

Issue: Group III Written Notice (patient neglect); Hearing Date: 11/04/10; Decision Issued: 11/05/10; Agency: DBHDS; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 9413; Outcome: No Relief – Agency Upheld.

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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In the matter of: Case No. 9413

Hearing Date: November 4, 2010  
Decision Issued: November 5, 2010

Department of Behavioral Health and Developmental Services (“Agency”) issued to the Grievant a Group III Written Notice on May 18, 2010, for violation of Departmental Instruction 201, Reporting and Investigating Abuse and Neglect of Individuals Receiving Services in Department Facilities. The Grievant had no other active Written Notices. No suspension or termination was levied.

Grievant timely filed a grievance to challenge the Agency’s disciplinary action. The outcome of the resolution steps was not satisfactory to the Grievant and he requested a hearing. On September 20, 2010, the Department of Employment Dispute Resolution (“EDR”) appointed the Hearing Officer. A pre-hearing conference was held by telephone on September 29, 2010. The hearing ultimately was scheduled at the first date available between the parties and the hearing officer, November 4, 2010, on which date the grievance hearing was held, at the Agency’s human resources office. Because of the Grievant’s unavailability during much of October, good cause was found to extend the 35-day deadline for completion of the grievance hearing and decision.

The Agency submitted documents for exhibits that were, without objection from the Grievant, admitted into the grievance record, and they will be referred to as Agency’s Exhibits. The Grievant’s exhibits were received into the grievance record without objection, and they will be referred to as the Grievant’s Exhibits. The hearing officer has carefully considered all evidence presented.

APPEARANCES

Grievant  
Representative/Advocate for Agency  
Witnesses

ISSUES

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?

The Grievant requests rescission or reduction of the Group III Written Notice.

### BURDEN OF PROOF

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, such as claims of retaliation and discrimination, the employee must present his evidence first and must prove his claim by a preponderance of the evidence. *In this disciplinary action, the burden of proof is on the Agency.* 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.

### 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.

The Agency's Standards of Conduct, Policy 1.60, defines Group III offenses to include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination. Agency Exh. 5. Examples stated in the policy are offenses that endanger others in the workplace, constitute illegal or unethical conduct; neglect of duty; disruption of the workplace; or other serious violations of policies, procedures, or laws. Agency Exh. 5.

Departmental Instruction 201-3 defines neglect as follows:

. . . failure by a person, program, or facility operated, licensed, or funded by the department, responsible for providing services to do so, including 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.

Agency Exh. 4.

### The Offense

After reviewing the evidence presented and observing the demeanor of each testifying witness, the Hearing Officer makes the following findings of fact and conclusions:

The Agency employed Grievant as a registered nurse for two years. The Grievant also has a long record of service in other capacities. On the date of the offense, February 27, 2010, the Grievant was the charge nurse on the evening shift of the maximum-security ward. On the ward was Patient P, who presented a “code red” threat to himself and others. The Agency assigned an extra staff person to the ward because of Patient P.

The Agency’s witnesses, including the Agency’s investigator, Agency’s director of nursing, and the Agency’s facility’s director, testified that the charge nurse assigns and supervises the other staff on duty, and there is supposed to be a staff person positioned in the ward’s dayroom to view the sleeping rooms hallway to monitor patient activity. This observation ensures that the patients’ movements are monitored for safety and care.

The Agency’s Nursing Policy P-10, “Sleep Monitor,” requires adequate monitoring of all patients for health and safety while sleeping every 15 minutes. The charge nurse is responsible for ensuring this monitoring. Agency Exh. 3.

The Agency presented video recording of the evening of February 27, 2010, and the Grievant was visible in the dayroom, watching television with other staff who were designated to be monitoring the hallway. Patient P was also seen walking in and out of the dayroom. The video in the hallway also captured Patient P walking unobserved from his into the room of Patient D several times while the Grievant and other staff were watching television. Patient P’s activities were unobserved because staff was not positioned as assigned for long intervals of time. Moreover, the 15-minute checks on the Grievant’s shift were spotty.

