

Issues: Group III Written Notice (falsifying records), Group III Written Notice (patient neglect), and Termination; Hearing Date: 02/19/15; Decision Issued: 03/10/15; Agency: DBHDS; AHO: Ternon Galloway Lee, Esq.; Case No. 10526; Outcome: No Relief – Agency Upheld.

DECISION OF HEARING OFFICER

In the matter of

Case Numbers: 10526

Hearing Date: February 19, 2015

Decision Issued: March 10, 2015

SUMMARY OF DECISION

The Agency had found Grievant falsified a document, and it issued Grievant a Group III Written Notice. In addition, the Agency found Grievant violated Departmental Instruction (DI) DI 201 and Agency Policy # 050-57, and it then issued Grievant a Group III Written Notice with removal. The Hearing Officer found Grievant engaged in the behaviors alleged and they constituted misconduct. Next, finding the Agency's discipline was consistent with policy and reasonable, the Hearing Officer upheld the discipline.

HISTORY

On November 25, 2014, the Agency issued Grievant two Group III Written Notices. Specifically, one notice stated Grievant had falsified documents. The other alleged that Grievant neglected a patient in violation of DI 201 and Agency Policy # 050-57 "Reporting and Investigating Abuse and Neglect of Clients." This latter group notice identified termination in addition for the stated offence. On or about December 8, 2014, Grievant timely filed her grievance challenging the Agency's discipline set forth in the notices. Thereafter, the Office of Employment Dispute Resolution (EDR) assigned the undersigned as the hearing officer to this grievance on December 29, 2014.

The Hearing Officer held a telephonic prehearing conference (PHC) on January 14, 2015¹. Based on discussions during the PHC, the Hearing Officer found the first available date for the hearing was February 19, 2015. Accordingly, by agreement of the parties, the hearing was set for that date. On January 20, 2015, the Hearing Office issued a scheduling order addressing those matters discussed and ruled on during the PHC.

On the date of the hearing and prior to commencing it, the parties were given an opportunity to present matters of concern to the Hearing Office. The Agency's advocate then stated that one of the Agency's witnesses was unavailable due to illness. The Agency advocate also noted that she had requested and obtained a witness order that instructed this witness to appear at the hearing. However, the Agency advocate represented that she no longer needed this witness and was prepared to proceed without her. Grievant responded that even though she did not request a witness order for this witness, she anticipated that this witness would have testified to the following:

- (i) that Grievant was never provided a mentor when Grievant was transferred to Pod 4 on October 27, 2014; and

¹ This was the parties' first available date for the PHC.

- (ii) that this witness was in a supervisory role and “wrote up” Grievant on November 6, 2014, alleging that Grievant failed to show for work on October 27, 2014, or failed to call in her absence.

The Agency’s Advocate had no objection to the proffered testimony and the Hearing Officer accepted the proffer as evidence.

Also, during the hearing the Hearing Officer admitted Agency Exhibits 1 through 5, to which Grievant did not object. She also admitted Grievant’s Exhibits 1 through 7, without objection. In addition, the Hearing Officer’s exhibit, consisting of orders and correspondence from the Office of Employment Dispute Resolution was admitted without objection.

At the hearing both parties were given the opportunity to make opening and closing statements and to call witnesses. Each party was provided the opportunity to cross examine any witnesses presented by the opposing party.

During the proceeding, the Agency was represented by its advocate. Grievant represented herself.

APPEARANCES

Advocate for Agency
Witnesses for the Agency (3 witnesses)
Grievant
Witnesses for Grievant (2, including Grievant)

ISSUE

Were the written notices warranted and appropriate under the circumstances?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary actions against Grievant were warranted and appropriate under the circumstances. Grievance Procedure Manual (“GPM”) § 5.8(2). 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. The Agency is a facility of the Department. Specifically, it is a mental health hospital. Grievant had worked for the Agency for 20 years. At the time of her termination from the Agency she was a licensed professional nurse (LPN). The evidence does not indicate that

Grievant worked in any other capacity during her employment with the Agency. (Testimony of Grievant).

