

DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 12067

Hearing Date: February 29, 2024
Decision Issued: March 1, 2024

PROCEDURAL HISTORY

On January 2, 2024, Grievant was issued a Group III Written Notice and was terminated on January 2, 2024.¹ On January 11, 2024, Grievant filed a grievance challenging the Agency's actions.² The grievance was assigned to this Hearing Officer on January 22, 2024. A hearing was held on February 29, 2024.

APPEARANCES

Agency Advocate
Agency Representative
Grievant
Witnesses

ISSUES

Did Grievant violate DI 201(RTS)03 and cause patient neglect or abuse?

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.³ 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:

¹ Agency Exh. 1, at 4

² Agency Exh. 1, at 33

³ See Va. Code § 2.2-3004(B)

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 decide 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 that more probably than not occurred, or that they were more likely than not to have happened.⁴ However, proof must go beyond conjecture.⁵ In other words, there must be more than a possibility or a mere speculation.⁶

FINDINGS OF FACT

After reviewing the evidence and observing the demeanor of each witness, I make the following findings of fact: Agency submitted a notebook containing pages 1 through 151. Agency also admitted into evidence a video recording that is not a part of the notebook. Grievant objected to pages 14, 27, and 31. With the exception of those 3 pages, the notebook and video were accepted in their entirety as Agency Exhibit 1. Grievant submitted no documentary evidence. Four witnesses testified on behalf of the Agency: a Human Resources officer (HR), the Facility Director (AD), the Chief Nurse Executive (CX), and the Charge Nurse (SA).

Several Departmental Instructions (DI) policies are relevant to this matter.

DI 201-1, **Background**, states: “*the Department of Behavioral Health and Developmental Services [DBHDS] strives to provide a safe and secure environment to individuals admitted to a facility for treatment or services. There is no tolerance for abuse and neglect.*”⁷

DI 201-3, **Abuse** states: “*This means any act or failure to act by an employee... responsible for the care of an individual in a facility, operated by [DBHDS], that was*

⁴ *Ross Laboratories v. Barbour*, 13 Va. App. 373, 377, 412 S.E. 2d 205, 208 1991

⁵ *Southall, Adm’r v. Reams, Inc.*, 198 Va. 545, 95 S.E. 2d 145 (1956)

⁶ *Humphries v. N.N.S.B., Etc., Co.*, 183 Va. 466, 32 S.E. 2d 689 (1945)

⁷ Agency Exh. 1, at 72

performed, or was failed to be performed, knowingly, recklessly, or intentionally, and that... might have caused physical or psychological harm, injury, or death to an individual, receiving care or treatment for mental illness...”⁸

Policy AN-09 (I), **Assignment of Nursing Personnel** states: “... *The Charge RN is responsible to delegate and coordinate the implementation of patient care assignments during the shift to assure consistency with the individualized plan of care...*”⁹

Policy AN-09 (III)(I)(1)(2) states:” *Each nursing staff member shall: (1) Report to the Charge RN upon arriving for the shift and each time prior to leaving the unit, including at the end of the shift. No staff shall leave the unit without first notifying the Charge RN and receiving their approval. (2) Clarify, with the Charge RN any questions regarding patient assignment, care, requirements, barriers, to completion of assignments, and or related documentation at the beginning of their shift, and when the Assignment Sheet is received.*”¹⁰

Policy CP-95 (III)(B)(5)(a)(1), **Special Precaution Status** states: “*If a patients behavior poses risk of harm to self, increased observation and monitoring may be required...*”¹¹

Policy CP-391 (I)(3), **Constant Observation, 1:1... Special Observation** states: “*These levels of special observation require a dedicated staff person... to observe an individual patient. These levels of special observation represent the highest possible levels of observation and should be utilized only with those patients at the highest level of risk.*”¹²

Policy CP-391(III)(A)(5) states: “*No special observation order will be allowed to expire or lapse. Orders shall NOT be entered with a time frame in the order... Special Observations and/or Special Staffing can only be discontinued pursuant to a Provider’s order...*”¹³

On November 24, Grievant returned to the facility from a hospital with patient (P). Grievant volunteered for this duty and meet P at the hospital. It was uncontradicted that P was at risk for self-harm. Because of this he required 1:1 coverage. The video that was played at the hearing showed the following take place over an approximate 5-minute period: Grievant and P enter a dayroom; Grievant walks into the nursing station and is no longer 1:1 with P; Grievant appears to have a conversation with someone; Grievant leaves the area; and off camera, P runs into a wall, hitting his head.

