

Issue: Group I Written Notice (unsatisfactory job performance); Hearing Date: 06/30/14;
Decision Issued: 07/08/14; Agency: DBHDS; AHO: John V. Robinson, Esq.; Case No.
10375; Outcome: No Relief - Agency Upheld.

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 10375

Hearing Officer Appointment: May 29, 2014

Hearing Date: June 30, 2014

Decision Issued: July 8, 2014

PROCEDURAL HISTORY, ISSUES
AND PURPOSE OF HEARING

The Grievant requested an administrative due process hearing to challenge the issuance of a Group I Written Notice issued March 4, 2014 by the Department of Behavioral Health & Developmental Services (the "Department" or "Agency"), as described in the Grievance Form A dated March 7, 2014.

The Grievant is seeking the relief requested in her Grievance Form A including rescission and removal from her record of the Group I Written Notice.

The hearing officer issued a Scheduling Order entered on June 6, 2014, which is incorporated herein by this reference.

At the hearing, the Grievant represented herself and the Agency was represented by its advocate. Both parties were given the opportunity to make opening and closing statements, to call witnesses and to cross-examine witnesses called by the other party. The hearing officer also received various documentary exhibits of the parties into evidence at the hearing¹.

In this proceeding, the Agency bears the burden of proof and must show by a preponderance of the evidence that the discipline was warranted and appropriate under the circumstances. Of course, the Grievant bears the burden of proof concerning any affirmative defenses.

¹ References to the agency's exhibits will be designated AE followed by the exhibit number. Any references to the Grievant's exhibits will be designated GE followed by the exhibit number (the hearing officer did not admit into evidence GE 1).

APPEARANCES

Representative for Agency
Grievant
Witnesses

FINDINGS OF FACT

1. The Grievant is currently employed by a medical center (the "Medical Center") of the Agency which treats the sickest patients of the facility (the "Facility") where the Grievant has worked since 2004. AE 1 at 10. The Grievant has worked at the Medical Center since November 10, 2013. AE 1 at 10.
2. The Medical Center is audited by both CMS and the Joint Commission. Documentation of medical treatment is extremely important to both the CMS and the Joint Commission and when auditing the records and the standard of care provided to the patients at the Medical Center, both of these outside agencies hold to the maxim that if something is not documented, it simply did not occur.
3. The Facility has a Director of Nursing who is in charge of nursing for the whole Facility.
4. Under the Director of Nursing is the Chief Nurse Executive who supervises the RNCBs at the Medical Center, including the Grievant as the RNCB of the dayshift and the RNCBs for the evening and night shifts. The RNCBs supervise the RNCA's who function as charge nurses, providing clinical supervision of the CNAs, LPNs, etc.
5. The RNCBs have the same EWP's. The Grievant's EWP states that 50% of the Grievant's responsibilities concern clinical supervision. AE 1 at 3.
6. Amongst other things, this clinical supervision includes:

As the Shift Nursing Supervisor, responsibility on assigned shift and nursing department includes:
 - directing all clinical functions based on regulatory standards
 - provision of the highest quality patient care based on regulatory standards
 - Staff compliance of Policies/Procedures and regulatory standards.

Responsibilities over Regulatory compliance on care delivery:

- Ensures **self awareness** of current, revised and new standards through research, seeking assistance from the PI Director and by participating in the workgroup initiatives.
- Ensure **staff awareness** of the current, revised and new standards by conducting shift training.
- Ensures **staff compliance** of the current, revised and new standards through rounds, observation and documentation reviews.
- Ensures **staff compliance** of the established **plans of corrections** through rounds, observation and documentation reviews.
- Performs plan of correction audits and submits timely.

Clinically visible and makes frequent rounds on each nursing units to:

- Ascertain the quality of care given by staff and discusses patient's care with staff.
- Ensure all staff stays abreast of resident/patient care information by participating in shift to shift reports and rounds.
- Ensure all duties, flow sheets and documentation are completed accurately and before end of each shift.
- Ensure unit operations run smoothly for continuity of care.

Sets expectations and monitors staff to comply with resident care delivery standards. To ensure staff compliance of the following:

- residents receive appropriate care by carrying out MD orders.
- accurate delivery of personal care, medications, and treatments.
- all records and all flow sheets are documented completely and accurately to end of shift.

Trains staff and uses progressive disciplinary actions if non compliance continued.

Identifies, investigates and resolve problems related to patient care, and staff.

AE 2 at 3.

7. Another 25% of the Grievant's responsibilities concern leadership, including counseling employees utilizing progressive disciplinary actions based on Standards of Conduct for performance or infractions affecting unsatisfactory performance, policies and procedures. AE 2 at 3. The Grievant also is required to

mentor and develop RNs to become effective Charge Nurses; to mentor LPNs to become strong clinically; and to perform other duties as assigned. AE 2 at 3-4.

