

Issue: Group III Written Notice with termination (patient neglect); Hearing Date: 01/04/05; Decision Issued: 01/06/05; Agency: DMHMRSAS; AHO: David J. Latham, Esq.; Case No. 7924



***COMMONWEALTH of VIRGINIA***  
***Department of Employment Dispute Resolution***

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

Case No: 7924

Hearing Date: January 4, 2005  
Decision Issued: January 6, 2005

**APPEARANCES**

Grievant  
Nurse Investigator  
Advocate for Agency  
One witness for Agency  
Observer for Grievant  
Observer for Agency

**ISSUES**

Did grievant's actions warrant disciplinary action under the Commonwealth of Virginia Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

**FINDINGS OF FACT**

The grievant filed a timely appeal from a Group III Written Notice for neglecting a patient.<sup>1</sup> As part of the disciplinary action, grievant was removed from state employment effective October 6, 2004. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for hearing.<sup>2</sup> The Department of Mental Health, Mental Retardation and Substance Abuse Services (hereinafter referred to as "agency") employed grievant as a licensed practical nurse (LPN) for six years.

Section 201-1 of MHMRSAS Departmental Instruction 201 on Reporting and Investigation Abuse and Neglect of Clients states, in pertinent part: "The Department has zero tolerance for acts of abuse or neglect."<sup>3</sup> The facility prepares daily Work Assignment sheets that list the specific duties to be performed each day by RNs and LPNs (licensed practical nurse).<sup>4</sup> A treatment administration record (TAR) is maintained for each patient on which the person administering treatment must record her initials for each date and time of treatment.<sup>5</sup> If the treatment is omitted or refused, the nurse must initial the corresponding date and time and circle her initials; she must also document on the reverse side of the form an explanation of why the treatment was not given.<sup>6</sup> If any staffing changes occur during a shift, the Work Assignment sheet must reflect the adjusted assignments.<sup>7</sup> The LPN on each shift is assigned responsibility for "auditing"<sup>8</sup> the Narcotic Sheets, Medication Administration Records (MAR), and the TAR forms.

Patient F is an obese male with multiple diagnoses including severe psoriasis that covers most of his body. During the time relevant to this case, the standing physician orders for treatment of patient F's psoriasis included ultraviolet light treatments (administered at an off-site location) and application of topical creams. Two of the creams (Aclovate and Fluocino) were to be applied daily and the third (Dovonex) was to be applied four times per week. Application of topical creams is performed by registered nurses.<sup>9</sup> On September 29, 2004,

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<sup>1</sup> Exhibit 2. Written Notice, issued October 6, 2004.

<sup>2</sup> Exhibit 2. *Grievance Form A*, filed October 9, 2004.

<sup>3</sup> Exhibit 14. Section 201-3, Departmental Instruction (DI) 201(RTS)00, *Reporting and Investigating Abuse and Neglect of Clients*, revised April 17, 2000. The definition of neglect is: "Neglect means failure by an individual, program or facility responsible for providing services to provide nourishment, treatment, care, goods or services necessary to the health, safety or welfare of a person receiving care or treatment for mental illness, mental retardation or substance abuse."

<sup>4</sup> Exhibit 4. Assignment sheets from August 26 through September 29, 2004.

<sup>5</sup> Exhibit 5. TAR forms for patient F, August and September 2004.

<sup>6</sup> Exhibit 10, p.7, ¶ 3, Documenting the administration of Medication and Treatment, Policy 06.012, *Administration of Medications and Treatments*, revised September 1, 2004. [NOTE: The same language appeared in the prior revision of June 1, 2004 (see Exhibit 3)]

<sup>7</sup> Exhibit 11, p.3, ¶ 5, Policy 6.008, *Patient Care Assignments*, revised September 1, 2004.

<sup>8</sup> "Auditing" the Narc Sheet, MAR and TAR forms means cross-checking each form to assure that all required documentation has been entered on the forms before the end of the shift. If gaps are observed, the auditor is supposed to remind the appropriate nursing staff of the need to document treatment given during the work shift.

<sup>9</sup> Exhibit 11, p.3, ¶ 4, Policy 6.008, *Ibid*.

the physician received a request to increase the frequency of ultraviolet light treatments. Before approving the request, the physician reviewed the patient's treatment records and found 16 dates in the preceding five weeks on which scheduled cream applications had not been applied. Because failure to apply the topical creams could be the cause of the patient's worsening psoriasis, the physician notified the facility director. The facility director initiated a patient neglect investigation by assigning the facility's lead investigator to the case.

The investigator (an RN who is also the facility's Director of Quality Improvement) interviewed six RNs who were involved in care of patient F, and one LPN who was responsible for auditing treatment records. She also reviewed the relevant assignment sheets and patient treatment records. During her interview with grievant, grievant admitted that he had not audited the TAR forms on ten dates - September 4, 5, 7, 8, 11, 13, 14, 15, 16, 18, and 20, 2004. On these dates, grievant was assigned to audit the Narc Sheet, MAR and TAR forms. Grievant contends that he audited the Narc Sheet and MAR forms but did not audit the TAR form. Approximately one year ago, grievant had told his supervisor that he should not be auditing the TAR form because he believed doing so constituted supervision of RNs. The supervisor told grievant that he should "audit the forms or it's your job." Despite understanding that he could be discharged for failure to audit the TAR, grievant did not audit the TAR forms.

Of the seven employees investigated, three (including grievant) were given Group III Written Notices and removed from employment because of the frequency of their failure to treat or document treatment refusals, or because of failure to audit the TAR. The remaining four employees were counseled either verbally or in writing.

