

Issue: Group III Written Notice with Termination (patient neglect); Hearing Date: 05/24/13; Decision Issued: 05/28/13; Agency: DBHDS; AHO: Cecil H. Creasey, Jr., Esq.; Case No.10079; Outcome: No Relief – Agency Upheld; **Judicial Review: Appealed to Circuit Court in Dinwiddie County; Outcome: AHO's decision affirmed.**

COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 10079

Hearing Date: May 24, 2013
Decision Issued: May 28, 2013

PROCEDURAL HISTORY

Grievant was a charge nurse for the Department of Behavioral Health and Development Services (“the Agency”), serving the facility. On April 5, 2013, the Grievant was charged with a Group III Written Notice for patient neglect by not ensuring a patient’s transfer was properly documented on February 21, 2013. The discipline was job termination, based on this and her prior record of notices of improvement needed.

Grievant timely filed a grievance to challenge the Agency’s disciplinary action, and the grievance qualified for a hearing. On April 24, 2013, the Office of Employment Dispute Resolution, Department of Human Resource Management, (“EDR”) appointed the Hearing Officer. During the pre-hearing conference, the grievance hearing was scheduled for May 24, 2013, on which date the grievance hearing was held, at the Agency’s facility.

Both the Grievant and the Agency submitted documents for exhibits that were accepted into the grievance record, and they will be referred to as Agency’s or Grievant’s Exhibits, respectively. The hearing officer has carefully considered all evidence presented.

APPEARANCES

Representative for Agency
Advocate for Agency
Witnesses
Grievant
Counsel for Grievant

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?

Through her grievance filings, the Grievant requested rescission of the Group III Written Notice, reinstatement, and back pay.

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 relied on the Standards of Conduct, promulgated by the Department of Human Resource Management, Policy 1.60, which defines Group III Offenses to include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination. This level is appropriate for offenses that, for example, 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. 7.

Departmental Instruction 201-3 defines “neglect”:

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.

Agency Exh. 7.

Facility Policy RTS-15a, Patient Abuse, Reporting and Investigation of Allegations, provides, at IV(J)(4):

It is expected that the Hospital Director will issue a Group III Written Notice and terminate an employee(s) found to have abused or neglected a patient. If it is determined that, based on established mitigating factors, disciplinary action may warrant a penalty less than termination, the Hospital Director must consult with the Central Office Human Resource Development and Management Office and provide written justification within five working days to the Assistant Commissioner for Behavioral Health.

Agency Exh. 7.

Facility Policy P-11, Monitoring Patient Movement, directs nursing staff in the appropriate methods on ensuring patient movement is done in a controlled, efficient, and safe manner. The policy “is to ensure that all patients being moved from one location to another within the locked units are escorted in a safe and orderly manner and consistently accounted for before, during, and after the move.” Section III (A), Civil Side Treatment Mall Patient Movement, provides:

1. The Patient Roll Call Form will be completed by the charge nurse at the beginning of the shift with the current list of patients present on the ward and given to the staff member designated to perform the visual roll call.
2. Prior to patient movement, all patients must be in the dayroom.
3. A security sweep should be done by the nursing staff going through each of the patient rooms and bathroom to ensure that all of the patients are in the dayroom

4. During the security sweep the nursing staff shall inspect each room and then close and lock the doors behind them to ensure that patients do not reenter those areas and get left behind.
5. The patients will be asked to line up at the exit door and at that time nursing staff will be positioned at the front, middle, and back of the line.
6. Once all of the patients are lined up, the designated staff staff at the front of the line will conduct a visual roll call by utilizing the Patient Roll Call Form.

...

Agency Exh. 7.

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

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 charge nurse, and the Grievant had prior notices of improvement needed in 2010 and 2012 (the most recent of which involved an occurrence of a patient walking away unnoticed). Agency Exh. 3.

The current written notice charged:

Violation of DI-201: Patient Neglect; You were found to be negligent by not ensuring a patient's transfer was properly documented, which led to the patient being left alone on the ward.

Agency Exh 2.

The Agency's witnesses testified consistently with the charge in the Written Notice of the incident in question.

