

Issue: Group III Written Notice with Termination (failure to follow policy, violating safety rule, unsatisfactory performance); Hearing Date: 11/13/12; Decision Issued: 11/28/12; Agency: DMA; AHO: Ternon Galloway Lee, Esq.; Case No. 9957; Outcome: No Relief – Agency Upheld.

DECISION OF HEARING OFFICER

In the matter of

Case Number: 9957

Hearing Date: November 13, 2012

Decision Issued: November 28, 2012

SUMMARY OF DECISION

The Agency had found Grievant violated numerous standards of conduct mentioned below and issued Grievant a Group III Written Notice with termination. The Hearing Officer determined that while the evidence was insufficient to show Grievant falsified records and abused a client, it did establish that Grievant failed to follow instructions and/policy, violated a safety rule, and performed unsatisfactory. Hence, the hearing officer upheld the Agency's Group III Written Notice with termination.

HISTORY

On September 4, 2012, the Agency terminated Grievant because it contends Grievant violated the following standards of conduct:

- (i) unsatisfactory performance;
- (ii) failure to follow instructions and/or policy;
- (iii) violating a safety rule;
- (iv) falsifying records; and
- (v) patient/inmate/client abuse.

(A Exh. 1A).

On September 28, 2012, Grievant timely filed his grievance to challenge the Agency's action. On October 24, 2012, the office of Employment Dispute Resolution ("EDR") assigned the undersigned as the hearing officer to this appeal. A pre-hearing conference ("PHC") was held on October 31, 2012, and subsequently a scheduling order was issued.

The Hearing Officer scheduled the hearing for November 13, 2012, the first date available between the parties. Prior to commencing the hearing, the parties were given an opportunity to present matters of concern to the Hearing Officer. At that time, Grievant did request the production of the Agency's security video for the date of his offense. Upon the Agency's sworn representation that such recordings are not maintained beyond two weeks, the Hearing Officer determined Grievant's request could not be granted. The Hearing Officer also admitted the Agency's Exhibits 1 through 15 including those with lettered tabs; Grievant's Exhibit 1; and Hearing Officer's Exhibits 1 through 7

At the hearing both parties were given the opportunity to make opening and

closing statements and to call witnesses. Each party was provided the opportunity to cross examine any witnesses presented by the opposing party.

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

APPEARANCES¹

Advocate for Agency
Witnesses for the Agency (5 witnesses)
Grievant (6 witness, including Grievant)²

ISSUE

Was the written notice with termination warranted and appropriate under the 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 Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual (“GPM”) § 5.8(2). 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 all the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

1. The Agency sponsors a residential program for at risk adolescents that is structured in a military style environment. Its goal is to help the students (referred to as “cadets”) graduate and experience success. Grievant was a team/squad leader of cadets in the residential program and he had been employed by the Agency for at least 13 years (Testimony of Grievant; Testimony of Director).
2. One cadet (“Cadet”) had multiple teeth extracted on Thursday, August 16, 2012. As follow-up care, the dental surgeon provided the Agency’s nurse (“Nurse”) with instructions regarding Cadet’s medication schedule. Cadet had been prescribed two pain killers, a narcotic – Vicodin 500mg- and Motrin 600mg. Due to their strength and possible side effects, Nurse was instructed to cause the medications to be administered to

¹ The Agency requested that its human resource officer be allowed to observe the hearing. Grievant consented and she did observe.

² Grievant presented two witnesses that were also Agency witnesses.

Cadet on a staggered basis in three hour intervals.³ Reportedly Cadet was bulimic and the medications if taken at the same time could cause severe and possibly fatal stomach bleeding. (Testimony of Nurse; A Exh. 1B).

3. Because a narcotic had to be administered to Cadet, the medical supervisor, who was also Nurse established a policy that the medications would not be kept in the barracks and that the team leaders would be responsible for administering the medications to Cadet.

Also, the medical supervisor (“Nurse”) prepared special written instructions addressing when and how Cadet was to receive her medications on August 17, 18, and 19, 2012. (Testimony of Nurse; A Exh. 2). Those instructions were taped on the right side of the team leader’s desk in a visible location and a copy was also placed in the Daily Staff Journal/Duty Officer’s log. (Testimonies of Nurse, Platoon Squad Team Leader, and Security Officer II Team Leader; A Exhs. 1B and 2).

