

Issue: Group III Written Notice with termination (client neglect); Hearing Date: 08/15/18; Decision Issued: 08/16/18; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 11238; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11238

Hearing Date: August 15, 2018
Decision Issued: August 16, 2018

PROCEDURAL HISTORY

On June 11, 2018, Grievant was issued a Group III Written Notice of disciplinary action with removal for client neglect.

On June 12, 2018, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On July 2, 2018, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On August 15, 2018, a hearing was held at the Agency's office.

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 CNA/Escort. Grievant was employed by the Agency for approximately 19 years. No evidence of prior active disciplinary action was introduced during the hearing.

On May 29, 2018, Grievant escorted the Patient from the Facility to a local Hospital. The Patient was to receive services from the Hospital Radiology department staff. Grievant dropped off the Patient at the Hospital office. Once the Patient was called to receive services in another room, Grievant asked the Transportation Driver to take her to a local department store so she could get a drink. Grievant left the Hospital with the Transportation Driver to go to the local department store. Grievant left the Patient at the Hospital and went to the local department store. Grievant remained in the store longer than expected by the Transportation Driver. When the Patient finished receiving services, Hospital staff attempted to locate Grievant to escort the Patient away from the Hospital. Hospital staff were unable to locate Grievant, so a Hospital employee called the Facility. A Facility employee called the Transportation Driver and then he and Grievant returned to the Hospital to pick up the Patient. Grievant was away from the Hospital for approximately 20 to 25 minutes.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “include acts of minor misconduct that require formal disciplinary action.”¹ Group II offenses “include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action.” Group III offenses “include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.”

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.

“[N]eglect of clients” is a Group III offense.² On May 29, 2018, Grievant was responsible for providing services to the Patient. Those services consisted of remaining with the Patient to ensure the Patient’s safety. Facility Policy 280-T governed Patient Escort Service and provided:

Escort staff supervise the patients they transport or accompany to labs and clinics, and assure that no patient is left unattended.³

Grievant left the Hospital leaving the Patient behind. When the Patient finished receiving services from Hospital staff, Grievant was unavailable to provide services thereby leaving the Patient unattended. Grievant neglected the Patient because she left the Patient unattended at the Hospital. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant’s removal must be upheld.

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”⁴ Under the *Rules for Conducting Grievance Hearings*, “[a] hearing

¹ The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

² See, Attachment A, DHRM Policy 1.60.

³ Agency Exhibit D.

⁴ *Va. Code § 2.2-3005.*

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 she was honest throughout the investigation and had no prior active disciplinary action. She had been employed by the Agency for approximately 19 years. Grievant presented evidence showing she was a good worker for the Agency. She was always on time, in uniform, and willing to assist as necessary. Although these factors speak well of Grievant's character and devotion to her work, they are not sufficient to mitigate the disciplinary action under the EEDR standard for mitigation.

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 EEDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EEDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Equal Employment and 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 EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

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