

Issue: Group III Written Notice with termination (patient neglect); Hearing
Date: 04/13/12; Decision Issued: 04/23/12; Agency: DBHDS: AHO:
Ternon Galloway Lee, Esq.; Case No. 9796; Outcome: No Relief – Agency
Upheld.

DECISION OF HEARING OFFICER

In the matter of

Case Number: 9796

Hearing Date: April 13, 2012

Decision Issued: April 23, 2012

SUMMARY OF DECISION

The Agency had found Grievant violated Departmental Instruction 201 (“DI 201”) and Agency Policy # 050-57 (“Policy 050-57”) regarding Reporting and Investigating Abuse and Neglect of Patients. It therefore issued Grievant a Group III Written Notice with termination. After finding Grievant engaged in the conduct alleged and the Agency’s discipline was warranted and appropriate, the Hearing Officer upheld the discipline.

PROCEDURAL HISTORY

On February 13, 2012, the Agency issued Grievant a Group III Written Notice with termination for violating DI 201 and Policy # 050-57 regarding Reporting and Investigating Abuse and Neglect of Patients.

On February 13, 2012, Grievant timely filed a grievance to challenge the Agency’s action. The Grievant was dissatisfied with the outcome and requested a hearing. On March 19, 2012, the Department of Employment Dispute Resolution (“EDR”) assigned the undersigned as the Hearing Officer to this appeal. A pre-hearing conference (“PHC”) was held on March 29, 2012, and subsequently a scheduling order was issued.

The Hearing Officer scheduled the hearing for April 13, 2012, the first date available between the parties. The hearing followed where admitted exhibits included Hearing Officer’s exhibits one through four, the Agency’s exhibits one through nine, and Grievant’s exhibit one.

At the hearing both parties were given the opportunity to make opening and closing statements, to call witnesses and to cross-examine witnesses called by the other party.¹ During the proceeding, the Grievant represented herself and the Agency was represented by its advocate.

APPEARANCES

¹ Grievant waived her opening statement.

Advocate for Agency
Witnesses for the Agency (6 witnesses)
Grievant (1 witness, the Grievant)

ISSUE

Was the Group III Written Notice with termination warranted and appropriate under the circumstances?

BURDEN OF PROOF

In disciplinary actions, 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. 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. On February 1, 2012, Grievant was a twenty-three (“23”) year veteran employee of the Agency. Her job title was DSA II, or nurse’s assistant. Job responsibilities included providing care for patients to include sitting with them and monitoring their behaviors. (A Exh. 4; Testimony of Grievant).
2. On February 1, 2012, Agency Patient # 194028 (“Patient”) was spending the night as a patient at [Hospital]. Patient had been transported to [Hospital] by emergency because while at the Agency, Patient had pulled out her PEG tube. Because of this, Patient required a procedure at [Hospital] to re-implant it. Grievant was assigned to monitor Patient while at [Hospital] on February 1, 2012. (Testimony of Grievant; A Exh. 6).
3. Patient is non-geriatric and has been a patient at the Agency since August 2011. She weighs about 300 pounds. (A Exh. 6, p.3; Testimony of Grievant).
4. Patient has diagnoses of Borderline Personality Disorder, Bipolar Disorder. She also has a history of self-injurious behaviors to include swallowing foreign objects. Due to this latter assessment Patient’s treating physician ordered one to one (“1:1”) monitoring of Patient. This order of monitoring was required prior to February 1, 2012.² (Testimony

² The Hearing Officer notes that Agency Exhibit 6, at page D.1.11 provides a copy of the treating physician’s order for 1:1 monitoring of Patient. While the order indicates a February 1, 2012 effective date, the Hearing Officer has found 1:1 monitoring of Patient was required prior to February 1, 2012. This is so, because Grievant admitted that the 1:1 monitoring was required prior to February 1, 2012. Further, a treatment team

of treating physician; Testimony of Grievant; A Exh. 6, pp.3, and D.1.20).

5. The 1:1 monitoring required an Agency staff person to closely observe Patient. Specifically, during the monitoring, the staff person was required to remain within five feet of Patient and to keep the patient's hands and face in view at all times during the monitoring. Staff persons monitoring Patient usually rotated every two hours. (Testimonies of treating physician, Grievant's supervisor, and Agency Witnesses C and D; Agency Exh. 6).

6. On January 27, 28, and 29, 2012, all staff providing care for Patient were informed that Patient was to continue receiving 1:1 monitoring as defined in the immediate preceding "Finding of Fact." (A Exh. 6, pp. 6 and D.1.20; Testimonies of Grievant's supervisor and investigator).