2. On or about October 27, 2014, management transferred Grievant from one unit in the facility to another one, identified as Pod 4. She worked during the day shift. Pod 4 housed geriatric patients. Regularly, these patients were incontinent. (Testimony of Charge Nurse).

3. Customarily, when the Agency hires a new employee, the Agency assigns the new hire a mentor. The Agency did not undertake this practice when it transferred Grievant to Pod 4. The reason lay in Grievant having been employed by the Agency for 20 years and having filled in for other nurses in Pod 4 in the past. Also, the tasks Grievant was expected to perform on November 4, 2014, were customary for that unit. (Testimony of Charge Nurse and Grievant).

4. On November 4, 2014, among other tasks, Grievant bore the responsibility of dressing or changing the bandage on Patient 1's newly healed wound. (Testimony of Charge Nurse).

5. Grievant failed to perform this task. Despite this, she initialed the Treatment Administrative Record (TAR)² noting that she had changed Patient 1's dressing on that day. (Testimony of Charge Nurse; A Exh. 1E 11-38; A Exh. 2E; G Exh. 3).

6. Under Agency policy, the TAR should be signed/initialed by the treating nurse (the nurse who actually performed the task) only after the treatment has been completed. (Testimonies of Charge Nurse, Former Supervisor, and Co-worker 1).

7. On November 4, 2014, Co-worker 1 worked in Pod 4 during the day shift also. She provided medications to patients but no other treatment during that shift. Co-worker 1 did not sign the TAR on November 4, 2015, because she did not provide wound care for Patient 1. (Testimony of Co-worker 1; A Exh. 1, E4-38).

WOUND CARE TEAM

8. The Wound Care Team (team) consists of health care professions, to include but not limited to physicians and nurses, who are employees of the Agency. The team makes rounds usually on Tuesdays at the hospital. Particularly and usually, they check patients on the unit who have active wounds. An active wound is defined by the Wound Care Team as a break in a patient's skin. (Testimony of Charge Nurse).

9. November 4, 2014, was a Tuesday. On that day, Patient 1's wound was inactive, as it had freshly healed. Thus, no break in his skin existed. Because of this fact, the team did not visit with him and provide wound care treatment. However, a physician's order existed requiring the treatment nurse to provide preventive care by changing the dressing on Patient 1's newly healed wound during the day shift.³ Patient's freshly healed wound was in an area that, if

² The TAR is the record the treating nurse is required to sign or initial indicating certain treatment for a patient(s) has been performed during the shift. (Testimony of Charge Nurse).

³ The evidence demonstrates that the dressing was required to be changed sometime during the day shift. (Testimony of Charge Nurse; A Exh. E1, 20-38).

Patient was incontinent - which the evidence indicates he could be by virtue of his being classified as a geriatric patient - the newly healed wound could easily be irritated and reopened. (Testimony of Charge Nurse; Testimony of Nurse Practitioner; A Exh. 4, pp. 38-39).

10. Specifically, the order required the treatment nurse to change Patient 1's bandage every three days during the day shift. November 4, 2014, was a third day. Thus, per the physician's order, the patient's dressing was required to be changed on that day during the day shift. (Testimony of Charge Nurse).

11. Although Patient 1's physician discontinued the referenced order on November 5, 2014, the directive remained effective on November 4, 2014. (A Exh. 1E 20-38; G Exh. 3).

INVESTIGATION

12. On or about November 6, 2014, Grievant's immediate supervisor became aware that the dressing on Patient 1 was not changed on November 4, 2014. This was contrary to Grievant's documentation on the TAR indicating she had changed the dressing on November 4, 2014. (Testimony of Charge Nurse; A Exh. 1E, 2-38).

