

Issue: Group III Written Notice with Termination (HIPAA violation); Hearing Date: 08/17/15; Decision Issued: 09/05/15; Agency: DBHDS; AHO: Ternon Galloway Lee, Esq.; Case No. 10645; Outcome: No Relief – Agency Upheld.

Division of Hearings

DECISION OF HEARING OFFICER

In the matter of

Case No. 10645

Hearing Date: August 17, 2015

Decision Issued: September 5, 2015

SUMMARY OF DECISION

The Agency had found the Grievant violated HIPPA policy. Thus, the Agency issued the Grievant a Group III Written Notice with removal. The Hearing Officer upholds the Agency's discipline.

PROCEDURAL HISTORY

On June 18, 2015, Grievant's supervisor issued her a Group III Written Notice with termination. This notice contends Grievant violated HIPAA regulations by using her cell phone to take a picture of the patient care assignment sheet.

On June 19, 2015, Grievant timely filed a grievance to challenge the Agency's action. The Grievant was dissatisfied with the outcome of her challenge at the Agency level and requested a hearing. Thereafter, the Office of Employment Dispute Resolution ("EDR") assigned this Hearing Officer to the appeal.

As agreed to by the parties, the Hearing Officer held a pre-hearing conference on July 16, 2015, and subsequently issued a scheduling order incorporated herein.

As scheduled, by agreement of the parties, the Hearing Officer held the grievance hearing on August 17, 2015, at the Agency's office.

Also, at the hearing prior to the Hearing Officer taking evidence, both parties were given the opportunity to present matters of concerns to the Hearing Officer. Grievant then objected to the Agency's proposed exhibit "5" stating that it was irrelevant. After hearing the arguments of the parties, the Hearing Officer overruled the objection. She then admitted Agency's Exhibits 1 through 5. Grievant had an opportunity to submit exhibits, but she declined to do so.

Also, both parties were provided the opportunity to make opening and closing statements, to call witnesses¹ and to cross-examine witnesses called by the other party.

During the proceeding, the Grievant represented herself. The Agency was represented by its advocate.

¹ Grievant elected to call no witnesses on her behalf.

APPEARANCES

Agency's Advocate
Witnesses for the Agency (5 witnesses)
Grievant
Grievant's Witnesses (none)

ISSUE

Was the Group III Written Notice with termination warranted and appropriate under the circumstances?

BURDEN of PROOF

In disciplinary actions, the burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8(2). A preponderance of the evidence is evidence which demonstrates 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:

1. The Agency is a mental health hospital providing, among other care, inpatient treatment for the mentally ill. Grievant was employed as a nurse's aide (DSA) by the Agency before her termination.
2. Grievant worked the evening shift. On June 5, 2015, at the beginning of Grievant's shift, a meeting was held in a conference room to give the "change of shift report" and assign tasks to the nurses' aides. During the meeting, the charge nurse placed the patient assignment sheet on the table in the conference room. As placed, this sheet revealed in plain view to those attending the meeting the names of patients. It also showed the care the patients were scheduled to receive and the assignments of the aides working the night shift. This information is considered confidential by the Agency. Grievant, as well as the charge nurse and other DSAs were present during this meeting. (A Exh. 3, p. 10; Testimony of Supervisor).
3. Grievant took a picture of the assignment sheet on the conference table with her cell phone. Several of Grievant's co-workers observed Grievant take the picture. (A Exh. 3, pp. 2 - 8).
4. The charge nurse did not observe Grievant taking the picture. (A Exh. 3, p. 9).
5. At least one of Grievant's co-workers reported Grievant's action to the Supervisor.

(A Exh. 3, pp. 1 and 8). Supervisor then summons Grievant to her office and inquired if Grievant had taken the picture. Grievant reported she had not. (A Exh. 3, p. 1). After Grievant's encounter with Supervisor, she reported to at least one of her co-workers that Grievant had not been truthful to Supervisor. (Testimony of Agency Witness 4; A Exh. 3, p. 2). Grievant even asserted to her co-worker that there was no way Supervisor could prove that she snapped a picture and that she could/would erase the picture. (Testimony of Agency Witness 4; A Exh. 3, p. 2, 8).

6. Supervisor then investigated the matter further and determined that Grievant had lied about whether she took a picture of the patient assignment sheet. To substantiate her finding, Supervisor gathered statements from Grievant's co-workers who were present and observed Grievant take the picture. Those statements confirmed Grievant's action. (Testimony of Supervisor; A Exh. 3).

