

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. 7926



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 7926

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.¹ 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.² The Department of Mental Health, Mental Retardation and Substance Abuse Services (hereinafter referred to as "agency") employed grievant as a registered nurse (RN) for five 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."³ The facility prepares daily Work Assignment sheets that list the specific duties to be performed each day by RNs and LPNs (licensed practical nurse).⁴ 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.⁵ 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.⁶ If any staffing changes occur during a shift, the Work Assignment sheet must reflect the adjusted assignments.⁷

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.⁸ On September 29, 2004, 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

¹ Exhibit 2. Written Notice, issued October 6, 2004.

² Exhibit 2. *Grievance Form A*, filed October 9, 2004.

³ 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."

⁴ Exhibit 4. Assignment sheets from August 26 through September 29, 2004.

⁵ Exhibit 5. TAR forms for patient F, August and September 2004.

⁶ 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)]

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

⁸ Exhibit 11, p.3, ¶ 4, Policy 6.008, *Ibid*.

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 she had not administered treatments to patient F on most of eleven dates - September 4, 5, 8, 9, 10, 13, 14, 15, 16, 18, and 20, 2004. On these dates, grievant was assigned as charge nurse. She believes she may have administered treatment on some dates but did not document having done so. Grievant asserted that the patient had either refused treatment or threatened to assault grievant on most of these dates. Grievant also acknowledged that she had failed to document the patient's refusal of treatment on each occasion.⁹ Grievant failed to notify her supervisor and the physician, either verbally or in writing, that patient F was frequently refusing his treatments. There is no documentation in patient F's medical records to show that he ever threatened any nurse, staff, or anyone else. Grievant acknowledged receiving a physician's order sometime in September noting that patient F's psoriasis was worsening.

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:

⁹ Exhibit 3, p. 4. *Investigator's Summary*.

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.¹⁰

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].¹¹ It is expected that a facility director will terminate the employment of an employee found to have abused or neglected a client.¹²

The agency has shown, by a preponderance of evidence, that grievant failed to treat patient F on eleven occasions during a 16-day period, and that she failed to document the patient's refusal of treatments. 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 her repeated failures to treat and document are a failure to follow established written policy and deserve only a Group II Written Notice. It is undisputed that grievant did fail to follow multiple written policies governing the administration of treatment, documentation of treatment or refusals, and patient care assignments. However, grievant's failures, under the circumstances of this case, also fall within the agency's definition of patient neglect.

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

¹¹ Exhibit 7. DHRM Policy No. 1.60, Standards of Conduct, September 16, 1993.

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

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 provide treatment to the patient. 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 properly document, in conjunction with similar failures of others, resulted in a significantly deficient treatment record for patient F. Equally importantly, grievant never informed her supervisor or the physician that the patient was frequently refusing his treatments. Had she notified them much earlier of the problem, it is probable that the physician could have taken appropriate action to prevent the patient's deterioration.¹³ Moreover, even after being notified by the physician that patient F's psoriasis was worsening, grievant did not tell the physician that she was not treating patient F most of the time.

On the dates at issue, grievant was assigned as charge nurse for the entire unit, which has an east hall and a west hall. Grievant contends that the nurse on the west hall should have treated patient F when he was in the west hall. However, even if that arrangement had been made by the nurses, it was not reflected as an adjustment to the assignment sheet. Moreover, as the charge nurse for the entire unit, grievant was obligated to assure that all scheduled treatments were administered, either by doing them personally or by checking to assure that the other nurse had done the treatment and documented the TAR.

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

¹³ 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.

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 14th St, 12th 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.¹⁴ 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.¹⁵

[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]

David J. Latham, Esq.
Hearing Officer

¹⁴ 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).

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