

Issues: Group II Written Notice (failure to follow instructions) and Termination (due to accumulation); Hearing Date: 05/21/15; Decision Issued: 08/11/15; Agency: DBHDS; AHO: Neil A.G. McPhie, Esq.; Case No. 10579; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution

DECISION OF HEARING OFFICER

In re:

Case Number: 10579

Hearing Date: 5/21/2015

Decision Issued: 8/11/15

PROCEDURAL HISTORY

On February 18, 2015, Grievant was issued a Group II Written Notice of disciplinary action with removal for failure to follow supervisor's instructions in addition to a prior active Group II Written Notice. Specifically, the Notice stated that:

Group II Written Notice for failure to follow supervisor's instructions due to your failure to communicate with me regarding the issuance of a pass to [The Patient] on January 16, 2015. On January 6, 2015, I gave a clear directive during a senior management meeting with instructions not to issue passes to [The Patient] in the future. You were in attendance at this meeting. On January 16, 2015, I was notified by the Nursing Supervisor that [The Patient] was issued a pass and eloped. You failed to follow previous instructions As referenced in documents such as your 2013-14 Performance Evaluation. In the past, you have been given repeated instructions to follow my directives as given to you. You were advised to communicate should you disagree or not understand and seek clarity or initiate further discussion with me in a timely fashion so as to avoid negative outcomes. (Agency Ex. 2)¹

On March 12, 2015 Grievant timely filed a grievance. On March 24, 2015, the Department of Human Resource Management (DHRM) assigned the matter to the Hearing Officer, effective March 30, 2015. On April 19, 2015, the parties and their representatives, by agreement participated in a telephonic prehearing conference, pursuant to the directives set forth in Rules for Conducting Grievance Hearings, §III(D). A case schedule was established and a hearing date of May 21, 2015 was chosen to accommodate the respective attorneys' schedules.

The hearing occurred as scheduled at the[Agency's facility]. Written closing arguments, by agreement, were submitted and received by the Hearing Officer on June 26, 2015.

¹ The Agency submitted 21 exhibits in a three-ring binder and the Grievant submitted 22 exhibits in a three-ring binder. There were no objections by either party to any exhibit at the hearing.

APPEARANCES

Grievant
Grievant's Attorney
Agency Advocate
Seven Witnesses including the Grievant

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 1, 11, or 111 offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, 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 the disciplinary action taken 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 carefully 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 Development Services (DBHDS or "the Agency") employed Grievant as the Medical Director at one of its mental health facilities.

At the time of termination, Grievant had had approximately 12 years of service with the Agency.

Grievant had a prior active disciplinary action consisting of a Group II Written Notice issued on July 12, 2013 for failure to follow instructions and/or policy related to denial of outside employment. (Agency Ex. 20). Both the prior and current disciplinary actions were taken by the same supervisor.

Grievant's supervisor is the Facility Director. (Agency Exhibit 4). The Facility Director is "responsible to the Commissioner or his designee for the safe, efficient, and effective operation of his state facility." (Va. Code § 37.2-707). However, when any act required by law to be performed by the

director “constitutes the practice of medicine as defined in Va. Code §54.1-2900, and the director is not a licensed physician, the act shall be performed by a licensed physician designated by the director.” Id.

As Medical Director, Grievant played a critical role in the treatment and management of patients and staff at the facility. (Agency Ex. 8) As such, he was required to ensure compliance with established facility Risk Management protocols and to work collaboratively with the Facility Director. (Id.)

Grievant had a history of failing to follow his supervisor’s instruction. On June 12, 2013, he was issued a Group II Written Notice for “Failure to follow instructions and/or policy related to the denial of [his] Outside Employment Request.” (Agency Ex. 20)²

In March 2014, the Facility Director gave Grievant a written notice of improvement³ needed in his job performance for failing to follow his supervisor’s instruction regarding the discharge of a patient. The notice clearly stated “...if there is any question about any future instructions you receive from me, the responsibility will be yours to either do as instructed or request clarification” (Agency Ex. 8). The document, which Grievant signed without comment, established an Improvement Plan that required him to follow directives given to him or to seek clarification or initiate further discussion with the Facility Director in a timely fashion to avoid negative outcomes. (Id)