7. Management considered Grievant's conduct serious due to a HIPPA violation, the use of a personal communication device, and obtaining patient information on a personal communication device. Grievant was then issued a Group III Written Notice with termination. The group notice described the nature of the offense as follows:

54 -VIOLATION OF HIPAA REGULATIONS, USED PERSONAL CELL PHONE TO TAKE A PICTURE OF THE PATIENT CARE ASSIGNMENT SHEET

(A Exh. 1; Testimony of Supervisor).

8. In addition, in Section IV of the group notice, management noted that the "offense also violates [Agency] Policy 053-61, personal communication devices." (A Exh. 1).

AGENCY POLICY 053-061

9. Agency policy 053-061 addresses usage guidelines for personal communication devices. Under the policy, cell phones are considered personal communication devices. (A Exh. 4).

10. In pertinent part the policy states the following:

The usage of personal communication devices is not permitted in patient care areas or where patient-related information could be overheard.

(A Exh. 4).

11. In addition the policy requires that devices be turned off during meetings or group gatherings. (A Exh. p. 2). The evidence establishes Grievant's cell phone was not turned off during the meeting. (A Exh. 3).

12. Grievant was aware of Agency Policy 053-061. (Testimony of Supervisor).

HIPPA

12. It is a policy of the Agency to secure health information about patients receiving care at the Agency. Also, the Agency outlines and maintain its procedures for implementing the HIPPA Privacy Rule in its Policy 050-103 - Privacy Policies and Procedures for the Use and Disclosure of Protected Health Information. (A Exh. 4, p. 3). Failure to comply with HIPPA can result in civil/criminal penalties. 42 USC §1320d-5.

13. Grievant had received HIPPA training prior to the conduct that is the subject of this Grievance. Also, Grievant was aware that taking pictures of patient information with her personal cell phone was prohibited by the HIPPA and Agency policies. Further, Grievant was aware that these policies were established to secure health information about patients at the Agency.² (Testimony of Supervisor; A Exh. 3).

14. The evidence establishes that Grievant was in a meeting or at a gathering when she snapped a picture of the patient assignment sheet with her cell phone. (A Exh. 3).

15. A reasonable person would find that Grievant's snapping a picture of the patient assignment sheet with her personal cell phone caused patient information to become unsecure.

OTHER

16. Grievant has a history of work performance problems. They include the following:

A July 3, 2014 memorandum for failing to document on the patient observation sheet;
An October 3, 2014 memorandum regarding failure to follow supervision;
A December 30, 2014 memorandum regarding failure to complete an ADL sheet;
A January 21, 2015 memorandum regarding mutual respect and workplace violence;
April 1, 2015 counseling memorandum regarding failure to attend mandatory training.
(A Exh. 5).

17. On or about April 17, 2015, Grievant's 12 Month Progress Review indicated that her job performance was substandard. Thus, Grievant's probationary period was extended until June 8, 2015. (A Exh. 5, p. 5).

18. In her response to the group notice, Grievant denied taking a picture of the patient care assignment sheet. She also stated that she had been falsely accused. (A Exh. 2, pp. 1-2).

² Grievant has never claimed that she was unaware of the HIPPA and Agency policies regarding securing patient information. In addition, Grievant's dishonesty and erasure demonstrate knowledge of these policies. For one, Grievant reported to co-workers that she lied to her supervisor about taking the picture. Moreover, Grievant stated that she would delete the picture or erase it so that management could not prove she took a picture using her cell phone.

DETERMINATIONS AND OPINIONS

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/her 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 resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

To establish procedures on Standards of Conduct and Performances for employees of the Commonwealth of Virginia under §2.2-1201 of the *Code of Virginia*, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60 (Policy 1.60). The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards 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.

Using the Standards of Conduct, Group I offenses are categorized as those that are less severe in nature, but warrant formal discipline; Group II offenses are more than minor in nature or repeat offenses. These offenses generally include acts of misconduct of a more serious nature that significantly impact agency operations. Further, Group III offenses are the most severe and normally a first occurrence warrants termination unless there are sufficient circumstances to mitigate the discipline. *See* Standards of Conduct Policy 1.60.

As referenced previously here, management issued Grievant a Group III Written notice with termination. The Hearing Officer examines the evidence to determine if the discipline was warranted and appropriate under the circumstance.

