

Issue: Group III Written Notice with Termination; Hearing Date: 06/16/17; Decision Issued: 06/19/17; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 11004; Outcome: No Relief – Agency Upheld; **Administrative Review Ruling Request received 07/05/17; Ruling No. 2018-4579 issued 07/14/17; Outcome: AHO's decision affirmed.**



# ***COMMONWEALTH of VIRGINIA***

## ***Department of Human Resource Management***

### **OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

#### **DECISION OF HEARING OFFICER**

In re:

**Case Number: 11004**

Hearing Date: June 16, 2017

Decision Issued: June 19, 2017

#### **PROCEDURAL HISTORY**

On March 24, 2017, Grievant was issued a Group III Written Notice of disciplinary action with removal for client neglect.

On March 31, 2017, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On April 17, 2017, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 16, 2017, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
Agency Party Designee  
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. 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 Forensic Mental Health Technician at one of its facilities. She had been employed by the Agency for over 20 years. No evidence of prior active disciplinary action was introduced during the hearing.

When transporting patients from one location to another using the Agency's bus, an employee was to sit in the front of the bus and another employee was to sit in the back of the bus. The employee sitting in the back of the bus was required by Agency practice and Agency Policy P-11 to conduct a "sweep" of the bus after patients had left the bus. The sweep served to ensure that all patients had been removed from the bus.

At approximately 8 p.m. on February 3, 2017, patients were being transported on a bus from the Treatment Mall to the Building. An employee, Ms. P, sat at the front of the bus. Grievant sat at the back of the bus. She sat in the back of the bus to ensure that no patients sat in the back near the emergency door.

When the bus arrived at the Building, Ms. P exited the bus and went inside the Building to begin counting the patients as they entered the Building. Nine patients left the bus, but one remained on the bus. The Patient remained on the bus. Grievant exited the bus without successfully completing a sweep to ensure that no patients remained on the bus. The Driver did not realize that the Patient remained on the bus. He closed the door and began driving from the Building to the Motor Pool. Grievant and the Ms. P realized that the Patient was missing. They exited the Building and attempted

to notify the Driver. They called the Driver using their radios, but the Driver did not respond because he had turned off his radio.

The Driver continued to drive the bus to the Motor Pool approximately seven blocks away from the Building. He parked the bus, locked the gate to the motor pool, clocked out, and went home. The Driver did not look in the back of the bus as he exited. He was not required to do so prior to locking the bus.

Grievant “handed off” her patients to the Nurse and obtained permission to drive to the Motor Pool. Grievant got into her personal vehicle and drove to the Motor Pool. Other employees also went to the Motor Pool in an Agency van. Grievant and the other employees did not have keys to the gate. They notified the Campus Security staff who quickly arrived at the Motor Pool. Security Staff did not have keys to open the Motor Pool gate. A security employee was able to pass through a gap in the fence as the other employees helped create the gap. He went to the bus and told the Patient how to open the door. The Patient exited the bus. When Grievant asked the Patient why he remained on the bus, the Patient said he had fallen asleep and was enjoying the ride.

Approximately five minutes passed from the time the bus left the Building with the Patient and the Patient was able to exit the bus.

## **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.

On February 3, 2017, Grievant was responsible for performing a “sweep” of the bus to ensure that no patients were left on the bus. Grievant exited the bus without ensuring that the Patient had left the bus. The Patient remained on the bus without being supervised. He remained unsupervised for approximately five minutes. Grievant failed to provide care to the Patient while he remained unsupervised thereby engaging in client neglect.

Client neglect is a Group III offense. Upon the issuance of a Group III Written Notice, an employee may be removed. Accordingly, the Agency’s decision to remove Grievant must be upheld.

Grievant argued that she was distracted and unable to complete a full physical sweep. Grievant argued that she conducted a sweep but not see anybody. The evidence showed that Grievant failed to properly sweep the bus to ensure that no patients remained on the bus. That evidence is sufficient to show client neglect.

*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>1</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. In light of this standard, 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 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 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 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by fax to (804) 371-7401, or e-mail.

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<sup>1</sup> Va. Code § 2.2-3005.

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 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 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.<sup>2</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>2</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.