

Issue: Group III Written Notice (falsification of records); Hearing Date: 06/30/14;
Decision Issued: 07/18/14; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.;
Case No. 10374; Outcome: Partial Relief.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10374

Hearing Date: June 30, 2014

Decision Issued: July 18, 2014

PROCEDURAL HISTORY

On February 5, 2014, Grievant was issued a Group III Written Notice of disciplinary action for falsification of records.

On February 26, 2014, 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 May 28, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 30, 2014, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
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 employs Grievant as a Registered Nurse II at one of its facilities. Her responsibilities include administering medication to residents at the Facility. No evidence of prior active disciplinary action was introduced during the hearing.

Medication intended to be given to residents is delivered to the Facility's Pharmacy. The Pharmacy maintains a perpetual inventory sheet to account for the medication it receives. When a new order arrives at the Pharmacy, the order is entered into the Pharmacy's perpetual inventory.

Some of the Facility's residents take medication on a daily basis over several months. Their medication is kept in the Facility's Pharmacy until it is moved to the Living Unit and kept in medication carts. Medication is moved from the Pharmacy to the Living Unit on a "cycle fill day". Twenty-eight pills are placed in a bag intended for a resident and transported from the Pharmacy to the Living Unit. A nurse counts the pills delivered along with a Pharmacy Tech who delivered the medication. Both persons sign the delivery sheet. A signed copy is given to the Pharmacy Tech to be returned to the Pharmacy and retained by the Pharmacy.

Once the 28 day supply of medication is taken to the Living Unit, medication is dispensed to the resident on a daily basis. The nurse who dispenses a pill to a resident must write on that resident's medication administration record (MAR) that the pill was dispensed.

The Agency has a Record of Controlled Substance sheet to count down the quantity of pills available for a resident. Each time a pill is given to a resident, the quantity remaining is identified. The quantity starts at 28 and drops to zero as the refill cycle ends.

The Resident was prescribed Phenobarbital and another medication to control her seizures. She was to receive the Phenobarbital on a daily basis at 8 p.m. The medication was to be crushed and given to her through a G-tube along with several other medications.

On October 1, 2013, the Resident's Record of Control Substances sheet showed a quantity of 28 Phenobarbital tablets were at the Living Unit and available to be given to the Resident. On November 4, 2013, Grievant gave the Resident the one remaining tablet and wrote that there were zero pills remaining. On November 5, 2013, the quantity was zero.

November 5, 2013 was a cycle refill day. A mistake was made and the Pharmacy failed to send the Resident's 28 day supply of Phenobarbital to the Living Unit. Thus, there was no Phenobarbital on the Living Unit allocated to the Resident to be dispensed in accordance with the Resident's prescription.

Grievant wrote in the Resident's Medication Administration Record that Grievant gave the Resident Phenobarbital on November 5, 2013, November 6, 2013, November 8, 2013, November 9, 2013, November 10, 2013, and November 11, 2013. Grievant did not work on November 7, 2013.

On November 12, 2013, another nurse noticed that there was no Phenobarbital for the patient and called the Pharmacy to report the missing medication. The Pharmacy Director counted the Phenobarbital and the number matched the number for the Pharmacy's perpetual inventory shown "on the shelf." She concluded that, "our physical count matched our perpetual count." The Pharmacy Director looked at the Pharmacy's computer and concluded that a label had not been generated for the Resident and that the Resident's bag containing 28 days of medication had not been sent to the Living Unit.

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."¹ Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include

¹ The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

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.² 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.

Grievant failed to detect that she did not have necessary medication for the Resident. She continued to write in the Resident’s MAR that she had dispensed the medication even though she had not done so. Her actions were unsatisfactory job performance.

In rare circumstances, a Group I may constitute a Group II where the agency can show that a particular offense had an unusual and truly material adverse impact on the agency. Should any such elevated disciplinary action be challenged through the grievance procedure, management will be required to establish its legitimate, material business reason(s) for elevating the discipline above the levels set forth in the table above.

The Agency has established that Grievant’s error had a materially adverse impact on the Agency. The Agency was responsible for providing the Resident with medication as directed by the Resident’s physician. Grievant failed to administer prescribed medication to the Resident for six days thereby placing the Resident at risk of seizures. Issuance of a Group II Written Notice would be appropriate under the facts of this case.

The Agency alleged that Grievant had the intent to falsify the Resident’s MAR. Several Agency witnesses testified that they did not believe Grievant had the intent to falsify. This belief is supported by the evidence. Grievant’s practice was to dispense medication for her patients and then record later what medication she had dispensed. Grievant had to rely on her memory regarding what medications she had given to the Resident. The better practice was to dispense medication and immediately record in the MAR that medication was given to a patient. Because Grievant was relying on her memory, she did not realize she had had not given medication to the Resident. Grievant made a mistake but she did not intend to falsify the Resident’s MAR.

Grievant argued that on November 5, 2013 she noticed that all of the drugs for the Resident were accounted for except Phenobarbital. She claims she called the Pharmacy to report the missing medication and the narcotic sheet that came with the drug. The evidence showed that Grievant called the Pharmacy on November 5, 2013 and stated that Lorazepam was missing for another resident. Grievant did not mention Phenobarbital. The Hearing Officer does not believe that Grievant ordered additional Phenobarbital on November 5, 2013.

² See Attachment A, DHRM Policy 1.60.

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”³ 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.

DECISION

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

³ Va. Code § 2.2-3005.

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.⁴

[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

⁴ Agencies must request and receive prior approval from EDR before filing a notice of appeal.