Grievant’s failure to follow his supervisor’s instructions was documented in his performance evaluations for 2013 and 2014. His 2013 performance evaluation, the first one given by his current supervisor, noted he was issued a Group II written notice and he received a below contributor⁴ in the category “Senior Administrative Responsibilities”. His supervisor noted that Grievant “has had a difficult transition to a different style of supervision and oversight after years of having been the Facility Director/Medical Director and/or both positions and operating with little direct supervision...” (Agency Ex. 7)

Grievant received his 2014 performance evaluation on or about October 29, 2014. (Agency Ex. 7). In this evaluation, he received a below contributor in two categories, “Provides Medical Direction” and “Senior Administrative Responsibilities”. (Id). His supervisor noted that the March 2014 notice of improvement “supported a prior pattern of unacceptable behavior related to administrative direction” (Id) In the significant results summary of the evaluation, his supervisor noted that “[Grievant] appears to struggle with a perception of a seemingly decreased role within the facility hierarchy” and that it has been difficult to direct his performance in that he tends to interpret any supervisory direction within his own pre-ordained framework, seldom seeking clarity if it works to his own advantage...”.

In the Fall of 2014, there were significant patient risk management issues at the facility. Patients escaped or eloped from the facility at three times the statewide average and twice as high as the facility

² This notice would remain active until July 12, 2016)

³ Grievant was originally issued a notice of intent to issue a Group II Written Notice that was mitigated to a Notice of Needs Improvement.

⁴ Performance Evaluations provide for a rating of “Extraordinary Contributor” “Contributor” and “Below Contributor”

with the second highest rate of escape. (Agency Ex. 9 at p.2). This issue had raised the concern of the Commissioner and the local Commonwealth's Attorney.

, [The Assistant Commissioner] for Behavioral Health was instructed by the Commissioner to reduce the elopements at the facility. In the Fall of 2014, he met with the facility's leadership at the facility. As the Medical Director, Grievant was part of the facility leadership and was present at this meeting. At that meeting, [the Assistant Commissioner] made it abundantly clear that the observance of better risk management practices was critically important to the safety of the patients at the facility and the community. He instructed the leadership that too many patient passes were given by the facility. He advised the group that the facility had to do a better job of balancing patient needs with risk management. He instructed the leadership that risk management of the facility fell squarely within the purview of the Facility Director and they were required to follow his instructions. Grievant did not raise objections to [the Assistant Commissioner]'s comments.

On January 5, 2015, the Facility Director observed [The Patient] in the parking lot in an agitated state refusing to enter the facility on his return from a non-emergent pass for dental services with his father. Facility staff eventually coaxed [The Patient] back into the facility. The Facility Director reviewed the patient's medical record and discovered that [The Patient] was subject to mood swings, was erratic, and required frequent intervention and medication.

On January 6, 2015, the Facility Director discussed [The Patient] matter at the senior management team meeting and raised concerns about future passes being issued to [The Patient]. Grievant was in attendance at the meeting. At the meeting, the Facility Director instructed the team that there were to be no more passes for [The Patient]. Grievant admits he heard the instruction. (Agency Ex. 1 at p., 3) Grievant did not object to the instruction.⁵ The Facility Director left the meeting reassured that Grievant would comply with his instruction.⁶

On January 16, 2015, without discussion with the Facility Director, [The Patient] was given yet another pass to attend a dentist appointment off campus with a relative. (Agency Ex. 16) (Agency Ex. 11 at p.22) [The Patient] was scheduled to return to the facility at 1:25 p.m., however at 1:00 p.m., the relative called to inform the facility that [The Patient] had walked away after his dental procedure and refused to return to the facility. The Virginal State Police (VSP) and the [Area] County police were called and a warrant for [The Patient] was issued. [The Patient] was eventually picked up by the VSP and returned to the facility.

⁵ Grievant asserts that he "promptly responded during the meeting to [the Facility Director's concerns] about [The Patient] by indicating that he would obtain additional information regarding the incident and would work with [the] attending psychiatrist, to establish stricter guidelines for future passes." No other attendees to the meeting supported Grievant's account. The Hearing Officer concludes that Grievant did not have this conversation with the Facility Director.

