

Issue: Group III Written Notice with Termination (client neglect); Hearing Date: 03/26/18; Decision Issued: 05/09/18; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 11169; Outcome: Full Relief; **Attorney's Fee Addendum issued 05/30/18 awarding \$5,371.00.**



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11169

Hearing Date: March 26, 2018
Decision Issued: May 9, 2018

PROCEDURAL HISTORY

On December 29, 2017, Grievant was issued a Group III Written Notice of disciplinary action with removal for client neglect.

On January 24, 2018, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On February 5, 2018, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On March 26, 2018, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee
Agency's 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 Radiologic Technologist Supervisor. The purpose of her position was:

Supervises, directs, and manages a comprehensive Radiology/EKG-EEG Department in providing quality services to a special population. Responsible for meeting and maintaining current quality assurance and agency standards in the provision of services and departmental management.¹

She had been employed by the Agency for approximately twenty years. No evidence of prior active disciplinary action was introduced during the hearing. Grievant received an overall rating of Contributor on her 2017 performance evaluation.

¹ Agency Exhibit 6.

The Patient has a history of end stage renal disease. She was on dialysis three times per week. She was diagnosed as catatonic schizophrenia with depression and on ECT once per month.

Grievant began working on November 2, 2017 at 7:31 a.m.

Dr. M was a contract employee with the Agency. He began working at the Facility on September 11, 2017. Grievant filed a complaint against Dr. M for workplace harassment. Dr. M told the Investigator that he had ordered x-rays for the Patient, the x-rays were taken but he had not received an x-ray report notification that the x-ray was done. The workplace harassment investigation was suspended, “[e]ffective November 6, 2017, ... pending the outcome of a DI 201 (Abuse & Neglect) investigation that was initiated as a result of information reported during this HR Investigation.”²

Dr. M worked from 8 a.m. to 4:40 p.m. on November 2, 2017.

Ms. B, a Radiology Tech, began working at 7:31 a.m. on November 2, 2017 and left work at 3:47 p.m. When Ms. B left work, Grievant remained at work.

Dr. E had an office with an area containing a stack of physician distribution boxes designed to receive letters and papers. Each doctor had an assigned box. The doctor’s name appeared on each box. The boxes were open in the front. This meant anyone could place an item in a particular doctor’s box or remove an item from the box without being detected. Each doctor was supposed to check the box for papers prior to leaving at the end of his or her shift. The office area was accessed by a door that remained open throughout the day. Once the door was closed and locked, an employee could not access the boxes unless he or she had a key to the office door. Grievant and Dr. M did not have keys to the office door. Dr. E, the Administrative Assistant, a Maintenance Employee, and the Risk Manager had keys to the office door.

The Administrative Assistant was responsible for unlocking and opening and closing and locking the door to the area providing access to the distribution boxes. When she left early in the afternoon, she sometimes left the door open and unlocked with the expectation that Dr. E would close and lock the door when he left at the end of the day.

The Administrative Assistant worked on November 2, 2017. She did not recall whether or not Grievant put any papers in Dr. M’s box that day. The Administrative Assistant “clocked out” at 3:01 p.m. on November 2, 2017. At the time the Administrative Assistant left work, Dr. E had already departed. She did not recall whether she locked the office door when she left work on November 2, 2017. The Administrative Assistant believed that Ms. J may have locked the office door that day. The Administrative Assistant testified that if she left at approximately 3 p.m. and Dr. E

² Grievant Exhibit 2.

was not at work, she would have left the office door open but notified the medical director who would have ensured the door was locked at the end of the day.

On November 2, 2017, Dr. M ordered x-rays for the Patient's hips and knees. Dr. M wanted the x-ray to assist him in the physical evaluation of the Patient. He wanted to determine the proper treatment for the Patient. The x-rays were taken by Ms. B. The x-ray report was received in the Radiology Department at 3:08 p.m. on November 2, 2017. Grievant retrieved the x-ray from the x-ray system at approximately 3:30 p.m. Ms. B had gone for the day.

Grievant received the x-ray and attempted to give it to Dr. M but was unable to locate him. Grievant testified that at approximately 3:35 p.m., she took the x-ray to Dr. E's office and put the x-ray in Dr. M's box.

On November 3, 2017 at 11:51 a.m., Grievant faxed a copy of an x-ray report for the Patient to someone on the third floor of the Facility. Dr. M told the Investigator that on November 3, 2017, he asked Ms. B to fax him a copy of the Patient's x-ray report. Ms. B did not fax all of the reports so he called the Radiology department and spoke with Grievant. Dr. M then asked Grievant to fax the remaining x-ray report. Grievant told the Investigator she faxed a copy of the Patient's x-ray report on November 3, 2017 because someone asked her to do so. Grievant did not recall who asked her to fax the report.

A Female Employee alleged that Dr. M stopped her and stated he was having a heart attack. She asked him if he was serious and Dr. M said yes and that she needed to do "mouth-to-mouth" on him. Dr. M was not actually having a heart attack. The Female Employee alleged that on another occasion Dr. M put his hand on her shoulder and as he began removing his hand he deliberately brush down her front to ensure he made contact with her breast. As she stepped back, Dr. M said he did not know if they were fake or real, referring to her breasts. The Female Employee became angry and walked off and told another employee what had happened and also about the prior incident. Dr. M was arrested on January 9, 2018 and charged with sexual battery that allegedly occurred on December 5, 2017.