7. While Grievant was monitoring Patient on February 1, 2012, at [Hospital], Patient urinated on herself/informed Grievant she had wet herself. Patient became agitated because she was wet. Grievant testified credibly that she was under the assumption she was required to change Patient's clothing. Grievant was unfamiliar with the call button/bell or its location in the Patient's room at [Hospital]. Thus, to obtain assistance in changing Patient, Grievant walked to Patient's room door and requested assistance from [Hospital] nurse(s). Specifically, Grievant asked the nurse where she could find a diapered brief. When walking to the door and making the request, Grievant could not see Patient's hands and face. (Testimony of Grievant). There was nothing unusual about the nurses' call bell/button at [Hospital] or its location in Patient's room at [Hospital].³ (A Exh. 9, pp. B through D).

8. When Grievant turned around, Patient had removed the batteries from the television remote and swallowed them. (Testimony of Grievant; A. Exh. 5; A. Exh. 6, p. D.1.21).

9. Emergency surgery at [Hospital] was required to remove the batteries from Patient's body. (A Exh. 6, p. D. 1.22)

10. Then an allegation of Patient abuse was made against Grievant. Next the Agency conducted an investigation under DI 201 to determine if Grievant had neglected Patient. (A. Exh. 6, p.1).

11. As a result of the investigation, Agency found Grievant had neglected Patient. (A. Exh. 6, p.9; Testimony of investigator).

update note dated January 27, 2012 states "[Patient's] 1:1 monitoring will continue." (A Exh. 6, p. D.1.20).

³ Agency offered Exhibit 9 (pictures of the nurses' station and the call button in patient's [Hospital] room) to show the location and design of the call button in Patient's room at [Hospital]. Hearing Officer finds neither party presented testimony about whether the referenced pictures accurately showed the design and location of the call button. However, Grievant did not object to the pictures and they were admitted as Agency Exhibit 9. Thus, the Hearing Officer finds the pictures accurately display the call button's location and design in Patient's room on February 1, 2012.

12. The Agency then issued Grievant a Group III Written Notice with termination which described the nature of the offense as follows:

On February 1, 2012 while you were assigned to perform 1:1 observation of a client at [Hospital] you failed to maintain direct observation of the patient as required when on 1:1. As a result the patient incurred and injury resulting in emergency surgery. Therefore your actions violated DI 201 and ESH Policy #050-57 “Reporting and Investigating Abuse and Neglect of Client” which resulted in a substantiated finding of neglect.

(A. Exh. 4).

13. The Agency found no reason to mitigate the discipline. (A. Exh. 5, p. 2).

14. Agency Policy 050-57 requires allegations of abuse and/or neglect of patients at the agency to be investigated and prohibits abuse and neglect of patients in any form (A Exh. 7).

15. Policy 050-57 defines neglect as follows:

Neglect: The 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 in the facility.

(A Exh. 7, p.2)

16. The Agency’s policy DI 201 also prohibits abuse or neglect of patients. (A Exh. 8).

17. Policy DI 201 defines neglect as:

This means the 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.

19. Under the Standards of Conduct, governing state employees’ conduct in the work place, neglect as defined here is considered a Group III offense that warrants termination. (A Exh. 1, p.2; A Exh. 2).

APPLICABLE STANDAR), 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. GPM § 5.8.

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 ("Standards") 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. Less serious actions of misconduct are considered Group I offenses under the Standards. Group II offenses are considered more serious misconduct, and Group III offenses are considered the most serious actions of misconduct.

In this case, on February 13, 2012, Agency management issued Grievant a Group III Written Notice with termination.

The Hearing Officer examines the evidence to determine if the Agency has met its burden.

I. Analysis of Issue(s) before the Hearing Officer and Conclusions

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

The Written Notice asserts that Grievant engaged in neglectful conduct toward a patient.

As defined by Agency policy, neglect includes, among other things, the failure to provide care and/or services necessary to the health, safety, or welfare of a person receiving care or treatment by the Agency for mental illness, mental retardation, or substance abuse. (A Exhs. 7, p. 2; 8, p. 2).

In this case, Grievant was required to monitor Patient and keep the Patient's face and hands in view at all times. This degree of monitoring was required due to Patient's self-injurious behaviors, to include Patient swallowing objects. While on duty with Patient at [Hospital], Grievant apparently turned her back on Patient for a brief period and was unable to see Patient. The evidence shows Grievant's brief lack of monitoring occurred because she was unfamiliar with the nurses' call button/bell in the Patient's room. So, rather than requesting assistance by use of the call bell, Grievant stepped to the entrance of the room, looked out, and requested help from a nurse so Grievant could change Patient. While Grievant was not directly observing Patient, the patient put batteries in her mouth. Before Grievant could intervene, Patient swallowed them. Patient then required emergency surgery to remove them. Grievant admits she was wrong for taking her eyes off Grievant, but testified that Patient weighed 300 pounds and was agitated because she had urinated on herself. Grievant feared if Patient was not changed and her agitation increased, Grievant would be unable to handle the Patient.

