

Issue: Group III Written Notice with Termination (patient neglect); Hearing Date: 01/23/19; Decision Issued: 01/28/19; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 11273; Outcome: No Relief – Agency Upheld; **Administrative Review Ruling Request received on 01/29/19; EDR Ruling No. 2019-4852 issued 02/11/19; Outcome: AHO's decision affirmed.**



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11273

Hearing Date: January 23, 2019
Decision Issued: January 28, 2019

PROCEDURAL HISTORY

On September 11, 2018, Grievant was issued a Group III Written Notice of disciplinary action with removal for falsifying records.

On September 18, 2018, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On October 8, 2018, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On January 23, 2019, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Representative
Agency's Representative
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?

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. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. 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 Behavioral Health and Developmental Services employed Grievant as a Registered Nurse. No evidence of prior active disciplinary action was introduced during the hearing.

The Unit had approximately 26 patients including some who were "high-risk" and could engage in self-injurious behavior. The Unit had three hallways and an office that served as the Nursing Station. Each patient had a room with a door that the patient could leave open or closed. If the patient's door was closed, an employee could look through a window in the door to see the patient inside.

Unit staff were expected to conduct "checks" by observing each patient in his or her room to ensure the patient's safety. Psychiatric Nursing Assistants (PSAs) working in the Unit were expected to walk down the three hallways of the Unit, look inside the door of each room, and confirm that the patient inside was not in distress. PSAs were obligated to conduct patient checks every 30 minutes. Registered Nurses working in the Unit were expected to conduct two patient checks at random times chosen by the RNs. RNs performed random checks because patients might be able to predict the checks conducted by PNAs. If a patient wanted to hurt him or herself, the patient could wait until the PNA finished a check and the patient would have 30 minutes to harm him or herself before the next PNA check. The patient would not be able to predict an RNs check and, thus, the RN might be able to catch a patient acting inappropriately and

mitigate the patient's behavior. PNAs and RNs were supposed to record the times they conducted patient checks on the Patient Tracking Sheet.

It was not the practice at the Facility for the RN to rely on the checks of the PNA as a substitute for the RN performing two random checks. RNs were expected to conduct their own checks.

Grievant was working as the RN on the Unit from 11 p.m. on July 24, 2018 until 7 a.m. on July 25, 2018. She was the only RN on the Unit during that time. The Psychiatric Nursing Assistant was also working on the Unit during that time.

Grievant did not conduct any patient checks during her shift. In particular, she did not walk down the hallways of the Unit and look into patient rooms to determine whether the patients were safe.

Grievant wrote on the Patient Tracking sheet that she made random checks at 11:50 p.m. on July 24, 2018 and 03:20 a.m. on July 25, 2018. At the time Grievant wrote that she had conducted random checks, she knew she had not conducted any random checks.

The Psychiatric Nursing Assistant worked on the floor during Grievant's shift and did not observe Grievant walking down the hallways to perform a random check of patients. The Psychiatric Nursing Assistant reported Grievant to Agency managers as required by Agency policy.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action."¹ Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

"[F]alsification of records" is a Group III offense.² Falsification is not defined by the Standards of Conduct 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 (6th Edition) as follows:

¹ The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

² See, Attachment A, DHRM Policy 1.60.

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*.

Agency Policy entitled Nursing Procedure provides:

During each shift, the RN will perform 2 random checks and will document each of these in the right hand margin of the tracking sheet and place initials at the bottom of the column.³

The Facility used Patient Tracking Sheets to record the times that PNAs and RNs conducted patient observations. They were official State records. Grievant wrote on the Patient Tracking Sheet that she conducted a random patient check at 11:50 p.m. on July 24, 2018 and at 3:20 a.m. on July 25, 2018. Grievant knew that she had not conducted patient checks at the times she wrote she had completed patient checks. The Agency has presented sufficient evidence to show that Grievant falsified the Patient Tracking Sheets thereby justifying the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, the Agency's decision to remove Grievant must be upheld.

Grievant argued that she should have been notified she was under investigation and told of her error so she would not repeat the mistake. The Agency, however, allowed Grievant to work for an additional two months before telling her she had been investigated. This argument is unpersuasive because there is no policy requiring the Agency to notify Grievant that she was under investigation. Grievant knew or should have known not to claim to have performed random checks she had not performed.

Grievant argued that the discipline against her was excessive. The Agency presented sufficient evidence to support its decision to issue a Group III Written Notice with removal. Although the Agency could have issued a lesser level of disciplinary action, its action is consistent with State policy.

Grievant argued that she was denied procedural due process because she was not given notice of the charges against her after the incident and not interviewed regarding what happened. The Agency presented evidence showing that the Unit Coordinator presented Grievant with a letter informing her of the charges against her on September 10, 2018. Grievant argued that the letter was mailed to her and not presented to her on September 10, 2018. The Hearing Officer can assume for the sake

³ Agency Exhibit 3.

of argument that Grievant was denied procedural due process by the Agency. The outcome of this hearing does not change based on that assumption. The Hearing Process cures any defects in procedural due process arising from the Agency's communications to Grievant. Grievant had opportunity to present to the Hearing Officer any arguments or facts that the Agency may have denied her prior to the hearing.

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 Human Resource Management"⁴ 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 presented evidence suggesting that it was common practice for tracking sheets to have incomplete check boxes and for a nurse to ask someone else to fill in the boxes even though the checks had not been conducted. Grievant contends she was singled-out for disciplinary action for engaging in a common practice. The evidence showed that if a nurse asked them to fill in the sheet falsely showing checks had been made, staff were aware that they were not supposed to fill in the sheets. One witness testified he had been asked to fill in several blank spaces on a Patient Track Sheet by a nurse but refused to do so. It is not enough to show that some employees were falsifying Patient Tracking Sheets, Grievant was obligated to show that Agency managers were aware of the practice and allowed it to happen. Grievant did not show that Agency managers were aware some employees may have been falsely reporting patient checks that had not actually been performed. The Agency did not single-out Grievant for disciplinary action.

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 with removal is **upheld**.

⁴ Va. Code § 2.2-3005.

APPEAL RIGHTS

You may request an administrative review by EEDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EEDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Equal Employment and Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

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

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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.^[1]

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

^[1] Agencies must request and receive prior approval from EEDR before filing a notice of appeal.