

Issue: Group II Written Notice (failure to follow protocol); Hearing Date: 09/03/14;  
Decision Issued: 09/05/14; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.;  
Case No. 10409; Outcome: Partial Relief.



# **COMMONWEALTH of VIRGINIA**

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

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

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

In re:

**Case Number: 10409**

Hearing Date: September 3, 2014  
Decision Issued: September 5, 2014

#### **PROCEDURAL HISTORY**

On October 22, 2013, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow protocol.

On November 18, 2013, 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 July 21, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 3, 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 Nurse Practitioner at one of its Facilities. She has been employed by the Agency for approximately four years. No evidence of prior active disciplinary action was introduced during the hearing.

Hepatitis A is contagious and easily transferred to those in close proximity to someone with Hepatitis A. Good hygiene including hand washing reduces the risk of someone contracting Hepatitis A. Someone with Hepatitis A will display symptoms that are easily observed such as vomiting, stomach pain, fever, and loss of appetite.

The Patient is a 44 year old male with mild intellectual disability. During the relevant time periods, Nurse R was the primary care provider for the Patient.

On August 20, 2013, the Patient became ill and was transported by ambulance to a local Hospital. He returned to the Facility's infirmary on August 25, 2013. The Patient was transferred to his living area at the Facility on August 27, 2013. Dr. S became concerned about the Patient's health and ordered a CBC, Liver Panel and Hepatitis Screen (A, B, C) on August 29, 2013.

The Lab<sup>1</sup> completed the analysis and called the Facility Lab Department staff on August 30, 2013 with the results. The test results showed that the Patient had screened

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<sup>1</sup> The Lab was a private company independent of the Agency.

positive for Hepatitis A. The lab failed to fax a copy of the lab report to the building where the Patient resided. The lab results, however, ended up in the Patient's medical file as of September 3, 2013. A Tech in the Facility's Lab Department called Grievant at 9:10 a.m. on August 30, 2013 and told her that that the Patient had tested positive for Hepatitis A.

Grievant was busy attending to patients on August 30, 2013. She had one patient who suffered repeated and prolonged seizures. Grievant had to remain in close observation of that patient for much of the day. When Grievant finished her shift on August 30, 2013, she went home without notifying anyone else<sup>2</sup> of the test results and without warning other staff to take precautions to reduce the risk of contracting Hepatitis A.

If Grievant had notified Nurse R of the test results on August 30, 2013, Nurse R would have begun monitoring the Patient with knowledge that the Patient was likely ill with Hepatitis A instead of performing her usual monitoring to evaluate the Patient's physical condition in general. Nurse R would have informed her staff and the custodian to focus on proper hygiene such as washing their hands because of the heightened risk of contracting Hepatitis A.

On September 3, 2013, Ms. E of the local Health Department contacted Nurse D at the Facility and indicated that she had received lab results from the Lab indicating that the Patient tested positive for Hepatitis A. Ms. E said she needed to know if the Patient was having any clinical symptoms like fever or jaundice and wanted to know if the Patient had any elevated liver enzymes. Nurse D explained that she would need to contact the Patient's primary nurse and obtain some history and then call Ms. E back.

On September 3, 2013, Nurse D called Nurse R and Nurse R learned for the first time that the Patient had tested positive for Hepatitis A. Nurse R reviewed the Patient's ID notes and did not find any notes addressing the Patient's test results. Nurse R instructed her subordinate and the custodian to be sure to follow good hygiene in order to minimize the risk that they would contract Hepatitis A.

The Patient never displayed any of the symptoms of Hepatitis A. The Hepatitis Screen resulted in a "false positive" for Hepatitis A. In other words, the test results showed that the Patient was suffering from Hepatitis A when the Patient was not actually ill with Hepatitis A. Agency employees including Grievant did not know that the test was a "false positive" on August 30, 2013.

## **CONCLUSIONS OF POLICY**

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<sup>2</sup> The Hearing Officer does not believe that Grievant told her supervisor about the test result on August 30, 2013.

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>3</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.”

“[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 August 30, 2013, Grievant received a telephone call informing her that the Patient tested positive for Hepatitis A, a contagious disease. Grievant forgot about the telephone call and left the Facility at the end of her shift without informing anyone else of the telephone call. Grievant knew that Nurse R was the primary care provider for the Patient and knowing the test results for the Patient would be information that Nurse R would use with respect to her treatment of and interaction with the Patient. Grievant’s failure to notify Nurse R meant that Nurse R was delayed in notifying her staff and the custodian to take extra precautions to ensure good hygiene to minimize the risk of contracting Hepatitis A. Grievant’s failure to notify Nurse R also meant that when she observed the Patient, she did so without knowing to focus on the symptoms of Hepatitis A. Nurse R would likely have given the Patient a greater scrutiny if she believed he had a contagious disease. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice for unsatisfactory work performance.

Grievant argued that there were no consequences to the Patient or others at the Facility because the Patient did not actually have Hepatitis A and did not display any signs of such illness. Grievant argued that it was not medically necessary to order the test. These arguments are unpersuasive. The Patient’s Doctor ordered the test and the Lab provided the Agency with the results by telephone. Once the test was completed, the Agency was entitled to take precautionary actions in the event the Patient had a contagious disease regardless of whether the Patient was actually sick or the test was necessary. Grievant’s failure to inform Nurse R denied the Agency the opportunity to assess the risk immediately and take immediate action to protect its staff and patients.

Grievant argued that the Lab was obligated to fax a copy of the test results to the Patient’s living unit and if the Lab had done so, Nurse R would have known the test results on August 30, 2013. This argument is unpersuasive. To the extent the Lab was obligated to fax a copy of the report to the Facility, this obligation was independent of

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

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

Grievant's obligation to contact Nurse R with information necessary to provide treatment to the Patient.

The Agency argued that Grievant should receive a Group II Written Notice. The Facility employed a Registered Nurse who was an Infection Control Preventionist. The Agency argued that Grievant failed to notify the ICP thereby violating the Facility's protocol and justifying the issuance of a Group II Written Notice. The evidence showed that the Agency had no written policy requiring Grievant to call the ICP immediately upon learning of a positive Hepatitis A test result. The Agency did not provide any training to Grievant to notify her of its expectation that she call the ICP. Grievant did not know she was expected to call the ICP. Even Grievant's Supervisor was unaware of the Agency's expectation that Grievant immediately call the ICP regarding the Patient's test results. Grievant's failure to notify the ICP does not provide a basis to issue a Group II Written Notice because there was no written or verbal policy in place requiring her to give such notification.

*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 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.

Grievant objected to the Agency's failure to produce certain documents about the Patient's medical condition. The Hearing Officer will not make an adverse inference against the Agency. The documents that would have been produced would have shown that the Patient did not display symptoms of Hepatitis A and that the test was a false positive. These conclusions were established based on other evidence.

Grievant argued that the Agency failed to allege misconduct regarding treatment of the Patient in the "due process letter" but added that allegation in the Written Notice. This argument does not change the outcome of this case. The issue before the Hearing Officer involves the allegations expressed in the Written Notice and the Agency is free to draft the Written Notice without being limited by its allegations described in the due process letter. Grievant had the opportunity to present to the Hearing Officer any defenses she had to the Written Notice.

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<sup>5</sup> *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 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.