#### APPLICABLE LAW 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 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 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 § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions the grievant must present her evidence first and prove her claim by a preponderance of the evidence.<sup>10</sup>

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Va. Code § 2.2-1201, the Department of Human Resource Management promulgated *Standards of Conduct* Policy No. 1.60 effective September 16, 1993. 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. Section V.B.3 of the Commonwealth of Virginia's Department of Personnel and Training Manual *Standards of Conduct* Policy No. 1.60 provides that Group III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal [from employment].<sup>11</sup> It is expected that a facility director will terminate the employment of an employee found to have abused or neglected a client.<sup>12</sup>

The agency has shown, by a preponderance of evidence, that grievant failed to audit the TAR forms on ten occasions during a 16-day period. By failing to perform his assigned responsibility, nurses were not reminded to document the TAR forms. Grievant did not report to any agency management personnel that the TAR forms were significantly deficient in required documentation. Moreover, grievant has admitted these failures during both the investigation and the hearing.

The agency found that these failures constitute patient neglect and removed grievant from employment. Grievant contends that his repeated failures to audit and report documentation deficiencies are not offenses because of his belief that performance of such functions would constitute supervision of

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<sup>10</sup> § 5.8, Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001.

<sup>11</sup> Exhibit 7. DHRM Policy No. 1.60, Standards of Conduct, September 16, 1993.

<sup>12</sup> Exhibit 6. Section 201-8, DI 201(RTS)00, *Ibid*.

registered nurses. However, grievant's failures, under the circumstances of this case, fall within the agency's definition of patient neglect.

The definition of neglect includes failure by an individual to provide treatment or services necessary for the health and welfare of the patient. Grievant has already admitted failure to audit TAR forms as directed by agency management. Grievant's failure to follow a supervisor's instructions constitutes insubordination – a Group II offense. Normally a failure to provide a *single* treatment is not serious if the proper documentation is completed. By properly documenting the TAR, and providing an explanation in the patient's Interdisciplinary Notes, all those involved in the patient's case would be fully informed about the status of the patient's treatment. However, when there is a repeated failure to treat, and a repeated failure to document, those involved in the patient's care (especially the physician) are not receiving an accurate picture of the patient's care and treatment over an extended period of time. Lack of complete information can lead, as it apparently did in this case, to a deterioration of the patient's condition.

One can argue that the patient's condition might have deteriorated even if the treatments had been given but that is merely speculation. The salient issue is that all treatment or the lack of treatment must be fully documented so that the patient's medical records are accurate and complete. Grievant's failure to audit and to bring to a supervisor's attention extensive documentation deficiencies, in conjunction with the failure of others to treat the patient, resulted in a significantly deficient treatment record for patient F. Equally importantly, grievant never informed his supervisor or the physician that the patient's record was not being properly documented. Had he notified them much earlier of the problem, it is probable that the physician could have taken appropriate action to prevent the patient's deterioration.<sup>13</sup> Moreover, even after being notified by the physician that patient F's psoriasis was worsening, grievant did not tell the physician that patient F was not receiving the majority of his prescribed treatments.

Grievant's belief that cross-checking TAR forms constitutes supervision is misplaced. The general test for supervision is that a supervisor: conducts performance evaluations, handles counseling and disciplinary matters, grants leave approval, and is the one to whom an employee reports when ill. Clearly grievant had none of these responsibilities. The purpose of the "audit" function is simply to review the forms to assure that documentation has been completed, and if not, to bring the deficiency to the attention of the appropriate person. Grievant cited Va. Code § 54.1-3000 as authority for his belief. However, this section of the Code merely defines various terms used in Chapter 30 (Nursing).

Moreover, grievant had brought his concern to the attention of a supervisor about one year ago. The supervisor told grievant in no uncertain

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<sup>13</sup> Testimony of a co-grievant (with which grievant did not disagree) established that physicians are usually able to persuade recalcitrant patients that they must take their treatments.

terms that he should audit the TAR or he would lose his job. If grievant believed that the supervisor was incorrect, grievant could have taken the question to a higher level supervisor, to the facility director, or to Human Resources. Grievant did not pursue the matter; instead, he chose to disobey both the supervisor's verbal instructions and the written Work Assignment sheet. As an employee, grievant must follow all reasonable instructions of supervision. Grievant's belief regarding possible supervisory ramifications of the auditing is not supported either by the law he cited or by any other credible source.

In summary, it must be concluded that grievant's failures to audit and report resulted in patient F being neglected as manifested by the deterioration of his psoriasis. Thus, grievant's failures rose above mere failure to follow supervisory instructions and did, in fact, constitute patient neglect. The normal discipline for patient neglect is a Group III Written Notice and removal from employment.

### DECISION

The disciplinary action of the agency is affirmed.

The Group III Written Notice and the removal of grievant from state employment on October 6, 2004 are hereby UPHELD. The disciplinary action shall remain active pursuant to the guidelines in the Standards of Conduct.

### 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 have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. 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. Address your request to:

Director  
Department of Human Resource Management  
101 N 14<sup>th</sup> St, 12<sup>th</sup> floor  
Richmond, VA 23219

3. If you believe the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Address your request to:

Director  
Department of Employment Dispute Resolution  
830 E Main St, Suite 400  
Richmond, VA 23219

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 give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.<sup>14</sup> 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>15</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]

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David J. Latham, Esq.  
Hearing Officer

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<sup>14</sup> An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

<sup>15</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.