4. Team leaders are required to review the Daily Staff Journal or Duty Officer’s log at the beginning of their shift to be apprised of, among other matters, any pass down notes and special instructions to the oncoming duty officer. (Testimonies of Security Officers I and II; A Exh. 1B).

5. Cadet received her last dose of medication on August 17, 2012, at 7:00 p.m. and her next dose was not due until 7:00 a.m. on Saturday, August 18, 2012. (A Exh. 1B).

6. Security Officer Team Leader I was a team leader on August 17, 2012. This team leader wrote pass down notes in the Duty Officer’s log. One such note stated in pertinent part the following:

“[Cadet] 3rd has a strict med schedule this weekend.”

(A Exh. 1, p. 5). On Saturday, August 18, 2012, Grievant was assigned team leader for the work shift beginning at 7: 00 a.m. At approximately 8:00 a.m., Grievant and Nurse conferred by telephone. (A Exh. 1; Testimonies of Grievant and Nurse).

7. During his shift, when Grievant dispensed the medications to Cadet he failed to stagger them as instructed. Instead, Grievant administered the Motrin and Vicodin to Cadet at the same time. (A Exh. 8). Also, immediately after dispensing the medications, Grievant did not document his action on the medication sheet. And when he did supply data, Grievant did not note that his administration of the medications deviated from Cadet’s medication schedule. (Testimony of Grievant; Testimony of Platoon Squad Team Leader; A Exh. 7).

8. Deviations from a medication regiment must be documented. (Testimonies of Security Officer I Team Leader, Platoon Squad Team Leader).

³ Cadet’s last dosage for a day was 10:00 p.m.. If she was awoken during the night, instructions permitted her to receive, on a staggered basis, Motrin one time and Vicodin one time.

9. It was revealed that Grievant did not follow Cadet's medication schedule when Platoon Squad Team Leader succeeded Grievant as the team leader. During her shift, she proceeded to dispense Cadet her medications. At that time Platoon Squad Team Leader was informed by Cadet that she had received the Vicodin and Motrin at the same time from Grievant at 4:00 p.m. and on other occasions during Grievant's shift. (Testimonies of Nurse and Platoon Squad Team Leader; A Exh. 5).

10. Platoon Squad Team Leader informed the director of the program. (A Exh. 1).

11. Grievant then received a Group III Written Notice with termination for his failure to properly administer the Cadet's medication during his shift on August 18, 2012. The written notice contends that Grievant violated the standards of conduct by failing to perform satisfactory; failing to follow instructions and/or policy; violating a safety rule; falsifying records; and abusing a client. (A Exh. 1A).

12. Prior to August 18, 2012, Grievant had training in administering prescription and over the counter medications to cadets. That training instructed Grievant to, among other things, administer medications to the correct cadet and in the correct manner and provide proper documentation regarding the administration of medications to cadets. (A Exh. 9).

13. Each medication to be dispensed by the team leader is placed in a bubble blister pack by correct dosage. On a label in the upper right corner of the pack appears the name of the cadet who is to receive the medication, the name of the medication, and the time the cadet should be administered the medication. (Testimony of Nurse; A Exh. 9, pp 9 - 10).

14. The standard operating procedures ("SOP") for the Agency, in pertinent part, requires team leaders to:

(i) be responsible for the accountability, direct control, and safety of all cadets. this includes supervising and directing all of their activities and assuring their presence at instructional periods and work projects.

(ii) ensure all policies, procedures and guidelines regarding the health, welfare and rules governing juveniles are strictly followed and enforced.

(A Exh. 10, p. 2).