During the next shift (the night shift), Patient D was observed by staff at approximately 5:15 a.m., found unresponsive, and emergency response was made in effort to save Patient D’s life. Patient D was later pronounced dead and police investigation, based partly on the video evidence, concluded that Patient P murdered him sometime between 9:36 p.m. and 9:56 p.m. on

the Grievant's evening shift as charge nurse. The Agency's investigation report summarized these and other findings. Agency Exh. 2.

In his defense, while the facts noted above are not challenged, the Grievant stated and asserted that the Agency did not have an adequate plan to handle a dangerous patient like Patient P, that unwritten promises for security and staffing were not honored, and that the Agency inappropriately placed the sole blame for the tragedy on the direct care staff instead of management. The Grievant testified that Patient P put his treatment team on notice of his dangerous intentions. *See* Grievant's Exhibits.

The Agency's Group III discipline considered the Grievant's service history and was mitigated by not levying a suspension or termination.

Va. Code § 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code § 2.2-3005.1 provides that the hearing officer may order appropriate remedies including alteration of the Agency's disciplinary action. Implicit in the hearing officer's statutory authority is the ability to determine independently whether the employee's alleged conduct, if otherwise properly before the hearing officer, justified the discipline. The Court of Appeals of Virginia in *Tatum v. Dept. of Agr. & Consumer Serv.*, 41 Va. App. 110, 123, 582 S.E. 2d 452, 458 (2003) (quoting Rules for Conducting Grievance Hearings, VI(B)), held in part as follows:

While the hearing officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy... "the hearing officer reviews the facts *de novo*...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action."

The offense of neglect of duty, especially when harm results, constitutes a violation of the applicable rules and Standards of Conduct. I find the Grievant's neglect, at least partly, contributed to the tragic event of Patient D's demise. The Agency, thus, has met its burden of proving the Group III Written notice.

The Grievant argues, reasonably, that the Agency could have exercised progressive discipline along the continuum short of a Group III. The Agency had the discretion to elect less severe discipline. 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..." Va. Code § 2.2-3005. Under Virginia Code § 2.2-3005, the hearing officer has the duty to "receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Employment Dispute Resolution."

Under the *Rules for Conducting Grievance Hearings*, “[a] hearing officer must give deference to the agency’s consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency’s discipline only if, under the record evidence, the agency’s discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency’s discipline, the hearing officer shall state in the hearing decision the basis for mitigation.” A non-exclusive list of examples includes 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 among similarly situated employees, and (3) the disciplinary action was free of improper motive.

Grievant contends the disciplinary action was unfair and should be mitigated. The Grievant was subject to suspension of up to 30 days or discharge, yet the Agency mitigated and did not impose the normal sanction for a Group III offense. If the Agency does not consider mitigating factors, the hearing officer should not show any deference to the Agency in his mitigation analysis. In this proceeding, the Agency did consider mitigating factors in disciplining the Grievant, including his service to the Agency. However, the Agency also had to account for the tragic result of the patient/client neglect described above, even if that neglect was only partially responsible for Patient D’s death.

Accordingly, because the Agency assessed mitigating factors, even if the hearing officer disagrees with the action, the *Rules* only allow this hearing officer to mitigate the discipline further if this hearing officer upon consideration of the evidence finds that the Agency’s discipline exceeded the limits of reasonableness. Considering the gravity of the neglect and the result, the Group III Written Notice without discharge is within the bounds of reasonableness. Thus, the hearing officer has no discretion to mitigate the discipline further.

### DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of the Group III Written Notice of disciplinary action is **upheld**.

### APPEAL RIGHTS

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

**Administrative Review:** This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.

2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to the Director of the Department of Human Resources Management, 101 N. 14<sup>th</sup> Street, 12<sup>th</sup> Floor, Richmond, Virginia 23219 or faxed to (804)371-7401.
3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the EDR Director, Main Street Centre, 600 East Main Street, Suite 301, Richmond, VA 23219 or faxed to (804)786-0111.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar** days of the **date of the original hearing decision**. (Note: the 15-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days). A copy of each appeal must be provided to the other party.

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.

I hereby certify that a copy of this decision was sent to the parties and their advocates by certified mail, return receipt requested.



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Cecil H. Creasey, Jr.  
Hearing Officer