1. Conclusion

Although Grievant had good intentions when she sought help to change Patient, the fact remains that Grievant failed to perform her duty which was to remain within five feet of Patient and to keep Patient's hands and face in Grievant's view at all times. This level of monitoring was needed to prevent Patient from harming herself. Grievant was neglectful. Her conduct violated the above mentioned Agency policies and therefore was misconduct.

B. Was the Agency's Discipline consistent with law and policy?

The evidence shows that Grievant failed to provide 1:1 monitoring of Patient as defined here on February 1, 2012. Further, that failure constituted neglect of Patient. Also, the evidence shows that the Agency has a zero tolerance for this misconduct. And upon the Agency finding that an employee has engaged in neglecting a patient, policy requires that immediate action be taken to prevent future occurrences of the conduct. (See A Exh. 8, p. 1; A Exh. 7, p. 1). What is more, Agency policy normally dictates issuing a Group III written notice with termination to an employee found to have engaged in the neglect of a patient. (See Agency policy 050-07, p. 5). Further, the evidence does not show Grievant's discipline was retaliation or unlawful discrimination by Agency.

1. Conclusion

Thus, considering the above noted policies and how the Agency applied them in this case, the Hearing Officer finds Grievant's discipline was consistent with law and 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 rules established by the Department of Employment Dispute Resolution.”⁴ 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.”⁵ 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,
- (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.⁶

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.

The Hearing Officer has found the Grievant engaged in the behavior described in the Written Notice, that behavior constituted misconduct, and the Agency's discipline was consistent with law and policy. A focus on whether the discipline was reasonable is now undertaken.

The evidence shows prior to Grievant's termination, she had been employed by the Agency for 23 years. In mitigation Grievant references her long tenure with the Agency and contends that she had only worked with non-geriatric patients, like Patient, for only several months before the conduct that resulted in her termination. She further notes that she mistakenly believed she was responsible for changing Patient once Patient urinated on herself. Grievant testified Patient weighed 300 pounds and was becoming more agitated due to her being wet from urinating on herself. Because of these factors, Grievant testified that she briefly turned her back on Patient and stepped to the door's entrance just long enough to get assistance from a nurse to change Patient.

⁴ Va. Code Section 2.2-3005 (c)(6)

⁵ *Rules for Conducting Grievance Hearings* VI(A)

⁶ *Rules for Conducting Grievance Hearing* VI(B)

The Hearing Officer finds Grievant a credible witness and that she had good intentions. That said, the Hearing Office, cannot overlook Grievant had been given/reminded of the 1:1 monitoring instructions just days before the misconduct. Further, direct observations were required for the patient's safety due to Patient's self injurious behaviors, to include swallowing objects.

What is more, the Hearing Officer had an opportunity to view a picture of the call bell/button in a patient room at [Hospital] and its location. Having done so, the Hearing Officer finds nothing unusual about it or where it was placed in the room. Accordingly, the Hearing Officer finds Grievant should have been familiar with the nurses' call bell and its location in Patient's room. Grievant should have known how to use it, and, even if she did not, Grievant's continuous and direct monitoring of Patient should not have lapsed, given Patient's history of self-injurious behavior.

The Hearing Officer is guided by the Rules for Conducting Grievance Hearings. They require a Hearing Officer to give deference to the Agency's consideration and assessment of any mitigating and aggravating circumstances. Under these rules, only if under the record evidence, the Agency's discipline exceeds the limits of reasonableness is a Hearing Officer permitted to mitigate the discipline.⁷

The Hearing Officer has considered Grievant's credible testimony, arguments and any evidence presented to support them as well as all other evidence. The Hearing Officer also notes Grievant's error produced a life threatening incident. That said, the Hearing Officer finds no reason to disregard the Agency's assessment regarding mitigating the discipline. Also, she finds the Agency's discipline did not exceed reasonableness.

DECISION

Hence, for the reasons noted here, the Agency's discipline 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 review 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

⁷ *Id.*

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. Request should be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th floor Richmond, VA 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 that the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decisions so that it complied with the grievance procedure. Requests should be sent to the EDR Director, Main Street Centre, 600 East Main, 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 final decisions, a party may appeal on the ground 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 Directory before filing a notice of appeal.

ENTERED this 23rd day of April 2012..

Ternon Galloway Lee, Hearing Officer