15. The Agency's policy and procedure number 2-1a regarding administration of medication provides the following procedures:

a. Administration of medication by a staff member will be limited to a single dose at a time

b. Prior to administering any prescription medication, the staff member must confirm the following information which is provided for you on the upper right-hand corner of the bubble packs, in accordance with the pharmacy directions and label:

- 1) Correct patient
- 2) Correction medication
- 3) Correct dose
- 4) Correct time
- 5) Correct Route of Administration

c. The person administering the medication is responsible for completing documentation on the medication sheet directly following administering the medication. When complete, the medication sheet is placed in the medical staff mailbox in headquarters. This medication sheet is provided by the medical staff.

d. It is the responsibility of the person administering the medication to document that the medication was given, refused, or the patient was not present.

e. Questions regarding this policy should be directed to the program nurse, medical assistant, or program director.

(A Exh. 9, p. 13).

16. Grievant received a counseling statement on June 26, 2012, for not following proper procedures regarding handling a situation where a cadet had been injured or was in need of medical attention. (A Exh. 1B,p. 4A Exh. 13).

17. On March 28, 2012, Grievant received a counseling memorandum regarding his failure to conduct a face to face turnover with the oncoming team leader and to notify superiors of any significant issues relating to the barracks that may impact the health and safety of cadets. (A Exh. 12).

18. Teachers, counselors, and headquarter staff normally do not work at the Agency on weekends. (A Exh. 11, pp 1- 4).

DETERMINATIONS 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 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.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.⁴

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 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.

On September 11, 2012, management issued Grievant a Group III Written Notice with termination for the reasons previously noted here. Accordingly, I examine the evidence to determine if the Agency has met its burden.

I. Analysis of Issue before the Hearing Officer

Issue: Whether the discipline was warranted and appropriate under the circumstances?

A. Did the employee engage in the behavior described in the Group III Written Notice with removal and did that behavior constitute misconduct?

Among other infractions, the Agency contends Grievant failed to follow policy and violated a safety rule.

The evidence shows that team leaders, to include Grievant, were instructed to alternate administering Cadet her Vicodin and Motrin during the August 17, 2012, to August 19, 2012, weekend. These instructions were taped to the desk known as the team leader's desk for each shift's team leader to review. In addition, they were placed in the

⁴ Grievance Procedural Manual § 5.8

officer's duty log. Also, before dispensing medication to a cadet, Agency policy required each team leader to confirm the cadet's medication schedule by reviewing the label on each specific medication pack. The label provided the patient's name, the correct dosage, and the time to administer a medication. Also, the Agency's Standard Operating Procedures establishes that team leaders are responsible for the safety of cadets and must ensure that policies are followed for the health and welfare of cadets.

In spite of the instructions to alternate (in three hour intervals) giving Cadet her Vicodin and Motrin, the evidence is clear that Grievant administered the two medications at the same time, on several occasions during his shift. Evidence shows that, because of Cadet's eating disorder, causing her to take the medications together could have resulted in fatal stomach bleeding.

Grievant contends that on August 18, 2012, he was unaware of Cadet's medication schedule that required the Vicodin and Motrin to be staggered. He states that out of ignorance he improperly dispensed them. He alleges that during his conversation with Nurse the morning of August 18, 2012, Nurse did not explain Cadet's medication schedule. Further, he notes the instructions were not taped to the team leader's desk.

Having considered Grievant's claims and the evidence of record, the Hearing Officer finds Grievant knew or should have known the medication schedule for Cadet. This is so for several reasons. First, Grievant was responsible for reviewing the duty officer's log at the beginning of his shift. It contained "pass down" notes indicating Cadet had a strict medication schedule during the weekend. Second, the two medications administered by Grievant were placed in separate blister packs. Each pack contained a label with Cadet's name, the name of the medication, and the time the medication was to be administered. Third, the medication schedule appeared in the duty officer's log. Of particular note, the evidence shows that other team leaders who worked that weekend before Grievant's shift or immediately after his shift, saw the instructions taped to the desk and adhered to them. Fourth, prior to August 18, 2012, Grievant had training regarding the proper administration of medications to cadets and his conduct was contrary to the training.

Considering the above, the Hearing Officer finds Grievant failed to comply with Agency policy and instructions that he knew or should have known. Grievant's noncompliance was also a violation of safety procedures. That noncompliance put the Cadet's health and safety in grave jeopardy considering she had an eating disorder and the medication could have in Nurse's words "burned a hole in Cadet's stomach and caused death."