⁸ Agency Exh. 1 at 72

⁹ Agency Exh. 1, at 111

¹⁰ Agency Exh. 1 at 113

¹¹ Agency Exh. 1 at 123

¹² Agency Exh. 1 at 136

¹³ Agency Exh. 1 at 137

An investigation of this event took place and the Investigator's Summary (IS) was given to AD. Grievant was interviewed and she filed a written report that is a part of the IS. Grievant wrote: "*I came back to CSH...with [P]. I was told that **he might be on 1:1** and I said I have to go to the entrance and put my things in my locker and I would be back...*"¹⁴ (**Emphasis added**)

Grievant testified she heard about the 1:1 status for P the day before and not on her return to the facility with P. The most likely interpretation of her written statement is that she was told P was on 1:1 status when she escorted him back to the facility. Grievant should have asked the status of P when she met him at the hospital as a part of her duty to provide a safe and secure environment for P. If, as she testified, that is when she learned of his 1:1 status, she was on notice and knew that he could not be left alone.

If Grievant was uncertain as to the status of P, Policy AN-09 (III)(I)(1)(2) required her to clarify with the Charge RN any uncertainties she may have regarding the status of and care for P. I find from her own statement that Grievant was aware of P's 1:1 status.

SA testified and Grievant had the opportunity to cross examine her. I overruled Grievant objection to page 27 of Agency Exh. 1, as it was the written statement SA gave to IS. In the written statement, she states: "*Grievant came into the nursing station at this point. I informed her that she must remain 1:1 with the patient. She declined to do so, stating 'I have to go up front, I didn't sign up for this.' I then told her that you must remain on the patient because he is 1:1, within arms reach. Grievant left the unit leaving the patient without 1:1 staff*"¹⁵. SA confirmed what was said in her written statement was correct. This would be the second time that Grievant was made aware of the status of P.

During cross examination, Grievant admitted she might have known P was on 1:1 status. After viewing the video, she agreed that it showed her bringing P into the day room and then leaving P there, not on 1:1, while she left the room. This is a violation of DI 201-3. By leaving P without 1:1 coverage, Grievant created a situation where P could potentially harm himself. This is patient abuse.

Grievant has an active Group III Written Notice, with an offense date of August 24, 2023, and an issue date of November 27. There was a substantiated finding of patient neglect.¹⁶ Grievant send an email to AD on October 19 stating that "*I have reviewd policy CP-39.*"¹⁷ Approximately 36 days after this personal review, Grievant failed to comply with this policy.

MITIGATION

Va. Code § 2.2-3005(C)(6), authorizes and grants Hearing Officers the power and

¹⁴ Agency Exh. 1 at 25

¹⁵ Agency Exh. 1 at 27

¹⁶ Agency Exh. 1 at 150

¹⁷ Agency Exh. 1 at 151

duty to receive and consider evidence in mitigation or aggravation of any offense charges by an Agency in accordance with rules established by EDR. The Rules for Conducting Grievance Hearings (“Rules”), provide 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 the Agency management that are found to be consistent with law and policy. Specifically, in disciplinary grievances, if the Hearing Officer finds that (1) the employee engaged in the behavior described in the Written Notice; (2) the behavior constituted misconduct; and (3) the Agency’s discipline was consistent with law and policy, then the Agency’s discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.

Hearing Officers are authorized to make findings of fact as to the material issues of the Case and to determine the grievance based on the material issues and the grounds and the records for those findings. The Hearing Officer reviews the facts *de novo* to determine whether the cited actions constitute misconduct and whether there were mitigating circumstances to justify a reduction or removal of the disciplinary action, or aggravating circumstances to justify the disciplinary action. The Hearing Officer has the authority to determine whether the Agency has established by a preponderance of the evidence that the action taken was both warranted and appropriate under all the facts and circumstances.

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

I find no reason to mitigate this matter.

DECISION

I find that the Agency has borne its burden of proof in this matter and the issuance of a Group III Written Notice with termination was proper.

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 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 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 that 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 where the grievance arose within **30 days** of the date when the decision becomes final.^[1]

[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].

William S. Davidson
William S. Davidson, Hearing Officer

Date: March 1, 2024

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