On December 4, 2017, Dr. E let Dr. M read Grievant's account of Grievant's claim of harassment. Dr. M also told Dr. E that Dr. M did not get the x-ray report until November 3, 2017.

Dr. E testified that Dr. M told Dr. E that Dr. M checked his distribution box on November 2, 2017 before he left and there was no x-ray report in the box.

The Agency began its investigation of Grievant's behavior approximately 33 days after November 2, 2017. The delay was caused by Dr. M's failure to timely report the allegation of client neglect.

CONCLUSIONS OF POLICY

The Agency alleged Grievant engaged in client neglect “because you failed to report the results of an x-ray to a physician immediately.”

Facility Policy 5430.1W requires that x-ray reports “will be delivered immediately to the [Facility] attending physician (for [Facility] clients).”³ The Policy does not define “immediately” but the evidence showed that if Grievant placed the x-ray report in Dr. M’s distribution box on November 2, 2017, Grievant would have satisfied the immediate delivery requirement.⁴ Thus, the outcome of this case depends on whether the Agency can show that Grievant did not deliver the x-ray to Dr. M’s distribution box on November 2, 2017.

Grievant testified that she followed her normal practice on November 2, 2017 by receiving the x-ray report, attempting to locate Dr. M but after failing to locate him, she placed the x-ray report in Dr. M’s distribution box on November 2, 2017. The Hearing Officer was unable to conclude that Grievant was untruthful. Her demeanor did not display any clear signs of untruthfulness.

The Agency argued Grievant’s assertions should not be believed for several reasons: 1) Grievant alleged she called Dr. M on November 2, 2017, but there were no telephone records showing Grievant called Dr. M; 2) the Administrative Assistant left work at 3:01 p.m. and closed and locked the office door because Dr. E was not working on November 2, 2017; 3) Dr. M complained to the Administrative Assistant about locking the office door too early; 4) Dr. M told the Investigator he received the x-ray report on November 3, 2017; 5) Dr. M wrote 11/3/17 on the x-ray reports; 6) Dr. M told the Investigator he called the Radiology Department on November 3, 2017 to obtain the x-ray reports because he had not received them on November 2, 2017, and Grievant confirmed she faxed an x-ray report for the Patient to someone on the third floor on November 3, 2017.

The Agency began investigating the allegation approximately 33 days after November 2, 2017. As a result, Grievant’s mistaken recollection that she called Dr. M is understandable. On the other hand, Dr. M’s recollection was also affected by the 33 day delay. It may be the case that his recollection of events is also mistaken. As long as Grievant placed the x-ray report in Dr. M’s distribution box on November 2, 2017, it would not have been necessary for Grievant to also have spoken with Dr. M by telephone.

³ Agency Exhibit D.

⁴ Dr. E testified “immediately” meant that an x-ray with a positive finding should be reported to the attending physician within two hours. If Grievant placed the x-ray in Dr. M’s distribution box before 5:08 p.m., she would have satisfied the requirement.

The Agency alleged that Grievant could not have placed the x-ray report in Dr. M's distribution box on November 2, 2017 because Grievant received the x-ray only after the Administrative Assistant had left for the day. The Agency alleged that the Administrative Assistant closed and locked the door to the office where the distribution boxes were located. Since the door was locked and closed, Grievant could not have put the report in Dr. M's distribution box, according to the Agency. This conclusion is not supported by the evidence. The best interpretation of the Administrative Assistant's testimony is that she could not recall whether on November 2, 2017 she had closed and locked the office door to the room with the distribution boxes. Her practice was that if she left at approximately 3 p.m., she would have left the office door open and unlocked but notified another employee to handle closing and locking the office door. The Administrative Assistant's testimony did not support the Agency's conclusion and, more likely, confirmed that the office door was open and unlocked when Grievant claimed she placed the x-ray report in Dr. M's distribution box.

The Agency alleged that because Dr. M complained to the Administrative Assistant that she closed the office too early, the office must have been closed on November 2, 2017. The Administrative Assistant's testimony, however, showed that she assumed Dr. M was talking about November 2, 2017, but she was uncertain. The delay in reporting the neglect allegation affected the Administrative Assistant's ability to recollect events.

Dr. M told the Investigator he received the x-ray reports on November 3, 2017. Dr. M did not testify at the hearing. He had been removed from employment. The evidence showed that Dr. M was a man of poor character. He made numerous offensive remarks of a sexual nature and inappropriately touched a female employee. Grievant alleged Dr. M falsely reported the date he received the x-ray reports in order to retaliate against her for complaining about him. Whether Dr. M intended to retaliate against Grievant is unknown because Dr. M did not testify. Whether Dr. M's testimony would have been credible is not known.

