Issue: Group III Written Notice with Termination (patient neglect); Hearing Date: 08/27/14; Decision Issued: 08/28/14; Agency: DBHDS; AHO: William S. Davidson, Esq.; Case No. 10397; Outcome: Full Relief; **Attorney's Fee Addendum issued 09/15/14 awarding $1,932.25.**

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 10397

Hearing Date: August 27, 2014
Decision Issued: August 28, 2014

PROCEDURAL HISTORY

The Grievant was issued a Group III Written Notice on May 8, 2014, for:

> Violation of Departmental Instruction #201, Reporting and Investigating Abuse and Neglect of Clients. A facility investigation (Case #707-2014-006) substantiated that from 11:00 p.m. on April 11, 2014, until 4:23 a.m. on April 12, 2014, you failed to provide care to an individual (BM) in your assigned group. You also falsified documentation on the flowsheet and bedrail sheets for following the Nursing Care Plan and PNMP and made an inappropriate ID note entry in the individual's CRS. These actions are in violation of CVTC Policy #124, #308, and #316. [1]

Pursuant to this Written Notice, the Grievant was terminated on May 8, 2014. [2] The Grievant timely filed a grievance to challenge the Agency's actions on May 21, 2014. [3] On July 31, 2014, this appeal was assigned to a Hearing Officer. A hearing was held at the Agency's location on August 27, 2014.

APPEARANCES

Advocate for Agency
Attorney for Grievant
Grievant
Witness

ISSUES

1. Did the Grievant fail to provide care to an individual in her assigned Group?

2. Did Grievant falsify documents?

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[1] Agency Exhibit 1, Tab 1, Page 1
[2] Agency Exhibit 1, Tab 1, Page 1
[3] Agency Exhibit 1, Tab 2, Page 1

3. Did the Grievant make an inappropriate ID note entry?
4. Did the Agency discriminate, retaliate or harass the Grievant?

AUTHORITY OF HEARING OFFICER

Code Section 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 Section 2.2-3005.1 provides that the Hearing Officer may order appropriate remedies including alteration of the Agency's disciplinary action. By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government. [4] Implicit in the Hearing Officer's statutory authority is the ability to independently determine whether the employee's alleged conduct, if otherwise properly before the Hearing Officer, justified termination. The Court of Appeals of Virginia in *Tatum v. VA Dept of Agriculture & Consumer Servs*, 41VA. App. 110, 123, 582 S.E. 2d 452, 458 (2003) 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. Thus the Hearing Officer may make a decision as to the appropriate sanction, independent of the Agency's decision.

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 proof for establishing any affirmative defenses to discipline such as retaliation, discrimination, hostile work environment and others, and any evidence of mitigating circumstances related to discipline. A preponderance of the evidence is sometimes characterized as requiring that facts to be established more probably than not occurred, or that they were more likely than not to have happened. 5 However, proof must go beyond conjecture. 6 In other words, there must be more than a possibility or a mere speculation. 7

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of the witness, I make the following findings of fact:

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[4] *See* Va. Code § 2.2-3004(B)
[5] *Ross Laboratories v. Barbour*, 13 Va. App. 373, 377, 412 S.E. 2d 205, 208 1991
[6] *Southall, Adm'r v. Reams, Inc.*, 198 Va. 545, 95 S.E. 2d 145 (1956)
[7] *Humphries v. N.N.S.B., Etc., Co.*, 183 Va. 466, 32 S.E. 2d 689 (1945)

The Agency provided me with a notebook containing nine tabs and that notebook was accepted in its entirety as Agency Exhibit 1, without objection.

The Grievant provided me with a notebook containing 21 tabs. Pursuant to an objection, I excluded Tabs 16, 20 and 21. Other than the excluded Tabs, that notebook was accepted in its entirety as Grievant Exhibit 1.

Prior to the introduction of evidence, the Agency and the Grievant, by counsel, stipulated that no care was provided for BM from 11:00 p.m., on April 11, 2014, through 4:23 a.m., on April 12, 2014. The issue before me is whether or not this Grievant was responsible for providing care for BM during this time frame.

The time frame in question is part of the third shift for Unit 31-D. This Unit is located in Building 31. During the time in question, a registered nurse was responsible, in a supervisory capacity, for the building. That nurse (RN) testified before me. A licensed practical nurse was responsible for Unit 31-D. That nurse (LPN) testified before me. Each Unit would have several certified nurse assistants (CNA) and two of them, including the Grievant, testified before me.

