

Issues: Group III (client neglect), Group III (failure to follow policy), Group II (failure to follow established procedures), and termination; Hearing Date: 01/27/15; Decision Issued: 04/03/15; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10528, 10529, 10530; Outcome: Partial Relief; **Administrative Review: EDR Ruling Request received 04/17/15; EDR Ruling No. 2015-4137, 2015-4138 issued 06/01/15; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 04/23/15; Outcome pending.**



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10528 10529 10530

Hearing Date: January 27, 2015
Decision Issued: April 3, 2015

PROCEDURAL HISTORY

On November 14, 2014, Grievant was issued a Group III Written Notice of disciplinary action with removal for client abuse. On November 14, 2014, Grievant was issued a Group II Written Notice of disciplinary action with removal for failure to follow policy. On November 14, 2014, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow established procedures.

On December 8, 2014, Grievant timely grieved the Agency's actions. The matter proceeded to hearing. On December 19, 2014, the Office of Employment Dispute Resolution issued Ruling Number 2015-4070 consolidating the grievances. On January 5, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 27, 2015, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Representative
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notices?

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. 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 at one of its Facilities. She had been employed by the Agency since 2006. No evidence of prior active disciplinary action was introduced during the hearing.

When a nurse takes the "vitals" of a patient, the nurse determines the patient's temperature, blood pressure, pulse, and oxygen saturation.

A patient's temperature can be taken rectally, orally, and auxiliary¹. The most accurate temperature is one taken rectally. For example, if a patient's rectal temperature is 97 degrees, his or her actual core body temperature would be 97 degrees. A patient with a 97 degree rectal temperature would have approximately a 96 degree oral temperature and a 95 degree auxiliary temperature. Some employees circle the letter "r" and write it next to the temperature to indicate a rectal temperature. Some employees write "ax" to indicate the temperature is auxiliary.

On May 9, 2014, the Medical Staff Coordinator sent several Facility employees including Grievant an email stating:

¹ An auxiliary temperature is taken by placing a thermometer under a person's arm pit.

Per [Dr. B] a reminder to inform the PHCP if an individual's vital signs fall within the guidelines below:

Temperature >101 [degrees] F or < 95 [degrees] F

Pulse <50 or >130

Respirations >40/min or <12/min

BP systolic >160 or <90

BP diastolic >90 or <50²

The Patient had profound intellectual disabilities including hypothermia. Hypothermia occurs when the body temperature falls below 95 degrees Fahrenheit. If the Patient's core body temperature fell below 95 degrees, staff were to implement a hypothermia protocol. The protocol included placing warming blankets on the Patient, checking his skin condition, and checking his temperature every 30 minutes. Part of this protocol included notifying the Facility's Medical Clinic Doctor.

Grievant reported to work at 3 p.m. on September 25, 2014. She was responsible for several residents including the Patient. Grievant asked the CNA to take the vital signs of the Patient. At 4 p.m., the CNA took the Patient out of his wheel chair and placed him on his bed. She took his rectal temperature. The temperature was 94.7 degrees. She wrote the temperature and other vital signs on a piece of paper and handed it to Grievant. The CNA put blankets on the Patient to warm him. Grievant was in the same room with the Patient and the CNA when the CNA took the Patient's temperature.

At approximately 9:30 p.m. on September 25, 2014, Grievant typed in the Open Event Report that the Patient had no signs or symptoms of distress. She wrote that at 4 p.m., the Patient's temperature was 94.7 and pulse was 48. She also made a handwritten entry in the Patient's Interdisciplinary Notes saying his temperature was 94.7. The "4.7" numbers were written over two other numbers. Grievant did not indicate how the temperature was taken.

Grievant left the Facility at the conclusion of her shift at 11:30 p.m.

At approximately 1:30 a.m. on September 26, 2014, Ms. Sa took the Patient's rectal temperature. The temperature was 93.8 degrees and 94.2 degrees the second time. She placed a heating pad and blankets from the warmer on the Patient. About one hour later, she rechecked the Patient's rectal temperature and it was 94.8 degrees. She checked the Patient's temperature every 30 minutes and all vital signs every hour. Ms. Sa's shift ended at 7:30 a.m. on September 26, 2014.

On September 26, 2014 at 7:40 a.m., the LPN reported to the Agency that the Patient may not have received needed care regarding his Hypothermia protocol.

² Agency Exhibit 9.

Grievant was on short term disability status from October 3, 2014 through October 13, 2014. She did not report to work during that time. The Investigator³ called Grievant on October 6, 2014. Grievant said she had a lawyer. An interview was scheduled for October 14, 2014 and the Investigator interviewed Grievant on that day.