⁶ Unknown to the Facility Director, [The Patient] was scheduled for yet another outside consult the very next day, January 7. That pass was cancelled, not because of the Facility Director's instruction, but because of [The Patient's] disruptive behavior. (Agency Ex. 11 at p. 1)

ANALYSIS 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 employees 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)

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 § 2.203001.

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 (GPM) § 5.8.

The Department of Human Resource Management (DHRM) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees. Policy 1.60⁷. "The purpose of the policy is to set forth the Commonwealth's Standards of Conduct and the disciplinary process that agencies must utilize to address unacceptable behavior, conduct, and related employment problems in the workplace, or outside the workplace when conduct impacts an employee's ability to do his/her job and/or influences the agency's overall effectiveness." A legitimate goal of the policy is to "enable agencies to fairly and effectively discipline and/or terminate employees.... where the misconduct and/or unacceptable performance is of such a serious nature that a first offense warrants termination." *Id.*

Under the Policy, unacceptable behavior is divided into three types of offenses, according to their severity. Group II offenses "include acts of misconduct of a more serious and/or repeat nature that significantly impact business operations and/or constitute ...insubordination..." *Id.* Indeed, the policy specifically identifies failure to follow supervisor's instructions as a Group II offense. (*Id.* at p.22). The Policy also notes that a second Group II normally results in discharge. *Id.*

Disciplinary Action was warranted

⁷ The policy has an effective date of April 16, 2008 and was last revised June 1, 2011. (§ 7 Ex. 2)

It is a settled principle of state and federal law, that an employee is required to obey the reasonable instruction of his supervisor. See *Southerland v. ABC Stores*, 23 Va. Cir. 263, 265 (1991) (an employee commits misconduct when he fails to follow the reasonable instructions of or show reasonable respect for one in a supervisory capacity), citing [Branch v. Virginia Employment Commission](#), 219 Va. 609, 611-12, 249 S.E.2d 180, 182 (1978) and [76 Am. Jur. 2d Unemployment Compensation, § 52](#) (1975); *Morton v. SSA*, 2014 MSPB LEXIS 8886 at *5 (MSPB Dec. 22, 2014), *affirmed by, reconsideration denied by Morton v. SSA*, 122 M.S.P.R. 519 (2015) (“Finally, the rule of “obey now, grieve later” is well-settled, and employees are not free to disregard supervisory instructions -- even if they question the propriety of their supervisor's authority.”); citing *Pedelease v. Dep't. Of Defense*, 110 M.S.P.R. 508, P 16 (2009); *Cooke v. USPS*, 67 M.S.P.R. 401, 407 (1995); *Taylor v. Dep't. of Health and Human Services*, 40 M.S.P.R. 106, 112 (1989)(reaffirming that an employee does not have the unfettered right to disregard an order merely because there is substantial reason to believe that the order is not proper; he must first comply with the order and then register his complaint or grievance, except in certain limited circumstances where obedience would place the employee in a clearly dangerous situation).

Grievant argues that the Facility Director’s instructions regarding future passes for [The Patient] was an unlawful intrusion into the practice of medicine.⁸ After careful consideration, the Hearing Officer concludes that the instruction was lawful and reasonable.

The Assistant Commissioner and the Facility Director are not medical doctors and they made it clear in their testimonies that they did not attempt to usurp Grievant’s medical prerogatives regarding treatment options for [The Patient]. The record evidence supports their position. Arguably, determining whether a patient needs to have medical treatment outside the facility may constitute the practice of medicine, however, Grievant has cited to no authority to permit this hearing officer to conclude that the issuance of a pass in the context of this case is the practice of medicine. Indeed, Va. Code §54.1-2900 defines the Practice of Medicine as, “*the prevention, diagnosis and treatment of human physical or mental ailments, conditions, diseases, pain or infirmities by any means or method.*” That definition does not remotely encompass the instruction at issue in this case

The Facility Director is responsible for the “safe and efficient operation of his facility”. Va. Code §37.2-707. The Assistant Commissioner testified that the Facility Director is responsible for risk management at the facility, and this was an important balance to the health needs of a patient who may need a pass. The psychiatrist who treated [The Patient] testified that she would follow the Facility Director’s decisions regarding passes. Significantly she testified that Grievant never told her of the Facility Director’s instruction; had she been told, she would not have issued the pass to [The Patient].

