

DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case Nos: 12196

Hearing Date: December 19, 2024
Decision Issued: December 20, 2024

PROCEDURAL HISTORY

On October 2, 2024, Grievant was issued a Group III Written Notice with termination.¹ On October 21, 2024, Grievant filed a grievance challenging the Agency's actions.² The grievance was assigned to this Hearing Officer on November 4, 2024. A hearing was held on December 19, 2024.

APPEARANCES

Agency Advocate
Agency Representative
Grievant
Witnesses

ISSUES

Did Grievant violate D.I. 201, Reporting and Investigating Abuse and Neglect of Clients?

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:

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

¹ Agency Exh. 1, at 4

² Agency Exh. 1, at 26

³ See Va. Code § 2.2-3004(B)

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 134. Without objection, the notebook was accepted as Agency Exhibit 1. Grievant submitted electronically evidence containing pages 1 through 66. Without objection, it was admitted as Grievant Exhibit 1.

Several Policies and Procedures (PP) are relevant to this matter.

PP PM-01(III)(B)(D) and (E) state in part: *“Designated nursing staff shall ascertain the whereabouts and safety of each patient hourly during the waking hours and half hourly during the sleeping hours... Patients shall be seen when possible. No rollcall shall be done verbally... **Staff shall never guess or surmise where the patient is.** If a staff member does not actually know where the patient is, the unit charge nurse and other staff should be contacted to ascertain the patient’s whereabouts” ...⁷ (Emphasis added)*

PM CP-391(II) defines **High Risk Status** as *“... An observation level other than routine observation. All patients on special observation are considered high risk.”⁸*

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 54, 55

⁸ Agency Exh. 1 at 57

PM CP (II)(2), **15 Minute Special observations** states “*These are 15-minute checks and represent an elevated level of observation level on a specific risk. Under an order for Special Observation, when the patient is on the unit, the patient will be observed, at least every fifteen (15 minutes and a record of patient behavior will be kept by the assigned staff member. The assigned staff member must have visual contact with the patient within 15 minutes and not simply assume they know where the patient is on the unit...*”⁹

PM RTS-15c (II)(A) and PM 201-3 define **Abuse** as: “*Any act or failure to act by an employee... responsible for the care of an individual in the facility...that was performed or was failed to be performed, knowingly, recklessly, or intentionally, and that caused or might have caused physical or psychological harm, injury, or death to an individual, receiving care or treatment...*”¹⁰

The Agency Abuse and Neglect investigator, (ANI) testified before me. He filed his Investigator’s Summary with the Agency on September 9, 2024.¹¹ He interviewed 9 witnesses, including Grievant, and viewed a video that contained relevant evidence.¹² The video, which was played at the hearing, indicated that a patient (PAT) of this facility exited building 94-2 at 2:08 PM, August 23.¹³ PAT was able to exit the building because of a faulty locking mechanism on the door. After viewing the video at the hearing, both Agency and Grievant agreed that PAT left at 2:08 PM.

Grievant was assigned the observation post that was responsible for Grievant at 2:30 PM. PAT’s chart indicated that he was on 15-minute precautions. It also indicated that his behavior was appropriate and that his location was the Treatment Mall at 2:19, 2:35, 2:50 and 3:01 PM.¹⁴

Grievant testified that she was pulled from another building to fill in for missing staff on August 23. She testified that she was not familiar with the patients in 94-2 and that the pictures on the tablets are too small to clearly identify a patient. She stated the same to ANI.¹⁵

In her testimony, Grievant did not dispute that she was the author of the chart entries for 2:35, 2:50 and 3:01 PM, all indicating that PAT was still in 94-2. As in her statement to ANI, she testified that it was a case of mistaken identity.

The Facility Director testified. She stated Grievant told her it was a case of mistaken identity. She stated that she chose not to mitigate in this matter because of the falsification

⁹ Agency Exh. 1 at 57

¹⁰ Agency Exh. 1 at 83, 92

¹¹ Agency Exh. 1 at 9

¹² Agency Exh. 1 at 12

¹³ Agency Exh. 1 at 14

¹⁴ Agency Exh. 1 at 18

¹⁵ Agency Exh. 1 at 18

of the chart and the harm that could or has resulted to PAT. No one offered any evidence as to the current status of PAT.

I find that Grievant did falsify PAT's chart when she made entries that he was present when he was not. I find that this gave PAT extra time to facilitate his escape from the Agency and thus created an opportunity for harm to PAT.

MITIGATION

Va. Code § 2.2-3005(C)(6), authorizes and grants Hearing Officers the power and 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 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: December 20, 2024

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