At the commencement of the shift, LPN met with the CNA's and made assignments as to what patients each CNA would be responsible for that evening. LPN in this matter, when questioned by the Agency Investigator, provided a written statement that stated in part as follows:

> On the night of April 11th on 31-D, I was the LPN assigned to that floor. At 11:15 pm - [Grievant] CNA stated she wanted Group 2 because she knew that group of individuals. I said "OK, that's fine." I then asked her if she knew who she had because of the number of CNA's on the floor. I then showed her (pointed to) a written list of the individuals in that group. She said - "OK."... [8]

The written list that LPN referenced apparently is a list or, perhaps two lists, that are attached to a column in the area where LPN and the CNA's gather at the beginning of a shift. [9] The list(s), is/are more than a little complicated. Pursuant to the explanation of LPN, it appears to me that the list is based upon the number of CNA's that may be available for any particular shift. It creates groups. These groups change in size and membership if there are four CNA's, five CNA's, two CNA's or three CNA's.

There was no question whatsoever in any of the testimony regarding whether or not the Grievant was assigned to Group 2 from the list. It is clear from the written statement of LPN, and it was clear from all of the testimony, that the Grievant requested Group 2. What is at issue is that Group 2, depending on the number of CNA's present, [10] may consist of six individuals, five individuals, ten individuals, or seven individuals. The Grievant testified that she did not know how to interpret this list and that she always relied upon LPN confirming for whom she was to be responsible. It is of note that, on the shift in question, RN, in charge of the building,

[8] Agency Exhibit 1, Tab 4, Page 1
[9] Agency Exhibit 1, Tab 5, Page 1
[10] Agency Exhibit 1, Tab 5, Page 1

LPN, in charge of this Unit, and Grievant were all "floaters." This simply means that these were not their permanent assignments and they moved from Building to Building or Unit to Unit as was necessary for the Agency to properly staff and provide services.

BM was one of four patients who were located in a single room ("Quad"). One of the patients in Quad had a one-on-one CNA, meaning that CNA stayed with the patient continuously. If that CNA took a break, another CNA remained in the room until she returned from the break. Two other patients in this room had other individual CNA's, not the Grievant. BM was the fourth person in the Quad and from 11:00 p.m. on April 11, 2014, until 4:23 a.m., on April 12, 2014, no CNA provided services for BM. The Grievant testified that, when she received her assignment of Group 2, LPN stated to her that she would be responsible for "four down and two up," indicating a total of six patients. While that phraseology seemed to be foreign to some of the supervisors and management who testified before me, it appears that it was well understood by RN, LPN, Grievant and the other CNA's who testified before me. Those witnesses seemed to understand that meant that the Grievant was responsible for six particular patients, none of which were BM.

At approximately 4:23 a.m., on April 12, 2014, the one-on-one inquired of another CNA as to who was supposed to be caring for BM, as she had noticed no one caring for BM. The CNA to whom this inquiry was made stated that the Grievant was responsible for this patient and she notified the Grievant. The Grievant then notified RN, that she, Grievant, had just learned of her responsibilities for BM. RN, when she questioned LPN that morning, received the following response according to her written statement to the Investigator:

> ...I asked [LPN] which CNA had been assigned to [BM] she said she thought she told [Grievant] but she was not sure if she heard her... [11]

This statement by LPN was made immediately after the event took place.

Under oath before me, LPN testified that, **"I told the Grievant that she had four down two up."** This combination is in fact the combination that appears on the spreadsheet that was on the column if there were four CNA's. However, this particular morning in question, there were only three CNA's and BM was added to that list under that fact scenario. RN who testified before me, stated quite clearly and unequivocally, that she found the list to be wholly unclear and it took her several minutes to determine what it really stated. The Investigator who testified before me, stated that she had been a nurse for nearly 40 years and an Investigator for 7-8 years. She testified that, if LPN told the Grievant that she had responsibility that night for "four down and two up," she would not have made a finding that the Grievant failed to provide care for BM. She testified that, in her opinion, any CNA could and should rely upon the instructions given to her by LPN. LPN's statement before me, under oath, was clear that she told the Grievant that she was responsible for six patients, not seven. Further, those six were located such that "four down and two up," put them in rooms other than the Quad.

RN who was responsible for the Building that evening testified before me and stated that the Grievant could rely upon LPN's statement of "four down and two up," for a total of six. RN further testified that it was her conclusion that there was a monumental miscommunication on

[11] Agency Exhibit 1, Tab 4, Page 13

this particular evening and that there were many people who should have known, prior to 4:23 a.m., that BM was not being care for.

I heard testimony from RN, LPN and from the Investigator that LPN should, in the course of making rounds during the evening, be in front of BM at least once per hour. I also heard testimony from many witnesses that the CNA's who were responsible for two of the four people in the Quad should have been before their patients at least once every 30 minutes. Of course, the CNA who had one-on-one duty with the third person in BM's Quad was there continuously, or someone else was there on her behalf. Accordingly, during the five hours in question, it is not hard to imagine that LPN was in that room five times, one CNA was there continuously, and two other CNA's made a total of ten visits.

The Investigator testified that BM was a "heavy wetter." I heard testimony that sometimes her diaper needed to be changed hourly, or at a minimum, every two hours. Assuming the latter, in the 5 ½ hours in question, it is not hard to imagine that BM wet the same diaper three times. Apparently, neither the CNA who was in the room continuously nor the CNA's who came in every 30 minutes, nor LPN who came in once per hour during the 5 ½ hour period, detected the odor of urine. The Grievant, upon learning that LPN thought she was responsible for BM, went into the Quad and detected the strong smell of urine even before she entered the Quad. Accordingly, it seems highly unlikely that everyone who was supposed to be in the Quad was in the Quad during this time frame or, as the demeanor of one CNA witness indicated, there was a fair amount of angst between the Grievant and the other CNA's that evening.

It is clear that BM did not receive the care that was appropriate for approximately 5 ½ hours. What is absolutely unclear is whether or not this Grievant was assigned BM as one of her patients. LPN under oath indicated that she told the Grievant she was responsible for six patients. RN and the Investigator categorically stated that the Grievant could rely on LPN's oral statement. No witness who testified before me indicated that BM would have been part of "the six." BM only becomes the Grievant's responsibility when there are only three CNA's on the floor.

Pursuant to my questioning and the lack of any evidence offered by the Agency, it appears that the Grievant was the only person who received any discipline in this matter.

The charge for Falsification arises from the flow sheet and bedrail sheet. [12] The document which is titled, "Shift Notes," [13] has an entry on April 12, 2014, third shift, which seems to indicate that the Grievant cared for BM at least once every 30 minutes. The Agency's concept of falsification is that the Grievant clearly did not care for BM every 30 minutes during her shift. However, every witness who testified before me, most quite willingly and some grudgingly, testified that you had to read these documents in conjunction. The bedrail document [14] clearly indicates that the Grievant did not do anything for BM until the 30 minute span of 4:00 a.m to 4:30 a.m. All witnesses testified that, when those two documents are read together, there is clearly no falsification of either document.

[12] Agency Exhibit 1, Tab 6, Pages 2-3
[13] Agency Exhibit 1, Tab 6, Page 2
[14] Agency Exhibit 1, Tab 6, Page 3

The inappropriate ID note entry, in the individual's CRS issue, was testified to before me by the Director of Nursing for this Agency. She seemed to imply that the note on this document where the Grievant indicated that she was unaware that she was supposed to be responsible for BM and her following comments were inappropriate for this type of document. [15] When questioned by Grievant's counsel, she testified that there was no other logical place to put such a note. She also clearly stated that she knew of nothing fraudulent or false about the note. She simply felt it was inappropriate for an Interdisciplinary Note.

The Agency has provided to me no policy that defines what is appropriate or inappropriate in this matter. Further, the Agency has provided me with no policy that would indicate that the Grievant's language in this particular document would warrant termination.

Accordingly, I am left with the crystal clear statement by LPN that she confirmed to the Grievant that she was responsible for six patients, "four down and two up;" the uncontradicted evidence that those six patients did not include BM; the fact that BM is a heavy "bed wetter" and for 5 ½ hours neither LPN, nor the CNA's in that room detected any scent of urine; none of these people noticed that no one was visiting BM; the fact that the Investigator unequivocally stated that she would not have found abuse and neglect in her investigative finding if she knew that the Grievant was told that she had six patients that evening (not including BM); and finally the fact that every witness, including the author of the Written Notice, testified that the flow sheet and bedrail sheets did not indicate Falsification. I am left with an inappropriate note on the ID with no one being able to identify where such a note would go or whether or not it was inappropriate other than in the personal interpretation of the author of the Written Notice and, if it was inappropriate, what would be the appropriate punishment.

The patient BM was clearly neglected. Fortunately, BM suffered no harm. It, however, remains unclear as to who exactly was responsible for BM. And, it is clear that the Grievant, based on the instructions given to her by LPN, was not responsible for BM and could rely on the instructions given by LPN. It is also clear from the testimony of RN, who was in charge of this Building during this event, that the procedure to inform CNA's as to who their patients are is fatally flawed and subject to random events such as this.

The Grievant did not present evidence to support a claim of discrimination, retaliation or harassment.

MITIGATION

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the Agency disciplinary action." 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

[15] Agency Exhibit 1, Tab 6, Page 1

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, (3) the disciplinary action was free of improper motive, (4) the length of time that the Grievant has been employed by the Agency, and (5) whether or not the Grievant has been a valued employee during the time of his/her employment at the Agency.

Because of my prior finding that the Grievant had no reason to know that she was responsible for BM, nor was there a reasonable expectation that she should have known, I do not need to address mitigation. I would note, however, that it certainly appears that LPN certainly was not adequate in instructing her CNA's or subsequently supervising them during the evening and the other CNA's clearly did not assist each other in caring for the patients in Unit 31-D.

DECISION

For reasons stated herein, I find that the Agency has not bourne its burden of proof in this matter. I order that the Agency reinstate the Grievant to the same position or an equivalent position. I further order that the Agency award full back pay, from which interim earnings must be deducted, to the Grievant and that she have a restoration of full benefits and seniority. I further award attorney's fees for the Grievant. Should counsel for the Grievant desire to recover attorney's fees, he must, within fifteen (15) days of the date of this Decision, file a petition for such fees with this Hearing Officer.

APPEAL RIGHTS

You may file an administrative review request 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. You may fax your request to 804-371-7401, or address your request to:

Director of the Department of Human Resource Management
101 North 14th Street, 12th Floor
Richmond, VA 23219

2. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. You may fax your request to 804-786-1606, or address your request to:

Office of Employment Dispute Resolution
101 North 14th Street, 12th Floor
Richmond, VA 23219

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 of the original hearing decision. A copy of all requests for administrative review must be provided 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 administrative requests for a review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.[16] 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.[17]

[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]

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William S. Davidson
Hearing Officer

[16]An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. Virginia Department of State *Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

[17]Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
DIVISION OF HEARINGS
FEE ADDENDUM OF HEARING OFFICER
In Re: Case No: 10397

Issued: September 15, 2014

PROCEDURAL HISTORY

A hearing was held in this matter on August 27, 2014, and a Decision was issued by the Hearing Officer on August 28, 2014. Grievant's counsel, filed a Petition for Attorney's Fees with the Hearing Officer on September 3, 2014. Grievant's counsel certified that, on that same date, a true copy of the Petition was mailed to D. Michael Bryant, the Agency's representative.

GOVERNING LAW

Attorney's fees are dealt with at VI(E) of Rules for Conducting Grievance Hearings and at Section 7.2(e) of the Grievance Procedure Manual. Attorney's fees are only available where the Grievant has been represented by an attorney and has substantially prevailed on the merits of a Grievance challenging his discharge. For such an employee to substantially prevail, the Hearing Officer's Decision must contain an Order that the Agency reinstate the employee to his former (or an equivalent) position. The Hearing Officer's Decision ordered that the Grievant be reinstated to the same position or an equivalent position.

Section 7.2(e) of the Grievance Procedure Manual requires that counsel for the Grievant ensure that the Hearing Officer receives within fifteen (15) calendar days of the issuance of the original Decision, counsel's Petition for Reasonable Attorney's Fees. In this matter, that was done and as provided, the Petition included an Affidavit itemizing services rendered, time billed for each service, and the hourly rate charged in accordance with the Rules for Conducting Grievance Hearings. Further, a copy of this Fee Petition was provided to the Agency, as is required by the Rules. The Agency has not responded.

OPINION

In his Petition for Attorney's Fees, counsel requested attorney's fees of $1,932.25. This was arrived at by charging $131.00 per hour for 14.75 hours. The Hearing Officer has carefully considered this Petition and accordingly, will allow counsel for the Grievant to collect attorney's fees of $131.00 per hour for 14.75 hours, for a total award of $1,932.25.

APPEAL RIGHTS

Within ten (10) calendar days of the issuance of the Fee Addendum, either party may petition EDR for a Decision solely addressing whether the Fee Addendum complies with the Grievance Procedure Manual and the Rules for Conducting Grievance Hearings. Once EDR

issues a ruling on the propriety of the Fee Addendum, and if ordered by EDR, the Hearing Officer has issued a revised Fee Addendum, the original Decision becomes final and may be appealed to the Circuit Court in accordance with Section 7.3(a) of the Grievance Procedure Manual.

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William S. Davidson
Hearing Officer