Grievant argues that [The Patient] had an urgent medical need to see a dentist on January 16, 2015. That is not supported by the record. [The Patient’s] medical chart

⁸ That position is seriously undercut by the Grievant’s acknowledgement that the Facility Director had the authority to be involved in the issuance of patient passes. (Agency Ex. 18 at p. 4)

contains no indication that he was in urgent need of dental care on January 16, 2015.⁹ In fact, Grievant admitted, in a January 28, 2015 email to the treating psychiatrist “It is not uncommon from my experience that we utilize family to assess an individual and proceed accordingly (as though it was our assessment) **but we should be able to not some behavioral changes associated with tooth pain.**” Agency Ex. 18 at p.3) (emphasis added)

Clearly, what should have happened, and did not, was that the Grievant should have brought any concerns he had with the instruction to the Facility Director and/ or the Assistant Commissioner and/or the Commissioner.

In the Fall of 2014, there were significant patient risk management issues at the facility. Patients escaped or eloped from the facility at three times the statewide average and twice as high as the facility with the second highest rate of escape. (Agency Ex. 9 at p.2). This issue had raised the concern of the Commissioner and the local Commonwealth’s Attorney.

The Assistant Commissioner for Behavioral Health was instructed by the Commissioner to reduce the elopements at the facility. In the Fall of 2014, he met with the facility’s leadership at the facility. As the Medical Director, Grievant was part of the facility leadership and was present at this meeting. At that meeting, [The Assistant Commissioner] made it abundantly clear that the observance of better risk management practices was critically important to the safety of the patients at the facility and the community. He instructed the leadership that too many patient passes were given by the facility. He advised the group that the facility had to do a better job of balancing patient needs with risk management. He instructed the leadership that risk management of the facility fell squarely within the purview of the Facility Director and they were required to follow his instructions. Grievant did not raise objections to [the Assistant Commissioner’s] comments.

Grievant argues he was unclear of The Facility Director’s directive at the January 6, 2015 meeting. No person in attendance at that meeting had any such confusion. Moreover, Grievant contradicts himself by admitting that the Facility Director “raised concerns about future civil patient passes being issued to [The Patient] during the senior staff meeting.” (Agency Ex. 1 at p.3). He admitted that he “heard and understood [the Facility Director’s] concerns.” His failure to get the Facility Director’s approval before he issued the pass, coupled with his prior history of failure to follow the Facility Director’s instructions leaves no doubt for this Hearing Officer that he engaged in misconduct as stated in the Notice.

Mitigation

The Standards of Conduct Policy provides for the reduction of discipline if there are mitigating circumstances such as conditions that compel a reduction to promote the interests of fairness. In

⁹ Dental pain is the type of medical symptoms that is addressed in the records of a patient as noted in a February 28, 2015 medical note that [The Patient] had “tooth pain” and Motrin was ordered. (Agency Ex. 10 at p. 9)

reviewing agency-imposed discipline, the hearing officer must give due consideration to management's right to exercise its good faith judgment in employee matters and the agency's right to manage its operations. (Rules for Conducting Grievance Hearings, §VI B at p.16). Therefore, if the hearing officer finds that (1) the employee engaged in the behavior described in the Written Notice, (II) the behavior constituted misconduct and, (III) the agency's discipline is 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. Id. Applying those standards to this case, the agency's decision to terminate Grievant's employment must be upheld.

Grievant's behavior clearly constituted misconduct. He received a clear, legal and reasonable instruction from his supervisor and he failed to follow it. The disciplinary termination is consistent with law and policy and is reasonable in the circumstances. Moreover the accumulation of notices and the prior mitigation of a Group II Notice to a Notice of Improvement, and the impact on the agency's operation are aggravating circumstances.

DECISION

The disciplinary action of the Agency is affirmed.

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.¹⁰

[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].

Neil A.G. McPhie
Hearing Officer

¹⁰ Agencies must request and receive prior approval from EDR before filing a notice of appeal.