

Issue: Group III Written Notice with Termination (violation of policies); Hearing Date: 04/10/19; Decision Issued: 05/06/19; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 11324; Outcome: Full Relief.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11324

Hearing Date: April 10, 2019

Decision Issued: May 6, 2019

PROCEDURAL HISTORY

On January 22, 2019, Grievant was issued a Group III Written Notice of disciplinary action with removal for violating policies.

On February 2, 2019, Grievant timely filed a grievance to challenge the Agency's actions. The matter advanced to hearing. On February 19, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 10, 2019, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
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 II at one of its facilities. She began working for the Agency in March 2018.

The Patient was admitted to the Former Facility on March 24, 2017. He was charged with "Threaten by writing, 3 counts." The Patient was adjudicated Not Guilty by Reason of Insanity on March 18, 2017. He had a history of hallucinations but not at the time of admission. The Patient transferred to the Facility on November 19, 2017. The Patient was taken into custody on December 19, 2018 and placed in the Local Jail.

The Probation Officer told an Agency employee that the Patient claimed he has sexual relations with three patients, Grievant, and his wife since June 2018. The Probation Officer also said that Grievant walked into the Patient's room after he came out of the shower and she looked at him. The Agency began an investigation which included interviewing Grievant.

Grievant wrote a witness statement regarding her interaction with the Patient. Grievant wrote that the Patient had never been inappropriate with her but when he was inappropriate with her socially, she did report it and asked to be reassigned to the female ward. Grievant wrote that when the Patient was inappropriate, she reported it to

a nurse. She said the Patient had not made any sexual advances to her. She wrote she had never been alone with the Patient “in any way.” She wrote:

No, I have not went to the room for no reason unless it was required of me to check him every thirty minutes. Yes, I was in the laundry room with [the Patient] but only when he requested to wash clothes or iron. [The Patient] never put his hands on me. He tried to make attempt after I threatened to report him. He apologized. I reported it to the nurse, but do not recall who I told. That incident was the first and only time. I no longer work on that unit.

The Investigator concluded that Grievant violated Policy 050-020 and Policy 050-095 and engaged in client neglect.

CONCLUSIONS OF POLICY

The Agency alleged Grievant engaged in client neglect, violated Policy 050-020, and violated Policy 050-095.

The Patient did not testify during the hearing. His statements to the Investigator were not otherwise corroborated. There is little reason for the Hearing Officer to believe the Patient’s account of sexual interactions with Grievant. The only reliable information regarding Grievant’s interaction with the Patient came from Grievant.

Policy 050-020 governs Staff and Patient Interactions and Boundaries and provides:

All hospital staff ... are expected to exhibit behaviors that are professional, appropriate, and therapeutic when interacting with any hospital patient or employees.

The Agency did not show that Grievant displayed behavior that was unprofessional, inappropriate, or non-therapeutic when interacting with the Patient.

Under Policy 050-020, “[b]ehaviors considered INAPPROPRIATE and to be unacceptable in a professional interaction between hospital staff or patients including, but are not limited to: ***

- Staff disclosure of personal information/correspondence regarding other staff members and/or patients in any format (email/paper hard copy/verbal) to patients.

The Agency did not establish how the Patient was aware that Grievant had a dating relationship with another employee at the Facility. Only if Grievant told the Patient of the relationship could she be disciplined for disclosing personal information to

a patient. Grievant denied telling the Patient about her relationship with another employee and the Agency did not show how the Patient learned of this information.

Policy 050-095 governs Ethical Behavior and requires:

All Hospital staff [are] to maintain professional and ethical standards of conduct in their interactions with patients, co-workers, and any agency/firm that interacts with Hospital employees. All patients ... will be treated with dignity, respect, and courtesy. ***

Anyone who becomes aware of behavior that is illegal or breaches [Facility] policy must immediately report that behavior to a staff member who is in a position to respond. ***

A proper employee relationship with a patient is oriented toward the patient's treatment needs in the facility setting, and not discharged, in the outpatient setting. Employees are to be friendly, cordial, and helpful, but not in the context of a social relationship or friendship.¹

The Agency did not present sufficient credible and persuasive evidence to show that Grievant acted contrary to Policy 050-095. Grievant reported any inappropriate behavior by the Patient to a nurse. Grievant believed the nurse was in a position to respond to the Patient's behavior and record it in the Patient's ID notes. Grievant could not remember the name of the nurse. This is consistent with the fact that Grievant did not work regularly in the Patient's unit and the passage of time between the event and when Grievant was asked about the event.

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.

No credible and persuasive evidence was presented to establish that Grievant neglected the Patient. Grievant reported the Patient's inappropriate behavior to a nurse who Grievant believed was responsible for responding to and recording the Patient's behavior. Other than Grievant's characterization of the Patient's behavior as inappropriate, the time and details of the Patient's inappropriate behavior have not been established. The nature of Grievant's reporting obligation (other than to a staff member in a position to respond) have

¹ Agency Exhibit E.

not been established. The Agency did not establish how the Patient's treatment could have been undermined by any inaction by Grievant.

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, or if the position is filled, to an equivalent position. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal. The Agency is directed to provide **back benefits** including health insurance and credit for leave and seniority that the employee did not otherwise accrue.

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]

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

[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