8. On September 30, 2013, the Grievant received a written counseling for unsatisfactory job performance and the Grievant was required to "take responsibilities for any nursing deficiencies on your shift and work to correct them." AE 1 at 9; AE 3.
9. During a CMS audit in September 2013, CMS found document deficiencies which needed to be addressed by the Facility. If such deficiencies are deemed immediately dangerous to life and limb, the Medical Center can be closed and this has happened to other agencies. Short of closure, the Medical Center could lose licensure/accreditation or funding for document deficiencies.
10. Accordingly, documentation deficiencies or "holes" as the nurses often refer to them, need to be taken seriously and addressed by the Chief Nurse Executive, by progressive discipline if necessary.
11. In her 2013 performance evaluation signed by the Grievant on October 8, 2013, the Grievant received a "Below Contributor" rating on core element D, Leadership. AE 1 at 9; AE 2 at 9. The Grievant was required "to improve on document deficiencies and working with peers and other disciplines." AE 2 at 9.
12. On October 18, 2013, the Chief Nurse Executive met with the Grievant and, amongst other things, discussed "working with other supervisors to review deficiencies better" and "performance documentation expectations." AE 3, AE 4 at 3.
13. The Grievant is required to "[e] sure all duties; flow sheets and documentation are completed accurately and before end of each shift." AE 2 at 3. The Chief Nurse Executive concedes that the Grievant cannot complete the holes within GE 2 for the LPNs committing the infractions but the Chief Nurse Executive asserts that the Grievant has been slow to address the infractions with the transgressing LPNs through proactive measures, such as written plans of correction, counselings or formal discipline. This led to the approximate 200 holes in the month of January 2014 for which management issued the Group 1 Written Notice.
14. The hearing officer agrees with the Chief Nurse Executive's assertion. For example, the Grievant asserts that she must wait to the end of the month before she can be expected to take any formal disciplinary action. The hearing officer finds, as asserted by the Chief Nurse Executive, that by the Grievant addressing the holes sooner with LPNs, the LPNs may reasonably be expected to conform to policy sooner and thus avoid potential future infractions. In any event, policy

clearly requires that documentation deficiencies be addressed by the Grievant by "end of shift".

15. The Grievant argued that it is not feasible to address such matters by end of shift. However, the Chief Nurse Executive testified that it is feasible to comply with the policy and that the Chief Nurse Executive has so complied since mid-March when the Grievant left and the number of holes has been greatly reduced from the approximate 200 holes found in the period January 1 - 31, 2014, under the Grievant's tenure of the day shift. The Chief Nurse Executive testified that document deficiencies can be determined quickly and that all RNCBs are held to the same standard.
16. The Grievant admits that the Chief Nurse Executive is "a factual person". AE 1 at 6.
17. The Grievant admits that there were a lot of holes in January 2014 but not as many as 262, as asserted in the Written Notice.
18. The testimony of the Agency witnesses was credible. The demeanor of such witnesses was open, frank and forthright.

APPLICABLE LAW, ANALYSIS AND DECISION

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 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 the 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. *Grievance Procedure Manual*, § 5.8.

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 "SOC"). The SOC provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The SOC 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 SOC, unsatisfactory job performance can clearly constitute a Group 1 offense. AE 6.

In this instance, the Agency appropriately determined that the Grievant's violations of Agency policies concerning addressing daily document deficiencies with supervised employees/subordinates, constituted a Group I offense.

As previously stated, the Agency's burden is to show upon a preponderance of evidence that the discipline was warranted and appropriate under the circumstances.

The hearing officer agrees with the Agency's advocate that the Grievant's disciplinary infractions could also have supported a Group II Written Notice for failure to follow instructions. Accordingly, the Grievant's behavior constituted misconduct and the Agency's discipline is consistent with law and consistent with policy, being properly characterized as a Group I offense.

EDR's Rules for Conducting Grievance Hearings provide in part:

The *Standards of Conduct* allows agencies to reduce the disciplinary action if there are "mitigating circumstances" such as "conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or . . . an employee's long service, or otherwise satisfactory work performance." 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. *Rules* § VI(B) (alteration in original).

If the Department does not consider mitigating factors, the hearing officer should not show any deference to the Department in his mitigation analysis. In this proceeding the Department did consider mitigating factors in disciplining the Grievant. AE 1.