Further, I find that Grievant's conduct on August 18, 2012, demonstrated unsatisfactory work performance as he either failed to review the duty log as team leaders are required to do or ignored pass down notes in the Officer's duty log. Similarly, he failed to review the instructions taped to the desk or ignored them. He failed to review the medications packs or ignored them and did not document according to Agency policy.

Accordingly, the Hearing Officer finds Grievant's behavior constituted a failure to follow instructions, a safety rule violation, and unsatisfactory job performance. Thus, his behavior established misconduct.

The Hearing Officer has also considered the Agency's claims that Grievant falsified records and abused Cadet. After considering all the evidence she finds it insufficient to establish these behaviors.

B. Was the discipline consistent with policy and law?

As mentioned above, the evidence establishes that the Agency had implemented instructions on how Cadet's medications were to be dispensed by the team leader on August 18, 2012. Grievant should have known the procedures but did not follow them. Further, Grievant failed to assure the health and safety of Cadet. Grievant's misconduct was serious. Further, the evidence establishes it was a repeated offense in that Grievant had previously been counseled for failure to follow procedures during an incident where another Cadet had broken his nose and needed medical attention.

Due to Grievant's conduct he was subject to discipline under the standards of conduct. Such discipline can include the issuance of a Group III Written Notice with termination due to the serious nature of the offense.

The facts of this case indicate that Grievant failed to follow instructions regarding administering medications to a minor. The drugs were pain killers; one a narcotic. This failure was also aggravated by the fact that Grievant violated a safety rule which could have caused a fatality due to the cadet's eating disorder. Due to the serious nature of the offenses, the Hearing Officer finds the Agency's discipline is consistent with policy.

II. 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 the rules established by the Office of Employment Dispute Resolution ["EDR"]."⁵ 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."⁶ 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.

⁵ Va. Code § 2.2-3005 and (c)(6)

⁶ *Rules for Conducting Grievance Hearings* VI(A)

- (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.⁷

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.

I have found that Grievant engaged in several behaviors of misconduct noted above, and the Agency's discipline was consistent with law and policy. Next, a focus on whether the discipline was reasonable is undertaken.

Grievant contends he has worked for the Agency for at least 13 years. He further notes that he did not see the instructions taped to the desk. He indicated he did not review the pass down notes regarding Cadet's medication regiment because they were not affixed to the desk. He states the nurse did not explain the medication regiment to him during his telephone conversation with her the morning of August 18, 2012. Further, he notes it was the nurse's responsibility to determine that the medications were correctly administered and she is trying to use him as a scape goat. He further contends that he was without adequate staff on August 18, 2012, to carry out all his responsibilities.

In considering Grievant's arguments, the Hearing Officer notes that other team leaders working the August 17 through 19 weekend shift reviewed the instructions regarding Cadet's medication schedule and followed them. The evidence does not establish any legitimate reason for Grievant's failure to follow the procedures regarding administering Cadet's medication plan and documenting same. Moreover, concerning Grievant's allegation that he worked with inadequate staff on the weekend and therefore could not be expected to perform all his tasks, the Hearing Officer notes that other weekend team leaders testified or provided statements that they were capable of handling their responsibilities on the weekend and if unusual circumstances occurred adequate resources were available.

Having considered all of Grievant's arguments, any evidence submitted to support them, as well as all other evidence, the Hearing Officer is not persuaded that the Agency acted unreasonably.

DECISION

Hence for reasons noted here, the Hearing Officer finds Grievant violated a safety rule, performed unsatisfactory, and failed to follow Agency policy and procedures.

⁷ *Rules for Conducting Grievance Hearings VI(B)*

Accordingly, the Hearing Officer upholds the Agency's discipline.

APPEAL RIGHTS

You may file an **administrative review** requests 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
Departmental 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 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.⁸

Entered this 28th day of November, 2012.

Ternon Galloway Lee, Hearing Officer

cc: Agency Advocate
Agency Representative
Grievant
Senior Consultant, Office of EDR

⁸ Agencies must request and receive prior approval from EDR before filing a notice of appeal.