13. Next on November 6, 2014, Grievant's immediate supervisor met with Grievant regarding this discrepancy. At that meeting, Grievant never denied that it was her initials appearing on the TAR documenting Patient 1's dressing was changed. In fact, she acknowledged that she had signed the TAR on November 4, 2014. Further, Grievant noted during the meeting that she did not know why she failed to change Patient 1's bandage. This meeting was witnessed by Charge Nurse. (A Exh. 1, E3-38 and E11-38; Testimony of Charge Nurse).

14. The Agency then conducted a preliminary review of the incident and determined that patient neglect was suspected. Grievant was then placed on administrative leave pending the outcome of a neglect investigation. Several employees were interviewed during the investigation, including Grievant. (A Exh. 1, E4 -5; E2-38).

15. The investigation revealed the following:

- (i) As of November 6, 2014, Patient 1's dressing had not been changed;
- (ii) Under the physician's order, the dressing should have been changed by Grievant during her shift on November 4, 2014;
- (iii) Grievant initialed the TAR on November 4, 2014, indicating she had changed Patient 1's dressing, but she had not;
- (iv) On or about November 6, 2014, Grievant's supervisor learned that the only bandage on Patient 1 was one dated November 1, 2014, and signed by a nurse other than Grievant;

- (iv) On November 6, 2014, Grievant informed her supervisor that she had signed the TAR but did not know why the dressing had not been changed;
- (v) Later on November 6, 2014, Grievant informed the investigator that Grievant did not recognize the initials as hers that appeared on the November 4, 2014 TAR. Further, she stated that she probably performed the treatment on November 4, 2014.

(A Exh. 1, E2 through 38).

16. The Investigator determined Grievant had neglected Patient 1. (A Exh. 1, E5 - 38).

GROUP NOTICES

17. Next, the Agency issued Grievant a Group III Written Notice with removal. The group notice described the nature of the offense as follows:

Violation of [Agency] policy #050-57, Abuse of Patients, DI 201, Reporting and Investigating Abuse and Neglect of Clients as you failed to change the bandage on the patient at the required interval. By not providing the treatment as required, this resulted in a substantiated allegation of patient neglect.

(A Exh. 1, E1-3; G Exh. 2).

18. In pertinent part, the Department's Instruction 201 (DI 201), section 201-3 defines neglect as follow:

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.

(A Exh. 4, E2-18)

19. Similarly, Agency Policy # 050-057 defines neglect as follows:

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.

(G Exh. 6).

20. The Agency has a zero tolerance for neglect. (A Exh. 4, E1-18).

21. In addition, management issued Grievant a Group III Written Notice for falsification of documents/records. In pertinent part, this group notice described the nature of the offense as follows:

You failed to change the bandage on the patient at the required interval and documented the bandage had been changed. By not providing the treatment as you indicated in your report, this constitutes falsification of State documents.

(A Exh. 1, E1-5; G Exh. 1).

OTHER

22. Several of Grievant's former supervisors acknowledged that Grievant performed tasks asked of her. (Testimonies of Charge Nurse and Former Supervisor).

23. Grievant's past disciplinary history includes, but is not limited to, the following:

- Counseling on February 13 and 28, 2014, for failure to follow policy;
- Counseling memorandum dated January 20, 2014, for failure to follow protocol;
- Verbal Counseling on November 20, 2013, for failure to document on the MAR/TAR;
- Counseling on October 8, 2013, regarding being excessively late;
- Counseling on July 28, 2013, regarding failure to document blood sugar of a patient;
- Written counseling on March 10, 2013, for failure to follow procedure;
- Written counseling on March 15, 2013, for failure to properly clock in/out;
- Written counseling on February 22, 2012, for signing the TAR indicating a patient's dressing had been changed during Grievant's shift when it had not been changed.

(A Exh. 3).

24. During November, 2014, Pod 4 was understaffed. (Testimony of Former Supervisor).

25. Policy regarding documenting a dressing change is: when a nurse changes a dressing, that nurse initials the dressing and writes the date it was changed on the dressing. The nurse then documents this information on the TAR. (Testimonies of Former Supervisor and Co-Worker; A Exh. 1, E2 through 7-38).

