



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11851

Hearing Date: November 23, 2022
Decision Issued: December 12, 2022

PROCEDURAL HISTORY

On May 10, 2022, Grievant was issued a Group III Written Notice of disciplinary action with removal for falsifying records and client neglect.

On June 10, 2022, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On July 5, 2022, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 23, 2022, a hearing was held by remote conference.

APPEARANCES

Grievant
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 Direct Service Associate III at one of its facilities. No evidence of prior active disciplinary action was introduced during the hearing.

Approximately 20 patients lived in the Unit at the Facility. The Unit had a common area with four hallways leading to patient bedrooms. Some Unit staff were assigned responsibility to conduct fifteen minute checks ("Q15") of patients in the Unit. To complete a Q15 check, an employee was to walk to each patient's room, look into the room and observe the patient breathing. After observing the patient, the employee was to record the patient's location and status in a computer tablet.

Patients entering the Facility were not permitted to leave until they received appropriate mental health treatment and were properly discharged pursuant to the Agency's policies.

Patient L was admitted to the Facility from a local Jail based on a criminal temporary detention order. He was on non-acute suicide watch due to threats of self-directed violence. Patient W was admitted to the Facility from a local Jail because he attempted to hang himself and was considered suicidal.

Patient W's room had access to a bathroom. Patient L and Patient W dug a hole in the wall of Patient W's bathroom. They crawled through the hole and escaped the Unit. Patient W left at 10:20 p.m. and Patient L left at 10:23 p.m. on April 16, 2022. They left the Facility grounds to enter a vehicle which took them to the neighboring community. Before leaving the Unit, Patient L and Patient W arranged pillows and sheets on their beds to make it appear that someone was asleep in each bed.

Grievant began working on the Unit after the patients had absconded. She arrived at approximately 11:30 p.m. on April 16, 2022. Grievant was assigned responsibility to conduct Q15 checks from 11:30 p.m. until 12:50 a.m. on April 17, 2022. Grievant did not conduct Q15 checks. She did not go to the rooms of Patient L and Patient W to determine their status. Grievant wrote in the computer tablet that Patient W and Patient L were in their rooms even though she had not checked the rooms. If she had conducted Q15 checks, she would have noticed that Patient W and Patient L were not in their rooms and not in the Unit. She would have been able to report that information to Facility managers who would have notified local law enforcement personnel to find the missing patients.

Another employee later conducted Q15 checks and noticed that Patient W and Patient L were missing. The Facility Director was notified of the escape on April 17, 2022 at 5:28 a.m.

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.

"Significant neglect of duty" is a Group III offense.¹ On April 16, 2022 and April 17, 2022, Grievant was obligated to provide services to Patient W and Patient L to ensure their safety and welfare. Grievant failed to conduct Q15 checks beginning at 11:30 p.m. Because she failed to conduct Q15 checks, Facility managers learned the patients had escaped more than five hours after they would have been notified if Grievant had properly conducted Q15 checks. Grievant's failure to perform her duties resulted in a delayed restoration of services to the two patients.

¹ See, DHRM Policy 1.60.

Grievant argued that her actions did not cause the patients to escape. By failing to conduct Q15 checks, Facility managers were delayed in finding the patients and resuming their mental health treatment.

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 ...”² 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 inconsistently disciplined employees because she was removed from employment while other staff who failed to notice the patients were missing retained their jobs. The evidence showed that Mr. S did Q15 checks after Grievant but he did not notice that the patients were missing. He went to the rooms of each patient and believed the patients were inside their rooms because he was deceived by the arrangement of pillows and sheets on the beds. Mr. S received a Group III Written Notice. He was recommended for termination but kept his job with a four year probation. Ms. B’s removal was mitigated based on her length of service and otherwise satisfactory job performance. She remained an employee at the Facility.

On April 26, 2022, Grievant tested positive for marijuana.

The Hearing Officer cannot conclude that Grievant was improperly singled out for disciplinary action for several reasons. First, the other staff who failed to notice the patients were missing also received Group III Written Notices. Second, it appears that those staff attempted to view the patients but failed to notice that the patients were missing. Grievant, however, made no attempt to view the patients. Third, Grievant tested positive for marijuana contrary to policy. No evidence was presented showing the other employees tested positive for any drugs. 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**.

² *Va. Code § 2.2-3005.*

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 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.^[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].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

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