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.”⁴ 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.”

Group III Written Notice for Neglect

Client neglect is a Group III offense.⁵ Va. Code § 37.2-100 provides:

"Neglect" means failure by a person or a program or facility operated, licensed, or funded by the Department, excluding those operated by the Department of Corrections, responsible for providing services to do so, including nourishment, treatment, care, goods, or services necessary to the health, safety, or welfare of an individual receiving care or treatment for mental illness, intellectual disability, or substance abuse.

On September 25, 2014, the Patient's rectal temperature dropped below 95 degrees. Under the Patient's hypothermia protocol, Grievant was supposed to apply warming blankets, check the Patient's skin condition, and check the Patient's temperature every 30 minutes. Part of this protocol included notifying the Facility's Medical Clinic Doctor. Grievant failed to follow the protocol thereby failing to provide treatment necessary for the Patient's health, safety, and welfare. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant's removal is upheld.

Grievant argued that when she wrote 94.7 degrees as the Patient's temperature she was referring to the Patient's auxiliary temperature which would be approximately

³ The investigation began under another investigator but the investigation was completed by the Investigator.

⁴ The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

⁵ See, Attachment A, DHRM Policy 1.60.

96.7 if taken rectally (and thus above the 95 degree threshold). The evidence showed that the CNA took the Patient's rectal temperature at 4 p.m. and provided that temperature to Grievant. The CNA testified she was certain she took the Patient's rectal temperature and that the temperature was 94.7. Her testimony was credible.

Grievant argued that at 8 p.m., the CNA took the Patient's rectal temperature. The temperature was 98.7 degrees. Grievant argued that it was not possible or likely that the Patient's rectal temperature went from 94.7 degrees at 4 p.m. to 98.7 degrees at 8 p.m. and then fell to 94.8 by 3 a.m. the following morning. Grievant argued that this impossibility would show that the 94.7 degree temperature actually reflected an auxiliary temperature.

The Hearing Officer is unable to determine whether the Patient's vitals were taken by the CNA and given to Grievant after 4 p.m. The CNA initially did not recall the second taking of vitals but then remembered it as having occurred at 8 p.m. Grievant initially claimed the second taking of vitals occurred at approximately 5 or 5:30 p.m. Neither Grievant nor the CNA made entries in the Patient's medical records to show the Patient's vital signs were assessed after 4 p.m. If the Hearing Officer assumes for the sake of argument that the Patient's rectal temperature was 98.7 at 8 p.m. on September 25, 2014, Grievant's argument fails. Dr. S testified that it was possible for the Patient's body to self-regulate and changed several degrees during that time period.

Group II Written Notice for Failure to follow Policy

The Agency alleged that Grievant failed to tell the third shift Registered Nurse that the Patient had a low temperature, failed to record all of the Patient's vital signs, made confusing entries in the Patient's CRS and failed to follow correct protocol for making changes to an ID note in the Patient's CF.

Issuance of a Group II Written Notice is not supported by the evidence. Grievant's failure to notify the oncoming Registered Nurse is more appropriately considered as part of the Group III Written Notice for neglect. It is not clear that additional vitals were taken of the Patient. Grievant would not be obligated to record something that may not have happened. Although the Agency may have set forth best practices for making entries in medical records, the record shows that different employees used different styles to enter information including correcting information. The Group II Written Notice must be rescinded.

Group II Written Notice for Failure to Follow Policy.

Facility Policy "Protection of Individuals Against Abuse or Neglect" provides:

After reporting an incident or allegation of possible abuse or neglect to the Facility Director, workforce members are expected to cooperate fully in the investigation process. This may include submitting written statements, if requested, to the Investigator assigned to conduct the investigation.

The evidence showed that Grievant complied with the request of the Agency's Investigator and provided information to the Investigator. The Agency's claim that Grievant's delay in providing that information was excessive and unreasonable is not supported by the evidence. Grievant had the absolute right to consult with her attorney before speaking with the Investigator and any delay associated with Grievant's consultation with her attorney does not constitute a violation of policy. The Group II Written Notice must be rescinded.

Mitigation

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"⁶ 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. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce further 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**. The Agency's issuance to the Grievant of a Group II Written Notice for failure to follow policy is **rescinded**. The Agency's issuance to the Grievant of a second Group II Written Notice for failure to follow policy is **rescinded**.

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

⁶ *Va. Code § 2.2-3005.*

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.⁷

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

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

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