

Issue: Group III Written Notice (patient neglect); Hearing Date: 05/31/06; Decision Issued: 06/16/06; Agency: DMHMRSAS; AHO: Carl Wilson Schmidt, Esq.; Case No. 8335; Outcome: Agency upheld in full.; **Administrative Review: HO Reconsideration Request received 06/30/06; Reconsideration Decision issued 08/01/06; Outcome: Original decision affirmed; Administrative Review: EDR Ruling Request on Reconsideration Decision received 08/17/06; EDR Ruling No. 2007-1422 issued 08/24/06; Outcome: Request untimely. HO's decision affirmed.**



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8335**

Hearing Date: May 31, 2006  
Decision Issued: June 16, 2006

**PROCEDURAL HISTORY**

On February 2, 2006, Grievant was issued a Group III Written Notice of disciplinary action for:

*Violation D.I. 201, Reporting and Investigating Abuse and Neglect of Clients as defined in Section 201-3 for a substantiated allegation of neglect: The investigation substantiated neglect for failing to respond to an obvious need of the patient without reasonable justification. Additionally, you entered incorrect information on the Seclusion & Restraint Monitoring Form.*

On February 16, 2006, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On April 27, 2006, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 31, 2006, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant

Grievant's Representative  
Agency Party Designee  
Agency Advocate  
Witnesses

### **ISSUE**

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 Mental Health Mental Retardation and Substance Abuse Services employs Grievant as a Registered Nurse II at one of its Facilities. The purpose of her position is:

Utilizing knowledge base and experience, providing age-specific quality nursing care to adult psychiatric patients through the nursing process in accordance with hospital policy and procedure and standards of nursing practice. Evaluates, supervises, documents and provides guidance in the performance of staff.<sup>1</sup>

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<sup>1</sup> Agency Exhibit 6.

She has been employed by the Agency since May 1, 1986. No evidence of prior active disciplinary action was introduced during the hearing.

The Client has a history of behavioral difficulties dating back to her adolescence. She has had multiple length periods of hospitalization in several facilities. She has Borderline Personality Disorder and Factitious disorder. The Client was evaluated by a multidisciplinary team of professionals resulting in an individualized treatment plan. The treatment plan called for consistent attention to issues of closeness and distance, trust, opportunities for self-control and self-regulation and the avoidance of staff entanglement in her ongoing internal chaos.

On July 12, 2005, Grievant was working as charge nurse for the night shift. She was instructed to remain beyond the end of her normal shift and work for the dayshift until 11 a.m.

On July 12, 2005 at approximately 8:15 a.m., the Client was placed in four point restraints in a bed.<sup>2</sup> Grievant initiated placement of the Client in restraints by contacting the Doctor and obtaining an order to use restraints.<sup>3</sup> Grievant left to attend to other urgent duties in another part of the Facility. A Forensic Mental Health Technician (FMHT) was assigned to a “one on one” where the FMHT would be within arm’s length of the Client at all times. The FMHT began the one on one at 8:30 a.m. Shortly thereafter, the Client turned her head to the right and vomited a small amount of partially digested food. The Client asked the FMHT to leave it alone. In order to avoid upsetting the Client, the FMHT covered the vomit with a towel. The FMHT wanted to allow the Client to have more input into her care. There were no signs that the Client was in any physical distress such as signs of aspiration of her vomitus. At 9:16 a.m., Grievant entered the room. At approximately 9:19 a.m., staff entered the room and removed the Client from restraints. After the Client was released from restraints, the FMHT, another employee, and the Client cleaned up the vomit.

When a client is placed in restraints, Agency policy requires staff to complete a Seclusion and Restraint Monitoring Form. Staff are supposed to evaluate the restrained client every fifteen minutes and record that information on the form. The purpose of having a Registered Nurse check the client every fifteen minutes is to determine whether the client is no longer a danger to herself and can be released.

The FMHT completed her portion of the Seclusion and Restraint Monitoring Form by writing in the time intervals of 8:15 a.m., 8:30 a.m., 8:45 a.m., and 9:00 a.m. She also noted the Client’s status regarding nine aspects every fifteen minutes.

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<sup>2</sup> She was placed in restraints “for disrobing, picking up her arms, kicking at staff, verbally abusing, demanding to go into restraints instead of using other protective devices, and delusional thoughts that bugs were on her.” Agency Exhibit 3.

<sup>3</sup> Grievant Exhibit 3.