The current incident was investigated by the Agency investigator for abuse and neglect. The investigator's report described the incident. On February 21, 2013, the Grievant was the charge nurse when Patient X arrived at her ward at approximately 10:00 a.m. Patient X was escorted to his room, issued bed linens and was allowed to make his bed. The Grievant did not enter the Patient X's name on the Roll Call Form. The ward patients lined up at 10:17 a.m. in preparation for movement via bus to the treatment mall. The patients on the ward left for the treatment mall, and Patient X was left in the ward, unattended. Before the bus departed, there was no security sweep of the ward to ensure all patients were accounted for. Staff at the treatment mall noticed Patient X was not present, and the Grievant returned to the ward to pick up Patient X at 10:34 a.m. Agency Exh. 4.

The chief nurse executive testified that the role of charge nurse includes the responsibility to account for the hospital's patients. This responsibility includes adding admissions to the Roll Call Form, as well as removing those who have been discharged. She also testified that physical harm to an affected patient is not required for an act of neglect. The chief nurse executive also testified that the Grievant acknowledged in writing Facility Policy P-11 and training on the policy. Agency Exh. 5.

The hospital director testified that the Grievant's record of multiple notices of improvement needed weighed against mitigation of the offense to less than termination. For a founded occurrence of neglect, the director is required to issue a Group III Written Notice with termination unless she first obtains permission to issue a lesser level of discipline. In this case, the director did not request permission to levy lesser discipline under Facility Policy RTS-15a, described above. The hospital director emphasized the high risk patients involved and pointed to the Grievant's record of prior notices of improvement needed as aggravating factors outweighing any mitigating factors. The hospital director also testified that another staff member was disciplined for this incident, but, based on her specific case and disciplinary record, the policy "default" discipline of Group III and termination was mitigated to a lesser level.

The Grievant elected not to testify. In response to the investigation and before the Group III written notice was issued, the Grievant wrote to the hospital director:

I am writing this letter in response to the patient being left in the building while under my care. I want to again personally say how sorry I am that this incident occurred. In the future when a patient transfers to my ward I will make sure to stop what I am doing and place the patient[']s name on the patient's roll call form and the hourly observation sheet. I will be following policy P-11.

I enjoy working with the patients at Central State Hospital and feel I have empathy and care for them. . . .

As we discussed, 94-1 can get some of the most difficult patients, but I enjoy my job and would like to continue my employment. I will be picking a Policy a week, taking it home and sitting down somewhere quiet to review. Also if there are any in-services or classes available I am more than willing to take them. . . .

Agency Exh. 2. The Grievant did not deny any notice of the policies or misunderstanding of her responsibility to keep an accurate Roll Call Form to account fully for the hospital's patients on her ward. Good reference letters supporting the Grievant were also included in the record. The Grievant asserts, through argument of counsel, that Policy P-11 was not violated because Patient X transferred during the Grievant's shift and could not have been on the Patient Roll Call Form at the beginning of her shift.

As previously stated, the agency's burden is to show upon a preponderance of evidence that the discipline of the Grievant was warranted and appropriate under the circumstances. The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).

The grievance hearing is a *de novo* review of the evidence presented at the hearing, as stated above. The Agency has the burden to prove that the Grievant is guilty of the conduct charged in the written notice. What is clear from the evidence is that the Grievant was responsible for the supervision of the patients on her ward and neglected to document Patient X's presence or survey his whereabouts until other staff brought Patient X's absence to her attention. I do not accept the invitation from the Grievant to find that Facility Policy P-11 can be construed to direct or permit a charge nurse to omit a transferred patient from the Patient Roll Call Form because the patient was not present at the beginning of the shift. Such a construction of policy would be inconsistent and contrary to the vital purpose of the policy itself. Further, Grievant seeks a finding that the violation was *de minimus* and not worthy of discipline because no harm befell the patient and the span of time the patient was unaccounted for was less than fifteen minutes. Given the circumstances of the high-risk patients and the accordingly high responsibility to account for the patients, I find that the violation was not too insignificant for disciplinary action. Such decision falls within the discretion of the Agency so long as the discipline does not exceed the bounds of reasonableness.

Based on the evidence presented, I conclude that the Agency has met its burden of proof of the offense (neglect) and level of discipline—Group III.