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.

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 (Policy 1.60). The Standards of Conduct 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.

Under the Standards of Conduct, Group I offenses are categorized as those that are less severe in nature, but warrant formal discipline; Group II offenses are more than minor in nature or repeat offenses. Further, Group III offenses are the most severe and normally a first occurrence warrants termination unless there are sufficient circumstances to mitigate the discipline. *See* Standards of Conduct Policy 1.60.

As referenced previously here, on November 25, 2014, management issued Grievant two Group III Written Notices and she was terminated. The Hearing Officer examines the evidence to determine if the Agency has met its burden.

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

Issue: Whether the discipline was warranted and appropriate under the circumstances?

A. Did the employee engage in the alleged conduct? Further, if so did that behavior constitute misconduct?

The Agency contends that Grievant (i) neglected Patient 1 and (ii) falsified a document. First, the Hearing Officer addresses the neglect allegation.

Agency Policy # 050-057, similar to the Department's policy DI 201, defines neglect as follows:

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.

Now, the Hearing Officer examines the facts to determine if Grievant violated Agency Policy #050-057/DI 201. The evidence shows that a physician order existed on November 4, 2014, requiring Patient 1's bandage to be changed every third day. Moreover, the evidence shows that November 4, 2014, was a third day and the treating nurse on the day shift was required to change the bandage on that day. Grievant was the assigned treatment nurse on November 4, 2014, and bore the responsibility of changing the patient's dressing. On November 6, 2014, Grievant's supervisor discovered Patient 1's wound had not been changed per doctor's order. Specifically, the protocol for documenting a dressing change is: when a nurse changes a dressing, that nurse initials the dressing and writes the date it was changed on the dressing. The nurse then documents this information on the TAR. It was discovered on November 6, 2014, that the only dressing on the patient was dated November 1, 2014, and it contained the initials of a nurse other than Grievant. In addition, when confronted by her supervisor about the bandage not being changed on November 4, 2014, Grievant could not explain why she had not performed this treatment.

Having considered the evidence, the Hearing Officer finds it illustrates that Patient 1 was due treatment on November 4, 2014, under a physician's order. This order required nursing staff to change the patient's bandage every third day. November 4, 2014, was a third day. On that day, Grievant bore the responsibility of providing the treatment ordered. She did not perform the task. Her failure to change the bandage is established by evidence showing that on November 6, 2014, the only bandage on Patient 1 was dated November 1, 2014. Further, it bore the initials of a nurse other than Grievant. Hence, the Hearing Officer is convinced that Grievant did not change the bandage during the interval required.

Having made this finding, the Hearing Officer is cognizant of Grievant's statement at one point that "she probably did change the bandage" or "had no recollection of not changing it." And further, Grievant's alternative defense that she thought one of her superiors instructed Grievant not to change the bandage because the wound team would be doing the treatment. Having observed the demeanor of Grievant as she testified, noted her inconsistent statements, and considered all the evidence of record, the Hearing Officer is persuaded that Grievant failed to change the dressing. Thus, the Agency has met its burden and shown Grievant neglected to provide Patient 1 ordered treatment.

Next, the Hearing Officer examines the evidence to determine if Grievant falsified a document. As noted above, Grievant did not change the dressing on November 4, 2014, as required. To this point, the evidence shows that the only dressing on Patient 1 was a dressing that was put on him on November 1, 2014 by another nurse. Agency policy requires nurses to document they have completed treatment only after it has been done. Grievant failed to change the dressing. Yet she initialed the TAR representing that the dressing had been changed by her on November 4, 2014. The evidence shows Grievant knew or reasonably should have known this policy. This is illustrated by the fact that Grievant had been employed by the Agency for 20 years, had prior experience making notations on the TAR, had substituted for others in Pod 4 on several occasions before the incident, and the tasks required of the nurses in Pod 4 on November

4, 2014, were customary.