Grievant completed her portion of the form by indicating the Client's status regarding six aspects every fifteen minutes. Grievant wrote one or two sentences in four separate text blocks to describe the Client's behavior during the fifteen minute intervals. Grievant placed her initials at the 8:15 a.m., 8:30 a.m., 8:45 a.m., and 9:00 a.m. marks on the form. Although the form suggests Grievant made her assessments beginning at 8:15 a.m. and ending at 9:00 a.m., Grievant actually completed the form several hours later. Grievant was not in the room at 8:30 a.m., 8:45 a.m., and 9:00 a.m. and, thus, could not have checked the Client's skin even though Grievant indicated doing so on the form.

The Facility's Medical Director and Attending Psychiatrist reviewed the Client's treatment on July 12, 2005 and wrote:

As much as possible, we tried to see her as her own medical decision maker, and attempted to follow her lead in providing her care. Just as she was able to ask for a helmet or restraints if she had impulses to harm herself and wanted protection, she was also able to ask to be left alone to deal with some situations on her own. As long as she was assessed to be safe, we supported her efforts at self-regulation and control. It is my opinion that the staff acted within the bounds and spirit of this treatment plan during the episode of bed restraint in question. Rather than being neglectful, I think we maintained a high level of clinical attentiveness to this very special individual. The attention to closeness, distance, power and control allowed her to gain some degree of stability during the months she was with us, and eventually led to her being eligible for transfer to a civil hospital setting.<sup>4</sup>

## **CONCLUSIONS OF POLICY**

The Agency has a duty to the public to provide its clients with a safe and secure environment. It has zero tolerance for acts of abuse or neglect and these acts are punished severely. Departmental Instruction 201 defines client neglect as:

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.

Grievant did not neglect the Client. The Medical Director wrote, "[r]ather than being neglectful, I think we maintained a high level of clinical attentiveness to this very special individual." Based on the evidence presented there is no basis to support the Agency's Written Notice alleging Grievant acted contrary to Departmental Instruction 201.

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<sup>4</sup> Agency Exhibit 3.

## Falsification of State Documents

“Falsifying any records, including, but not limited to, vouchers, reports, insurance claims, time records, leave records, or other official state documents” constitutes a Group III offense. DHRM § 1.60(V)(B)(3)(b).<sup>5</sup> “Falsifying” is not defined by DHRM § 1.60(V)(B)(3)(b), but the Hearing Officer interprets this provision to require proof of an intent to falsify by the employee in order for the falsification to rise to the level justifying termination. This interpretation is less rigorous but is consistent with the definition of “Falsify” found in Blacks Law Dictionary (6<sup>th</sup> Edition) as follows:

Falsify. To counterfeit or forge; to make something false; to give a false appearance to anything. To make false by mutilation, alteration, or addition; to tamper with, as to falsify a record or document. \*\*\*

The Hearing Officer’s interpretation is also consistent with the New Webster’s Dictionary and Thesaurus which defines “falsify” as:

to alter with intent to defraud, *to falsify accounts* || to misrepresent, *to falsify an issue* || to pervert, *to falsify the course of justice*.

Grievant falsified the Seclusion and Restraint Monitoring Form, an official State document. She indicated on the form she had conducted fifteen minute checks, yet she had not completed them every fifteen minutes. She marked the form later in the day. Since she did not enter the room and directly observe the Client at 8:30 a.m., 8:45 a.m., and 9:00 a.m.<sup>6</sup> Grievant’s assessment of the Client’s status, such as description of the Client’s skin, was falsely reported.<sup>7</sup> The Agency has presented sufficient evidence to support its issuance to Grievant of a Group III Written Notice for falsification of State documents.

## Adequacy of Notice

The *Rules for Conducting Grievance Hearings* state:

In all circumstances, however, the employee must receive notice of the charges in sufficient detail to allow the employee to provide an informed response to the charge.

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<sup>5</sup> The Hearing Officer construes this language to include the circumstances where an employee creates a false document and then submits it to an agency where that document becomes a record of the agency.

<sup>6</sup> Dr E observed the Client at 8:30 a.m. Grievant was not relieved of her obligation to assess the Client simply because Dr. E observed the Client.

<sup>7</sup> Grievant was to assess whether the Client’s skin was warm to the touch. Grievant could not have assessed this by merely looking at the Client from outside the room.

In support of this principal, the *Rules* cite O’Keefe v. USPS, 318 F.3d 1310 (Fed. Cir. 2002). In O’Keefe, the agency removed an employee with the general charge of “improper conduct/fraudulent use of personal identifiers.” The Court reversed the agency’s action because the facts and reasons for the removal were not written in the Notice of Proposed Removal given to the employee.

The Written Notice alleged Grievant neglected the client. The Agency has not established Grievant neglected the Client. In order to uphold a Group III Written Notice for falsification of State documents, the Agency must show that it placed Grievant on notice of the charge against her of falsification.