The Grievant has raised progressive discipline as an issue in the hearing and in her Form A. While the Grievant might not have specified for the hearing officer's mitigation analysis all of the mitigating factors below, the hearing officer considered a number of factors including those specifically referenced herein, in the Written Notice, the Form A, the hearing and all of those listed below in his analysis:

1. the Grievant's service to the Agency of 10 years;
2. the Grievant's numerous "Extraordinary Contributor " ratings from the Agency;
3. the often difficult and stressful circumstances of the Grievant's work environment; and
4. the Grievant's previous written and verbal counselings concerning the need to address documentation deficiencies.

EDR has previously ruled that it will be an extraordinary case in which an employee's length of service and/or past work experience could adequately support a finding by a hearing officer that a disciplinary action exceeded the limits of reasonableness. EDR Ruling No. 2008-1903; EDR Ruling No. 2007-1518; and EDR Ruling 2010-2368. The weight of an employee's length of service and past work performance will depend largely on the facts of each case, and will be influenced greatly by the extent, nature, and quality of the employee's service, and how it relates and compares to the seriousness of the conduct charged. The more serious the charges, the less significant length of service and otherwise satisfactory work performance become. *Id.*

Here the offense was serious and informal attempts by Management to address the documentation deficiencies had not worked. Clearly, the hearing officer would not be acting responsibly or appropriately if he were to reduce the discipline under the circumstances of this proceeding.

The Grievant argued that the Agency did not provide progressive discipline and the discipline was too harsh. However, the Grievant has not responded to other efforts by Management to address this matter. Accordingly, the hearing officer decides that the Agency did pursue progressive discipline within its prerogative and the punishment was by no means too harsh.

The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).

Pursuant to DHRM Policy 1.60, Standards of Conduct, and the SOC, management is given the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with

law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer is not a "super-personnel officer" and must be careful not to succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management. *Id.*

In this proceeding, the Agency's actions were consistent with law and policy and, accordingly, the exercise of such professional judgment and expertise warrants appropriate deference from the hearing officer.

In EDR Case No. 8975 involving the University of Virginia ("UVA"), a grievant received a Group III Written Notice with removal for falsifying records on five (5) separate dates. Although the evidence supported only one of those instances, the hearing officer upheld the disciplinary action. The grievant appealed to EDR asserting that the disciplinary action was inappropriate in that the grievant did not engage in as much misconduct as alleged by UVA. The Director upheld the hearing officer's decision:

The grievant's arguments essentially contest the hearing officer's determinations of fact as they relate to the proper sanction for the misconduct. Such determinations are within the hearing officer's authority as the hearing officer considers the facts *de novo* to determine whether the disciplinary action was appropriate. In this case, while it appears that the hearing officer did find that the grievant did not engage in as much misconduct as alleged by the University, it was still determined that the grievant had falsified a state record with the requisite intent, generally a Group III offense under the Standards of Conduct. [footnote omitted] Upon review of the record, there is no indication that the hearing officer abused his discretion in making these findings or that the facts were not supported by the hearing record. Consequently, this Department has no basis to disturb the hearing decision.

EDR Ruling Number 2009-2192; February 6, 2009.

The Grievant did raise certain affirmative defenses in her Form A such as discrimination and retaliation. However, the Grievant did not develop these defenses at the hearing and did not begin to meet her burden of proof in this regard.

The hearing officer decides for the offense specified in the written notice (i) the Grievant engaged in the behavior described in the written notice; (ii) the behavior constituted misconduct; (iii) the Department's discipline was consistent with law and policy and that there are no mitigating circumstances justifying a further reduction or removal of the disciplinary action.

DECISION

The Agency has sustained its burden of proof in this proceeding and the action of the Agency in issuing the written notice and concerning all issues grieved in this proceeding is affirmed as warranted and appropriate under the circumstances. Accordingly, the Agency's action concerning the Grievant is hereby upheld, having been shown by the Agency, by a preponderance of the evidence, to be warranted by the facts and consistent with law and policy.

APPEAL RIGHTS

As the *Grievance Procedure Manual* sets forth in more detail, this hearing decision is subject to 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 two types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **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 refer to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219 or faxed to (804) 371-7401 or e-mailed.
2. **A challenge that the hearing decision does not comply with grievance procedure** as well as a request to present newly discovered evidence is made to EDR. This request must refer to a specific requirement of the grievance procedure with which the decision is not in compliance. EDR'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 Office of Employment Dispute Resolution, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219, faxed or e-mailed to EDR.

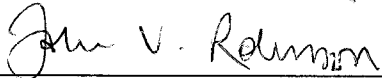
A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar days** of the **date of original hearing decision**. (Note: the 15-day period, in which the appeal must occur, begins with the 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 EDR before filing a notice of appeal.

ENTER: 7/8/14



John V. Robinson, Hearing Officer

cc: Each of the persons on the Attached Distribution List (by U.S. Mail and e-mail transmission where possible and as appropriate, pursuant to *Grievance Procedure Manual*, § 5.9).