



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11925

Hearing Date: May 3, 2023
Decision Issued: July 3, 2023

PROCEDURAL HISTORY

On January 10, 2023, Grievant was issued a Group III Written Notice of disciplinary action with removal for client neglect.

On January 15, 2023, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On February 13, 2023, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 3, 2023, 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 DSA II at one of its locations.

Grievant had prior active disciplinary action. Grievant received a Group II Written Notice for failing to complete and monitor Q15 checks on October 19, 2022. Grievant was given Due Process on December 8, 2022, and thus, knew the Agency's allegations against her regarding the October 19, 2022 incident.

The Agency required staff to check patients every fifteen minutes. To complete a check, an employee was obligated to enter a patient's room if the patient was inside and observe the patient to ensure the patient was alive and safe. The RN Manager gave Grievant a copy of the Agency's policy and Grievant was aware of how to properly complete a Q15 check.

Grievant began her shift at the Facility at 7 p.m. on December 17, 2022. Her shift was scheduled to end at 7:30 a.m. on December 18, 2022. Grievant was responsible for conducting Q15 checks from 10 p.m. until 11 p.m. Grievant would walk towards patients' rooms with closed doors but would not open the doors and look inside for every patient. Grievant did this at 10:19 p.m., 10:39 p.m., and 10:52 p.m.

As part of the Agency's investigation, Grievant viewed the video relating to her Q15 checks. Grievant admitted to the Investigator that she did not perform the checks properly.

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 December 17, 2022, Grievant was obligated to conduct Q15 checks to observe patients and ensure their safety. For three checks, Grievant did not properly conduct the checks. She had been counseled regarding the need to conduct Q15 checks properly. Grievant's failure to properly complete Q15 checks constituted neglect thereby justifying the Agency's decision to issue 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.

Grievant argued that not every employee was going into patient rooms. She argued it was not beneficial to the Agency to terminate her employment and that she cared for the patients and worked well with other staff. The Facility Director testified that the Facility had experienced several serious incidents because employees had failed to properly complete Q15 checks. He also testified that appropriate action was taken against any employee failing to properly conduct Q15 checks. The Agency has presented sufficient evidence to support its decision to take disciplinary action in this case.

Grievant argued that the policy did not require staff to go into the patients' bedrooms. Policy 280-033 provides, "if the patient is in their bedroom area, knock on the door before entering and let the patient know staff is entering. Staff is to identify themselves by name and purpose for entering." When patients are sleeping, the policy requires, "Nursing staff will enter the patient's room and visualize the patient for at least two (2) complete respirations before documenting."¹ The policy was effective October 28, 2022.

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

¹ Agency Exhibit p. 40.

....”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. 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 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.

² Va. Code § 2.2-3005.

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.