The Written Notice states, “[a]dditionally, you entered incorrect information on the *Seclusion & Restraint Monitoring Form*.” This language alone is insufficient to place Grievant on notice of an allegation of falsification. The First Step respondent wrote, “[f]rom my investigation of the grievance it was identified that the issue was that [Grievant] did not comply with policy and procedure by falsifying documentation.”<sup>8</sup> As part of the Investigator’s report that was provided to Grievant at least four workdays prior to the hearing, the Investigator concluded, “[Grievant] also falsified documentation on the *Seclusion & Restraint Monitoring Form*.”<sup>9</sup> Based on the aforementioned, the Hearing Officer finds that the Agency adequately informed Grievant of the allegation that she falsified State documents prior to the hearing.

### Mitigation

*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 Employment Dispute Resolution....”<sup>10</sup> Under the EDR Director’s *Rules for Conducting Grievance Hearings*, the Hearing Officer may mitigate based on considerations including 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, and (3) the disciplinary action was free of improper motive. The *Rules* further require the Hearing Officer to “consider management’s right to exercise its good faith business judgement in employee matters. The agency’s right to manage its operations should be given due consideration when the contested management action is consistent with law and policy.”

Grievant contends the disciplinary action should be mitigated because she was working with a client for whom she was not normally responsible, she had been working an extended shift because another employee failed to come to work, and the Written Notice was not issued until over six months after the event. Grievant was expected to

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<sup>8</sup> Agency Exhibit 2.

<sup>9</sup> Agency Exhibit 3.

<sup>10</sup> *Va. Code § 2.2-3005*.

accurately complete reports regardless of whether she was familiar with the client, the restraint procedures, or was tired because of having to work beyond her normal work hours.<sup>11</sup> The delay in issuing the Written Noticed resulted from the Agency's continuing review of the case to determine whether disciplinary action should be taken and, if so, what action to take. The delay was justified and appropriate.

In light of the standard set forth in the *Rules*, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action 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 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. Please address your request to:

Director  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

3. If you believe that 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. Please address your request to:

Director  
Department of Employment Dispute Resolution

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<sup>11</sup> Grievant should not have reported completing assessments every fifteen minutes, when she did not in fact complete such assessments. Given Grievant's other priorities, Grievant's failure to timely complete assessments would have been justified, according to the Agency.



830 East Main St. STE 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 all of your appeals to the other party and to the EDR Director. 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. 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>12</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].

*S/Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>12</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case No: 8335-R**

Reconsideration Decision Issued: August 1, 2006

**RECONSIDERATION DECISION**

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. “[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis ...” to grant the request.

Grievant argues the Agency failed to take progressive discipline against her. Although the Standards of Conduct encourage agencies to engage in progressive discipline, the Standards of Conduct do not require agencies to issue a lesser level of disciplinary action than would otherwise be appropriate in order to engage in progressive discipline. The Agency has presented sufficient evidence to support its issuance of a Group III Written Notice.

Grievant argues she reported to the Registered Nurse Coordinator “that a number of things were happening on the ward and that she needed help.” Grievant’s argument fails because whether she was busy or distracted did not affect her ability to accurately write a report about what happened. The fact that Grievant was busy elsewhere confirms that she did not observe the Client at 8:30 a.m., 8:45 a.m., and 9:00 a.m. Being busy did not cause her to report that she observed a client at a specific time when in fact she did not observe the Client.

Grievant contends she reported to the Registered Nurse Coordinator that she needed help filling out documents but did not receive any assistance. The absence of assistance to help Grievant does not relieve her of her obligation to correctly complete medical records.

Grievant contends that the Assistant Director of Nursing (ADN) was given a chance to revise the Written Notice form but Grievant was not given the chance to

revise medical records. She argues this is inconsistent. Grievant is proposing similarities between documents that are not similar. The ADN revised the Written Notice approximately one and a half months later to eliminate a ten workday suspension. The original Written Notice was not altered or revised to disguise the accuracy of information. The second Written Notice was issued to reflect a decision to reduce disciplinary action. The second Written Notice also was not altered or revised to disguise the accuracy of information. Grievant, however, intentionally misrepresented information in medical records that were a permanent record used for patient care. To make corrections to the Client's medical records, Grievant would have had to write on the original documents by striking through the erroneous information and entering the correct information as well as the date of the change. She would not have been permitted to submit a second copy. There is no reason to believe Grievant made any attempt to correct the medical records. In addition, the Agency is not obligated to afford Grievant a chance to correct her falsification.

Grievant knew or should have known that she was obligated to correctly enter information into the Client's medical record. Her failure to do so justified the Agency's issuance of a Written Notice for falsification of State records.

Grievant's request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. For this reason, Grievant's request for reconsideration is **denied**.

## **APPEAL RIGHTS**

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

### Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

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Carl Wilson Schmidt, Esq.  
Hearing Officer