I. Analysis of Issue before the Hearing Officer

A. Did the Grievant engage in the behavior described in the Written Notice and did that behavior constitute misconduct?

1. Did Grievant take a picture of the patient assignment sheet with her cell phone?

The evidence clearly establishes that during the "change of shift report meeting" or a gathering of employees shortly thereafter, Grievant used her personal cell phone to take a picture of the patient assignment sheet. Agency witnesses and statements overwhelmingly confirm Grievant engaged in this conduct in the presence of other employees. What is more, thereafter when Grievant was asked by Supervisor if she had taken the picture, Grievant denied she had done so. Yet, sometime later during the shift she expressed to a co-worker that she had not told Supervisor the truth. Grievant went on to say that, management could not prove she took the picture and that she had or would delete it from her cell phone. Accordingly, the evidence overwhelmingly shows Grievant engaged in the alleged conduct.

Next, the Hearing Officer examines if Grievant's action was wrongdoing. The evidence shows that under HIPPA policy (which the Agency follows) and the Agency's own policy, employees are required to secure patient information. Moreover, under the Agency's Policy 53-061 personal communication devices such as an employee's cell phone are prohibited from being used in patient care areas. In addition, personal communication devices are required to be turned off during meetings or group gatherings. The evidence shows Grievant was aware of these policies. Notwithstanding this knowledge, Grievant used her personal telephone to take a picture of patient information that was supposed to be secure. In addition, the cell phone was used during a meeting or group gathering. Further under a general definition of the phrase "patient care area," Grievant took a picture with her personal communication device in such an area. This is the case because tasks pertaining to patient care were being assigned in the conference room via the assignment sheet. In essence, Grievant elected to violate policies she knew. Hence her behavior constitutes misconduct.

II. Was the Agency's Discipline consistent with law and policy?

The evidence establishes that Grievant's misconduct was serious. HIPPA and Agency policies designed to secure patient information were ignored. As such, patient data was on Grievant's personal communication device. Group III offenses include misconduct of a most serious nature. Due to the gravity of Grievant's offense, the Hearing Officer finds the Group III Written Notice with termination consistent with law and policy.

III. Mitigation

Under statute, hearing officers have the power and duty to "[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance

with rules established by the Office of Employment Dispute Resolution.”³ EDR’s *Rules for Conducting Grievance Hearings* provides that “a hearing officer is not a ‘super-personnel officer’” therefore, “in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy.”⁴ More specifically, the *Rules* provide that in disciplinary grievances, if the hearing officer finds that:

- (i) the employee engaged in the behavior described in the Written Notice,
- (ii) the behavior constituted misconduct, and
- (iii) the agency’s discipline was 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.⁵

Thus, the issue of mitigation is only reached by a hearing officer if he or she first makes the three findings listed above. Further, if those findings are made, a hearing officer must uphold the discipline if it is within the limits of reasonableness.

The Hearing Officer has found Grievant engaged in the behavior described in the Written Notice, that behavior constituted misconduct, and the agency’s discipline was consistent with law and policy.

Next, the Hearing Officer considers whether the discipline exceeded reasonableness. Grievant argues that unfairness prevails at the Agency. She further stated in her opening statement that the picture was taken by accident. Grievant presented no evidence to support either of these arguments. In fact, as noted previously, the evidence overwhelmingly establishes Grievant intentionally violated HIPPA/Agency policy when she took the picture. Thereby, she subjected confidential patient information to Grievant’s unsecure personal cell phone, thereby subjected the Agency to possible penalties under HIPPA. Further, Grievant was intentionally untruthful to Supervisor when asked if she engaged in the conduct. Moreover, the Hearing Officer notes that when the incident occurred, Grievant was on probation and her job performance had been rated “substandard.” Thus, having considered all the evidence whether specifically mentioned or not, the Hearing Officer finds the Agency’s discipline was reasonable.

DECISION

For the reasons stated here, the Hearing Officer upholds the Agency’s issuance of a Group III Written Notice with termination.

³ Va. Code §2.2-3005 (c)(6)

⁴ *Rules for Conducting Grievance Hearings* VI(A)

⁵ *Rules for Conducting Grievance Hearing* VI(B)

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 N. 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 N 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 has 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.⁶

Entered this 5th day of September, 2015. -

cc: Ternon Galloway Lee, Hearing Officer
Grievant
Agency Advocate
Hearings Program Director of EDR

⁶ Agencies must request and receive prior approval from EDR before filing a notice of appeal.