Mitigation

The Agency had leeway to impose discipline along the continuum less than Group III with termination. However, the Agency expressed its inability to mitigate the discipline to less than termination because the Agency has exercised progressive discipline with prior counseling memos. The Grievant asserts, reasonably, that no harm befell Patient X and that the patient was left alone, unsupervised for less than fifteen minutes. The Grievant asserts that the incident was relatively minimal, weighing to mitigate the discipline to less than Group III and termination.

The level of discipline in this situation is fairly debatable. While the Hearing Officer may have reached a different level of discipline, he may not substitute his judgment for that of the Agency when the Agency's discipline falls within the limits of reasonableness.

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 Office of Employment Dispute Resolution." 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.

The agency has proved (i) the employee engaged in the behavior described in the written notice, (ii) the behavior constituted misconduct, and (iii) the discipline was consistent with law and policy. Thus, the discipline must be upheld absent evidence that the discipline exceeded the limits of reasonableness. *Rules for Conducting Grievance Hearings* ("Hearing Rules") § VI.B.1.

On the issue of mitigation, EDR has ruled:

Importantly, because reasonable persons may disagree over whether or to what extent discipline should be mitigated, a hearing officer may not simply substitute his or her judgment on that issue for that of agency management. Rather, mitigation by a hearing officer under the *Rules* requires that he or she, based on the record evidence, make findings of fact that clearly support the conclusion that the agency's discipline, though issued for founded misconduct described in the Written Notice, and though consistent with law and policy, nevertheless meets the *Rules* "exceeds the limits of reasonableness" standard. This is a high standard to meet, and has been described in analogous Merit System Protection Board case law as one prohibiting interference with management's discretion unless under the facts the discipline imposed is viewed as unconscionably disproportionate, abusive, or totally unwarranted.

EDR Ruling #2010-2483 (March 2, 2010) (citations omitted). EDR has further explained:

When an agency's decision on mitigation is fairly debatable, it is, by definition, within the bounds of reason, and thus not subject to reversal by the hearing officer. A hearing officer "will not freely substitute [his or her] judgment for that of the agency on the question of what is the best penalty, but will only 'assure that managerial judgment has been properly exercised within tolerable limits of reasonableness.'"

EDR Ruling 2010-2465 (March 4, 2010) (citations omitted).

The Agency expressed its position that the prior notices of improvement needed are aggravating circumstances more so than any mitigating circumstances. The Agency presents a position in advance of its role as guardian of public and institutional integrity regarding the security of the facility. The Grievant's acknowledged neglect, even though no harm befell the patient, warrants the disciplinary action. The hearing officer accepts, recognizes, and upholds the Agency's important role in safeguarding the public and residents in its charge, as well as the valid public policies promoted by the Agency and its policies. The applicable standards of conduct provide stringent expectations of hospital staff.

Termination is the normal disciplinary action for a Group III offense unless mitigation weighs in favor of a reduction of discipline. There is no requirement for an Agency to exhaust all possible lesser sanctions or, alternatively, to show that termination was its only option. While the Agency could have justified or exercised lesser discipline, I find no mitigating circumstances that render the Agency's action of a Group III Written Notice with termination outside the bounds of reasonableness. Accordingly, I find no mitigating circumstances that allow the hearing officer to reduce the Agency's action.

Under the EDR's Hearing Rules, the hearing officer is not a "super-personnel officer." Therefore, 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, even if he disagrees with the action. Even if the hearing officer would have levied a lesser discipline, the Agency has the management prerogative to act within a continuum of discipline as long as the Agency acts within the bounds of reasonableness. In this case, the Agency's action of imposing discipline of termination is within the limits of reasonableness. The Hearing Officer, thus, lacks authority to reduce or rescind the disciplinary action.

DECISION

For the reasons stated herein, I uphold the Agency's Group III discipline and termination.

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 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 14th St., 12th Floor
Richmond, VA 23219

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR 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:

Office of Employment 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 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 provide a copy of all of your appeals to the other party, EDR, 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.

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

I hereby certify that a copy of this decision was sent to the parties and their advocates shown on the attached list.



Cecil H. Creasey, Jr.
Hearing Officer

¹ Agencies must request and receive prior approval from EDR before filing a notice of appeal.