Dr. M wrote 11/3/17 on the x-reports according to the Agency. The Agency asserts that this confirms he received the reports on November 3, 2017. Grievant argued that Dr. M initially wrote 11/2/17 and then changed the "2" to a "3" so that the reports appeared to have been received on 11/3/17. Neither party provided the x-ray reports with Dr. M's original handwriting. Neither "3" appears as if made by a single handwriting stroke. For the hip x-ray report, Dr. M appears to have written a "2" and then drawn a horizontal line paralleling the tail of the "2" and then connected a downward sloping and to the left hook to create the bottom of the "3". For the knee x-ray report, Dr. M appears to have written a "2" with a straight horizontal tail and then drawn a downward sloping and to the left hook to complete the bottom of the "3". The "3" appears with a tail extending to the right which makes up the horizontal tail of the "2". It is unknown why Dr. M originally wrote a "2" and then changed it to a "3". Grievant's assertion that she gave the two reports to Dr. M on November 2, 2017 is supported by the way Dr. M initially wrote a "2" and then changed it to a "3".

Dr. M told the Investigator he called the Radiology Department and asked that the Patient's x-ray reports be faxed to him. When he received only one of the reports he called a second time and spoke with Grievant. Grievant confirmed she faxed a copy of the Patient's x-ray report to someone on November 3, 2017. This evidence is consistent with the Agency's assertion that Grievant did not deliver the x-ray to Dr. M's distribution box because if she had done so there would have been no need for him to request it a second time. This is a negative inference. The question becomes whether a negative inference is sufficient to support the removal of a twenty year employee with satisfactory work performance. The Hearing Officer concludes that the evidence is not sufficient to support the disciplinary action and Grievant's removal. It is equally likely that Grievant placed the x-ray reports in Dr. M's distribution box on November 2, 2017 as it is likely she failed to deliver the reports at all or sent them by fax on November 3, 2017. Because the Agency has the burden of proof, the disciplinary action cannot be upheld.

The Virginia General Assembly enacted *Va. Code § 2.2-3005.1(A)* providing, "In grievances challenging discharge, if the hearing officer finds that the employee has substantially prevailed on the merits of the grievance, the employee shall be entitled to recover reasonable attorneys' fees, unless special circumstances would make an award unjust." Grievant has substantially prevailed on the merits of the grievance because he is to be reinstated. There are no special circumstances making an award of attorney's fees unjust. Accordingly, Grievant's attorney is advised to submit an attorneys' fee petition to the Hearing Officer within 15 days of this Decision. The petition should be in accordance with the EDR Director's *Rules for Conducting Grievance Hearings*.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action is **rescinded**. The Agency is ordered to **reinstate** Grievant to Grievant's same position at the same facility prior to removal, or if the position is filled, to an equivalent position at the same facility. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal and credit for leave and seniority that the employee did not otherwise accrue.

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.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

ADDENDUM TO DECISION OF HEARING OFFICER

In re:

Case No: 11169-A

Addendum Issued: May 30, 2018

DISCUSSION

The grievance statute provides that for those issues qualified for a hearing, the Hearing Officer may order relief including reasonable attorneys' fees in grievances challenging discharge if the Hearing Officer finds that the employee "substantially prevailed" on the merits of the grievance, unless special circumstances would make an award unjust.⁵ For an employee to "substantially prevail" in a discharge grievance, the Hearing Officer's decision must contain an order that the agency reinstate the employee to his or her former (or an objectively similar) position.⁶

To determine whether attorney's fees are reasonable, the Hearing Officer considers the time and effort expended by the attorney, the nature of the services rendered, the complexity of the services, the value of the services to the client, the results obtained, whether the fees incurred were consistent with those generally charged for similar services, and whether the services were necessary and appropriate.

Grievant's attorney devoted 41 hours to representing Grievant in her grievance. These hours are reasonable given the extensive preparation displayed by counsel and the high quality of legal services rendered to Grievant.

The petition also includes one hour of paralegal costs. The statute provides for the award of attorneys' fees, not paralegal costs. Paralegal fees are not attorney's fees. Accordingly, the Hearing Officer has no authority to award paralegal fees.

⁵ Va. Code § 2.2-3005.1(A).

⁶ § 7.2(e) Department of Human Resource Management, *Grievance Procedure Manual*, effective August July 1, 2017. § VI(E) EEDR *Rules for Conducting Grievance Hearings*, effective July 1, 2017.

AWARD

Grievant is awarded attorneys' fees in the amount of \$5,371.00. The Agency may pay this sum directly to Grievant's attorney on Grievant's behalf.

APPEAL RIGHTS

If neither party petitions the EEDR Director for a ruling on the propriety of the fees addendum within 10 calendar days of its issuance, the hearing decision and its fees addendum may be appealed to the Circuit Court as a final hearing decision. Once the EEDR Director issues a ruling on the propriety of the fees addendum, and if ordered by DHRM, the hearing officer has issued a revised fees addendum, the original hearing decision becomes "final" as described in §VII(B) of the *Rules* and may be appealed to the Circuit Court in accordance with §VII(C) of the *Rules* and §7.3(a) of the *Grievance Procedure Manual*. The fees addendum shall be considered part of the final decision. Final hearing decisions are not enforceable until the conclusion of any judicial appeals.

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer