



**COMMONWEALTH of VIRGINIA**  
*Department of Human Resource Management*

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 11741**

Hearing Date: October 22, 2021  
Decision Issued: February 11, 2022

**PROCEDURAL HISTORY**

On July 29, 2021, Grievant was issued a Group III Written Notice of disciplinary action with removal for client abuse.

On August 26, 2021, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On September 13, 2021, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 22, 2021, a hearing was held by remote conference.

**APPEARANCES**

Grievant  
Grievant's Counsel  
Agency Representative  
Witnesses

**ISSUES**

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?

3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

### **BURDEN OF PROOF**

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

### **FINDINGS OF FACT**

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Department of Behavioral Health and Developmental Services employed Grievant as a Registered Nurse at one of its facilities. She began working for the Agency in July 2018.

The Facility had a quiet room where patients could stay to deescalate, in other words, become calm. To enter the room, an employee had to unlock the door, enter a smaller room called an ante room and then enter the quiet room.

An Emergency Restraint Chair (ERC) is a mechanical restraint that involuntarily restricts the freedom and movement of a patient's arms and legs. A doctor's order is required in order to place a patient in the ERC. The Charge Nurse or any other nurse can place the Patient in the ERC and can decide when to remove the patient from the ERC. When a patient is in restraints, an employee is to remain in Visual Constant (VC) observation of the patient.

Grievant had watched other nurses place patients in the ERC. Grievant had placed patients in the ERC more than ten times.

The Patient was admitted to the Facility on May 4, 2021 because she was disoriented, confused, and unable to communicate. The Patient was discharged on June 9, 2021.

On June 8, 2021, Grievant was working as the Charge Nurse at the Facility. Ms. M and Ms. C were Registered Nurses. They reported to Grievant when Grievant worked as the Charge Nurse. Several other employees also reported to Grievant.

Grievant reported to the Nursing Supervisor, Ms. A. Ms. A was responsible for overseeing the hospital's operations.

At 7:29 p.m. on June 8, 2021, the Patient approached a male patient and talked to the male patient in an offensive manner. At 7:31 p.m., the Patient approached the male patient again and made more offensive comments. At 7:33 p.m., the Patient approached the male patient and made offensive comments. At 7:34 p.m., Grievant observed the Patient and the male patient arguing in the hallway. She approached them to redirect them. Grievant unlocked and opened the door to the quiet room. She instructed the male patient to enter the quiet room and he complied. At 7:36 p.m., Grievant opened the door to the quiet room and let the male patient exit the room.

Grievant decided to place the Patient in the ERC in the quiet room. She instructed Mr. E to retrieve the ERC and bring it to the quiet room.<sup>1</sup> Grievant obtained a doctor's order permitting the restraint.

At 7:37 p.m., the Patient began yelling at Grievant and continued to do so as Grievant began walking away. The Patient approached Grievant from behind and shoved her in the back of the head casting Grievant forward several feet into the wall. Grievant activated an alarm to signal staff that a "TOVA team" should be assembled in her location.

Dr. R received a "phone order for seclusion and restraint" from Grievant because the Patient was agitated, aggressive, and had pushed Grievant. Dr. R ordered seclusion and restraint of the Patient with a maximum of four hours.

Grievant began preparing to put the Patient in the quiet room. She removed a chair from the ante room.

At 7:38 p.m., Mr. E brought an Emergency Restraint Chair into the ante room. On the ERC was a bag with a sling containing the key to lock and unlock the restraints on the chair. At 7:39 p.m., Grievant removed the bag from the ERC and began carrying it with her. At 7:39 p.m., the Patient approached Grievant and "postured" at Grievant meaning the Patient acted as if she was about to attack Grievant but stopped.

At 7:40 p.m. the TOVA team began to assemble in the hallway.

At 7:42 p.m., Grievant continued to carry the bag with her.

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<sup>1</sup> It does not appear that Grievant decided to place the Patient in the ERC as a result of the Patient pushing Grievant. It appears that Grievant had made that decision based on the Patient's interaction with the male patient.

At 7:45 p.m., the Patient postured at Grievant again while the TOVA team stood in the hallway with most of them against the wall.

At 7:45 p.m. the Patient walked into the ante room. Grievant removed the key for the ERC from the bag. The Patient sat in the ERC and was restrained in the chair. At 7:47 p.m., an employee rolled the Patient from the ante room into the quiet room where the Patient remained. The Patient talked to Mr. E and another employee who were observing her. Other employees assumed responsibility for observing the Patient while the Patient remained in the quiet room.

At 7:48 p.m., Grievant placed the bag with the key inside on a table in the ante room.

At 7:53 p.m., Mr. E adjusted the leg straps on the chair removed the Patient's shoes. At 8:12 p.m., Ms. M rolled down the bottom of the Patient's pants.

Ms. M believed the Patient had fallen asleep and notified Grievant.

At 8:35 p.m., Grievant entered the ante room and then walked out without assessing the Patient.

At 9:54 p.m., the Patient attempted to bump her chair backwards to move the chair. The Patient had urinated and the Patient appears to be attempting to move away from the urine. At 10:03 p.m., Mr. O brought two towels into the quiet room and placed them on the floor over top of the Patient's urine. The Patient cursed at Mr. O and he asked her to calm down.

Ms. A had called Grievant several times during the night to discuss the Patient. Grievant said the Patient did not meet the criteria for release because the Patient was still threatening and agitated.

Ms. M spoke with Ms. A about Ms. M's observations of the Patient. Ms. A decided to check the Patient.

At 10:57 p.m., Ms. A opened the door to the quiet room and spoke with the Patient. The Patient was crying and told Ms. A that she wanted to go to the restroom and had urinated on herself. Ms. A decided to release the Patient from the ERC.

At 11:03 p.m., Grievant and two other employees entered the quiet room and observed the Patient. Mr. S gave the Patient medication and water to drink. Grievant and another employee released the Patient from the chair. The Patient picked up one of the towels and wrapped it around her waist. She walked behind the chair and swiped her feet over the area where there may have been urine. She walked to put on her socks and then walked out of the room.

All Registered Nurses at the Facility had the authority to release the Patient from restraints. An RNII has seniority over an RNI. Ms. M did not believe she had authority to release the Patient. During the investigation, Ms. M told the Investigator she did not speak sooner with the nursing supervisor because Grievant was the charge nurse and had seniority over Ms. M. Ms. M described Grievant as the one responsible for making the "final decision." Ms. M believed Grievant was the "assigned nurse" for the Patient meaning that Grievant had assigned responsibility for the Patient to herself.

Employees took turns observing the Patient. Ms. M observed the Patient calm and sometimes asleep.

The Patient complained that she needed to go to the restroom. Ms. M and Ms. G informed Grievant of the Patient's request. Grievant did not allow the Patient to use the restroom. In one instance, Grievant watched the Patient and believed the Patient remained aggressive.

Grievant checked on the Patient three or four times but was trying to limit her interaction so the Patient would calm down. Grievant did not assess the Patient.

### **CONCLUSIONS OF POLICY**

The Agency has a duty to the public to provide its clients with a safe and secure environment. It has zero tolerance for acts of abuse or neglect and these acts are punished severely. Departmental Instruction ("DI") 201 defines Neglect as:

The failure by an individual, 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.

Policy M-45 governs Seclusion or Restraint.<sup>2</sup> The purpose of the policy is:

To establish policies and procedures governing the use of seclusion or restraint at the [Facility] in order to minimize use of these restrictive procedures, maximize protection and safety for individuals receiving services and staff, and to preserve individuals' dignity when seclusion or restraint is required.

Section II of the Policy provides:

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<sup>2</sup> Grievant received annual training regarding the Agency's Seclusion and Restraint policy beginning in 2018.

[Facility] will comply with the highest standard for seclusion/restraint as required by any applicable regulations or standards and shall strive to prevent, reduce, and eliminate the use of seclusion and restraint through effective performance improvement initiatives.

Seclusion or restraint shall be used only when less restrictive measures have proven ineffective and the behavioral emergency poses a risk of harm to the individual, staff, or others. All disciplines shall collaborate with the individual to develop strategies that may minimize the potential for a behavioral emergency and/or the need for seclusion or restraint. When seclusion or restraint is utilized, the individual's rights, dignity, and well-being shall be protected and preserved. This policy refers to behavioral restraints, except for the section pertaining to medical restraint.

Section F(4) states:

All staff providing assessments, care and monitoring shall assure the individual's privacy and dignity. In addition, staff shall observe for any signs of changing level of consciousness, as well as verbal expressions of pain or discomfort. If signs of pain or discomfort are observed or at any time, an individual visualizes discomfort, an RN shall be notified immediately to assess the individual.

Section F(5) provides:

c. Vital signs shall be taken and documented at least hourly.

d. Individuals in any type of restraints shall have the opportunity to exercise restrained limbs every 2 hours at a minimum or as the individual requires.

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h. Individuals shall have access to toilet facilities according to his/her needs or a minimum of every two (2) hours. Depending on the need and clinical status of the patient, this may be accomplished via bedpan/urinal, or by escorting to the toilet while restrained. If in mechanical restraints, nursing clinical discretion may be utilized to release one limb temporarily, for the purpose of cleaning, if benefit outweighs risk for that brief interval. If in ERC and bedpan/urinal is not a feasible option, the patient should be transitioned to mechanical restrains for the purpose of toileting only, and immediately placed back into the ERC. Successful toileting does not constitute adequate justification that restraints are no longer required, if release criteria have not explicitly been met. Please refer to section j. below for possible exceptions.

