient Dental Record". If the Agency's intent was to discipline Grievant for failure to comply with written policy, the Agency has not established that Grievant violated written policy when she acted contrary to general work instructions. The Agency did not cite the language of a written policy that Grievant supposedly violated.

Supervisors often give general and specific instructions to subordinates regarding how to perform work for an agency. When an employee fails to perform work in accordance with an agency's instructions, whether an employee has committed a Group I offense or a Group II offense often depends on whether the instruction was general or specific. A general instruction is in the nature of a performance expectation and resembles the performance expectations set forth in an employee's Employee Work Profile. An employee who fails to comply with a performance expectation may be subject to a Group I Written Notice for unsatisfactory work performance. For example, if a supervisor tells an employee to perform all of the employee's various duties on a timely basis, that instruction is best characterized as a general instruction. If the employee fails to perform timely one of the duties, the employee's work performance is unsatisfactory thereby justifying a Group I Written Notice. A specific instruction, however, justifies issuance of a Group II Written Notice because a supervisor has directed attention to the completion of an identified task. When an employee is given a specific instruction, the employee's attention is directed at completing the assigned task in accordance with a supervisor's expectations. For example, if a supervisor tells a subordinate to deliver a package to another employee on a specific date and at a specific time, that instruction is best characterized as a specific instruction. If the employee makes no effort to deliver the package, the employee has failed to comply with a supervisor's instructions thereby justifying the issuance of a Group II Written Notice.

The Agency argued that Grievant acted contrary to a supervisor's instructions thereby justifying the issuance of a Group II Written Notice. Despite repeated requests to do so, the Agency's witnesses could not cite the specific date or specific wording of the instruction given to Grievant. Agency witnesses testified that Grievant had been instructed to make the program more financially sustainable by treating only patients for whom the Agency could receive payment for services rendered. The Written Notice, however, did not discipline Grievant for the type of patient she treated. The memorandum attached to the Written Notice states in its subject line, "Group II Written

Notice: Violation of Standards of Conduct Policy 1.60 – ‘Unsatisfactory Performance and Failure to Follow Supervisory Instructions.’” The memorandum states:

Lastly, I have reviewed your response to the alleged violation of supervisor’s instructions. You indicated that you sent the letters to the school nurses in a timely fashion. I acknowledge that the email I provided you on April 8, 2012 was sent after normal working hours and you were on approved annual leave the next workday. However please keep in mind that you were initially instructed to provide me documentation that the letters were sent to the school nurses in January 2012. I have considered the amount of time that has elapsed regarding this issue. Therefore, I am requesting that you submit to my office for prior review any written communication to schools, communities, etc. on behalf of the dental programs that require [Health District] letterhead. You will also provide notification to me on the date the communication is sent.⁵

Insufficient evidence was presented by the Agency to show that Grievant violated any instruction regarding sending letters to school nurses. To the extent the Agency gave Grievant an instruction on financial efficiency, that instruction was too general to be classified as a Group II offense.

The Agency has not established a basis to elevate the disciplinary action from a Group I for unsatisfactory performance to a Group II offense.

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”⁶ 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 further the disciplinary action.

⁵ Agency Exhibit 1B.

⁶ Va. Code § 2.2-3005.

DECISION

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

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 14th St., 12th 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 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to 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.⁷

[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

⁷ Agencies must request and receive prior approval from EDR before filing a notice of appeal.