Hence, the Hearing Officer also finds that Grievant falsified a document when she documented on November 4, 2014, that she had changed the patient's bandage when she had not. Having made this finding, the Hearing Officer has considered that November 4, 2014, was a busy day in Pod 4, that the unit was understaffed, and that Grievant had only recently been transferred to the unit as a permanent employee. That said, the evidence clearly shows Grievant was a veteran LPN. In addition, she had previously been disciplined for a similar infraction involving making misrepresentations in writing on the TAR. What is more, credible testimony from other nurses during the hearing confirmed that policy requires a nurse to only document in writing that she/he has completed a treatment once it is done. Accordingly, Grievant knew or reasonably should have known that documenting she had completed work when she had not was unacceptable behavior.

Accordingly, the Hearing Officer finds that Grievant engaged in the conduct alleged in both group notices and that the behaviors constituted misconduct.

B. Was the discipline consistent with policy and law?

The Agency is a facility of the Department. Therefore, consistent with the Department's policies and the Agency's, the Agency has a duty to provide a safe and secure environment for its residents. Neglecting to provide treatment to a patient is a serious offense as it denies a patient the care deemed appropriate by his physician. Under the facts in this case, such denial could have caused physical harm to a vulnerable patient; that is a mentally ill and geriatric patient. Under DI 201 and Policy # 057-050, the Agency maintains a zero tolerance for this misconduct. Accordingly, the Hearing Officer finds the Agency's issuance of a Group III Written Notice in this matter is consistent with policy and law. Moreover, under Policy 1.60, the issuance of a Group III Written Notice, even if for a first offense, normally warrants removal. The Agency terminated Grievant for her neglect, and the Hearing Officer finds the removal is also consistent with policy.

Moreover, the Agency issued Grievant a Group III Written Notice for falsification of records. Under Policy 1.60, this offense is identified as a severe violation of expected conduct and classified as a Group III Offense. For this reason, the Hearing Officer also finds the discipline was consistent with policy and law.

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 the rules established by the Office of Employment Dispute Resolution [“EDR”].”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

⁴ Va. Code § 2.2-3005 and (c)(6)

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 that Grievant engaged in the conduct described in the group notices and that the behaviors constituted misconduct. Further, the Hearing Officer has found, the Agency’s discipline was consistent with policy and law.

Next, the Hearing Officer considers whether the discipline was unreasonable. In her plea for mitigation Grievant presents her 20 years of employment with the Agency. She notes also that she had only recently been transferred to Pod 4 and that this unit was understaffed. Grievant also claims that one of her supervisors has a thick accent and she understood this supervisor to inform her that Grievant did not need to change the bandage because the wound team would be performing this treatment. Moreover, her prior supervisors testified that when Grievant was asked to complete a task, she usually did. Further, Grievant suggests that any discipline for a failure to change the bandage on November 4, 2014, should be minimized because the physician’s order was discontinued the next day and because she had no intent to neglect the patient.

The Hearing Officer has considered all of Grievant’s arguments and all evidence whether specifically mentioned or not. After giving careful thought to the evidence, the Hearing Officer recognizes (i) the Agency’s mission to maintain an environment where patients are “in safe hands,” (ii) that the Agency provides services to a vulnerable group of individuals - the mentally ill and (in this case) a geriatric patient, (iii) the Agency maintains a zero tolerance for patient neglect, and (iv) an employee documenting work has been completed when it has not undermines the Agency’s ability to trust the representations of that employee.

DECISION

Hence for the reasons stated here, the Hearing Officer upholds the Agency’s discipline.

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

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

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
Departmental of Human Resource Management
101 N. 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 N. 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.⁷

Entered this 10th day of March, 2015.

Ternon Galloway Lee, Hearing Officer
cc: Agency Advocate/Agency Representative
Grievant
EDR's Hearings Program Director

⁷ Agencies must request and receive prior approval from EDR before filing a notice of appeal.