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j. Staff shall observe the individual for behaviors that demonstrate that the release criteria are met. In those situations where the individual is not

demonstrating the identified release criteria but is demonstrating other types of behavior that indicate readiness for release, the physician shall be consulted to discuss revision of the release criteria order to include alternative behaviors.

Section F(8) provides:

A RN shall conduct and document an in-person, face-to-face assessment of the individual's physical and psychological status at least hourly.

An ERC is a mechanical restraint. The decision to place the Patient in the ERC was appropriate. The Patient was aggressive, posturing, threatening, and making racial slurs. The Patient shoved Grievant in the back forcing her into a wall. Use of the ERC was an attempt to deescalate the Patient's aggressive behavior. Grievant obtained a doctor's order authorizing staff to place the Patient in the ERC.

Once Grievant decided to place the Patient in the ERC, Grievant assumed several additional responsibilities of care for the Patient. Policy M-45 identifies these responsibilities.

Grievant did not take the Patient's vital signs hourly or instruct other staff to take the Patient's vital signs.

All four of the Patient's limbs were restrained in the ERC. Grievant did not allow the Patient to exercise restrained limbs every two hours. Grievant did not instruct other employees to exercise the Patient's restrained limbs every two hours.

Allowing the Patient to urinate on herself did not protect and preserve her "rights, dignity, and well-being." Grievant was informed of the Patient's request to use the restroom. Grievant did not allow the Patient to use the restroom. Grievant did not allow the Patient to access "toilet facilities according to his/her needs or a minimum of every two (2) hours."

Grievant did not conduct and document an in-person, face-to-face assessment of the individual's physical and psychological status at least hourly. Grievant did not instruct other employees to conduct and document this process. Although employees observed the Patient as required, the Patient's physical and psychological status was not assessed hourly.

Abuse of neglect of clients is a Group III offense.<sup>3</sup> Grievant's failure to ensure these services were provided to the Patient are sufficient to uphold the Agency's issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, the Agency's decision to remove Grievant must be upheld.

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<sup>3</sup> See, DHRM Policy 1.60, Standards of Conduct.

Grievant argued that she could not release the Patient because the Patient was not calm. Even if Grievant's assertion is true, Grievant failed to provide appropriate services while the Patient was in the ERC prior to the Patient's release from the ERC.

Grievant argued that she could not release the Patient to use the restroom because the Patient remained aggressive. Grievant did not assess the Patient and, thus, her opinion was based on incomplete evidence. Grievant did not consider allowing the Patient to use a bed pan or escorting the Patient in restraints to the restroom. The Patient initially sat in the ERC without resistance. It is unclear why the Patient would become combative and refuse to be returned to the ERC. Grievant did not consider transitioning the Patient to mechanical restraints for the purpose of toileting.

Grievant argued that the Agency failed to provide her with due process because it failed to inform her of the allegations against her. For example, the Agency required Grievant to provide a statement but did not tell her the accusation. The Agency's Notice of Intent did not disclose the evidence against her. To the extent Grievant's prehearing due process was inadequate, that defect was cured by the hearing process. Grievant had the opportunity to test the Agency's allegations and present relevant evidence during the hearing.

Grievant argued the level of discipline was too harsh given her good work performance. It is clear that the Agency could have taken lesser disciplinary action and still corrected Grievant's behavior. The Agency's level of discipline was authorized under the Standards of Conduct.

*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 ...."<sup>4</sup> Under the *Rules for Conducting Grievance Hearings*, "[a] hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive.

Grievant argued that the Agency could have taken disciplinary action against other employees assisting the Patient, but only took disciplinary action against Grievant. Grievant showed employees had the authority to release the Patient from the ERC yet they were not disciplined for failing to do so. Although Grievant's assertion is true, it is not

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<sup>4</sup> *Va. Code § 2.2-3005.*



a mitigating circumstance because Grievant was the Charge Nurse and the other employees reported to her. Ms. M heard Grievant say Grievant would be the one who decided whether to release the Patient. The Agency distinguished between Grievant and the other employees because Grievant held a position of authority over those employees. The Hearing Officer cannot conclude that the Agency singled-out Grievant for disciplinary action.

In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is **upheld**.

## APPEAL RIGHTS

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

Please address your request to:

Office of Employment Dispute Resolution  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

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

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

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

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.<sup>[1]</sup>

[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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>[1]</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.