

Issues: Group II Written Notice (failure to follow policy) and Termination (due to accumulation); Hearing Date: 07/20/15; Decision Issued: 08/28/15; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10631; 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: 10631

Hearing Date: July 20, 2015
Decision Issued: August 28, 2015

PROCEDURAL HISTORY

On April 30, 2015, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow policy. She was removed from employment based on the accumulation of disciplinary action.

On May 28, 2015, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On June 15, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 20, 2015, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency' 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 employed Grievant as a Registered Nurse II at one of its Facilities. The purpose of her position was to, "[p]rovide nursing and other health-related services to a group of individuals in a skilled nursing or ICF/MR residential center."¹ She had been employed by the Agency for approximately 18 years. Grievant had prior active disciplinary action consisting of a Group II Written Notice issued February 10, 2015.

Grievant received training regarding how to transcribe physician's orders and update patient medical records. She made errors documenting medical treatment so the Agency placed her on Medication Error Monitoring beginning in October 2014. A supervisor was to monitor Grievant's medication practices on a monthly basis until April 2015.

When a physician orders that a drug be given to a patient, the order must be transcribed into the patient's medication administration record. When a nurse transcribes a physician's order, the transcription must be exactly as the order was written.

The Patient resided at the Facility. She had a rash that needed to be treated with a cream prescribed by a physician.

¹ Agency Exhibit 10.

On March 5, 2015, a Doctor ordered that the Patient receive a cream “until seen in dermatology in a.m.” Grievant spoke with the physician about where to apply the cream and then wrote below the physician’s order “to knee and lower legs.” Grievant signed below the doctor’s note and wrote the date of March 5, 2015 and time of 10:20 a.m.

Patients at the Facility have 31 Day Medication Administration Records (MAR). Physician medication orders are listed on the left vertical access of the record. The top horizontal axis of the record shows each day of the month. The intersection between the vertical and horizontal axis form a grid in which staff write their initials to indicate the date medication was administered to a patient. If a medication is to be given for a specific number of days, staff typically block out the dates after the end of the expected number of medication days. For example, if a doctor orders a patient to receive medication for three days beginning on the first day of the month, the nurse would transcribe the order on the MAR, leave the blocks for the first three days empty and mark through the blocks for the 4th day and until the end of the month show on the chart. This would serve to notify staff not to administer the medication after the third day.

Grievant wrote in the Patient’s Medication Administration Record:

3/5/15
[cream] until seen in dermatology 3/6/15.

Grievant did not write “to knee and lower legs” in the MAR. Grievant did not block off the dates after March 6, 2015 on the MAR because she interpreted the order to require administration of the cream until the Patient was seen in the dermatology clinic.²

The Patient had an appointment scheduled in the Clinic on March 5, 2015. She was unable to attend the appointment because of inclement weather. Her appointment was re-scheduled for March 6, 2015. She was unable to attend that appointment due to inclement weather so her appointment was re-scheduled for March 11, 2015. The Patient was taken to the hospital on March 11, 2015 and did not attend the appointment in the Clinic.

Nurses rubbed cream on the Patient from March 5, 2015 to March 10, 2015. Grievant applied cream to the Patient on March 7, 2015 and March 8, 2015. The Patient did not receive the medication on March 11, 2015, March 12, 2015, and March 13, 2015 while she was in the hospital. When she returned to the Facility, the Patient received the medication from March 14, 2015 through March 25, 2015.

The Facility maintains Interdisciplinary Notes (ID notes) for each patient to show the date, time, location, and “Prob. No.” for each medication interaction with a patient.

² The Doctor’s order was ambiguous. Grievant’s interpretation was reasonable given the ambiguity.

When nurses enter information into the ID notes, they are supposed to show the date, time, location, and “Prob No.” and then sign their names below the note.

On March 7, 2015, Grievant made an entry into the Patient’s Interdisciplinary Notes to indicate that the cream should be given until the Patient’s March 11, 2015 dermatology appointment. Grievant did not write the date of the note, time, location, or “Prob. No.” She did not sign the note.

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.”

Under the American Nursing Associations Principles for Documentation:

Entries into the medical record (including orders) must be legible, complete, and authenticated and dated by the person responsible for ordering, providing, or evaluating the care provided (according to correct JCAHO standards).

12 VAC 5 – 371-360 governs Clinical Records. This regulation provides:

A. The nursing facility shall maintain an organized clinical record system in accordance with recognized professional practices. Written policies and procedures shall be established specifying content and completion of clinical records. ***

E. An accurate and complete clinical record shall be maintained for each resident and shall include, but not be limited to: ***

4. Physician orders, including all medications, treatments, diets, restorative and special medical procedures required; ***

7. Nurse's notes written in chronological order and signed by the individual making the entry;

Facility Policy 204 governs Clinical Record System. This policy requires:

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

All entries made to the individual's record shall be legible, dated, and authenticated by the signature and job title of the staff person making the entry.

Failure to follow policy is a Group II offense.⁴ On March 5, 2015, Grievant transcribed a doctor's order for the Patient onto the Patient's MAR. She did not transcribe the order as it was written. Instead of writing, "until seen in dermatology in a.m.", Grievant wrote "until seen in dermatology 3/6/15." Grievant testified she spoke with the physician about where to apply the cream and the physician said to the Patient's knee and lower legs. Grievant wrote on the physician's order "to knee and lower legs." Grievant did not write "to knee and lower legs" in the MAR. Grievant made an entry into the Patient's ID note without indicating the date, time, location, "Prob. No." and without signing the note. Grievant did not maintain an accurate and complete clinical record for the Patient. She did not properly complete the ID Note as required by policy. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

Accumulation of a second active Group II Written Notice "normally should result in termination."⁵ In this case, Grievant had a prior active Group II Written Notice. Accordingly, the Agency's decision to remove Grievant must be upheld.

Grievant testified that she was busy when she began the ID note and became distracted. She attended to other matters without completing the ID Note by signing and dating it. Although Grievant's testimony may explain her actions, being distracted does not excuse Grievant's failure to follow policy.

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 the disciplinary action.

⁴ See, Attachment A, DHRM Policy 1.60.

⁵ DHRM Policy 1.60(B)(2)(b).

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 with removal is **upheld**.

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.