

Issue: Group III Written Notice with Termination (client neglect); Hearing Date: 06/10/19; Decision Issued: 06/11/19; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 11340; Outcome: No Relief – Agency Upheld; **Administrative Review Ruling Request received 06/12/19; EDR Ruling No. 2019-4944 issued on 07/09/19; Outcome: AHO's decision affirmed.**



# ***COMMONWEALTH of VIRGINIA***

## ***Department of Human Resource Management***

### **OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

#### **DECISION OF HEARING OFFICER**

In re:

**Case Number: 11340**

Hearing Date: June 10, 2019

Decision Issued: June 11, 2019

#### **PROCEDURAL HISTORY**

On March 7, 2019, Grievant was issued a Group III Written Notice of disciplinary action with removal for client neglect.

On March 8, 2019, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On March 25, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 10, 2019, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
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 Certified Nursing Assistant at one of its facilities. She had been employed by the Agency for approximately 4 years. Grievant had prior active disciplinary action. On May 23, 2018, Grievant received a Group II Written Notice of disciplinary action for refusal to work overtime as required.

The Patient uses a wheelchair and must be lifted from his wheelchair into his bed using a lift. The Agency requires two employees to be involved in moving its patients using a lift. One employee operates the lift while the second employee serves as a spotter in case the lift topples.

On February 21, 2019, Grievant and the Patient were in the Patient's room. Grievant was ready to move the Patient from the Patient's wheelchair into the Patient's bed. At approximately 2:15 p.m., the Nursing Director was making her "rounds" and observed Grievant with the Patient. The Nursing Director asked Grievant who would be assisting Grievant with moving the Patient into his bed. Grievant told the Nursing Director that Ms. J would be assisting Grievant with the transfer. The Nursing Director walked away from Grievant and continued her rounds.

Grievant used the lift to move the Patient from the Patient's wheelchair to the Patient's bed. Grievant did not obtain assistance from any other employee.

Several minutes later, the Nursing Director returned to the Patient's room and observed that he was in his bed. The Nursing Director walked to another part of the floor and spoke with Ms. J. The Nursing Director asked Ms. J if she helped Grievant transfer the Patient. Ms. J said "No". The Nursing Director asked the LPN and another woman working on the floor if they had helped Grievant transfer the Patient. Both employees told the Nursing Director that they had not helped Grievant.

The Nursing Director reported Grievant to Facility managers who began an investigation. The Investigator spoke with several employees including Grievant. On February 25, 2019, the Investigator spoke with Ms. J and asked Ms. J if she helped Grievant. Ms. J said she had not helped Grievant. On February 27, 2019, the Investigator conducted a follow-up interview with Ms. J to confirm and clarify Ms. J's prior statement. Ms. J said, "I have never helped [Grievant] transfer anybody to their bed."<sup>1</sup>

On February 27, 2019, the Investigator asked Grievant who assisted Grievant with the transfer of the Patient on February 21, 2019. Grievant said that Ms. J helped her on that date.

## 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.

Clinical Procedure 35 governs transferring patients from bed to chair or from chair to bed when a resident cannot assist in the transfer. This Policy provides:

**PROCEDURE: (REQUIRES TWO STAFF MEMBERS)** It is a standard procedure and applies to all residents to hold or support their extremities while assisting with transfers using hooyer lifts to provide support, maintain proper alignment and prevent injury.

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<sup>1</sup> Agency Exhibit C.

Have all items necessary for a smooth procedure such as: lifter, slings, and chair. This procedure requires two people. Make sure the bed and wheelchair wheels are locked before beginning the transfer.<sup>2</sup>

“[N]eglect of clients” is a Group III offense.<sup>3</sup> On February 21, 2019, the Nursing Director asked Grievant who would be assisting her with transferring the Patient from the Patient’s wheelchair to the Patient’s bed. This question should have reminded Grievant of the Agency’s policy requiring that two employees transfer a patient from a wheelchair to a bed using a lift. Grievant used a lift to transfer the Patient from the Patient’s wheelchair to the Patient’s bed without the assistance of another employee. Grievant was responsible for providing safe care and treatment to the Patient. By failing to obtain the assistance of another employee when using a lift to transfer the Patient, Grievant increased the risk of injury to the Patient in the event the lift malfunctioned or toppled. Grievant’s behavior constituted neglect under the Agency’s policy. 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 she received assistance from Ms. A to transfer the Patient from his wheelchair to his bed. Grievant presented a written statement purportedly from Ms. A indicating that Ms. A assisted Grievant with the transfer. Ms. A did not testify during the hearing.<sup>4</sup> Grievant’s argument is not persuasive. The Investigator asked Grievant who assisted Grievant with the transfer. Grievant said Ms. J assisted Grievant. If Ms. A had assisted Grievant, Grievant would have stated to the Investigator that Ms. A had assisted her. The Hearing Officer does not believe that the Investigator misunderstood Grievant’s comments.

Grievant argued the Agency’s action was excessive. The Agency could have issued lesser disciplinary action. The action it took, however, is consistent with its policies and the Standards of Conduct. The Hearing Officer cannot reverse the Agency’s decision when it is consistent with these policies.

*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 ....”<sup>5</sup> 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

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<sup>2</sup> Agency Exhibit F. Emphasis original.

<sup>3</sup> See, Attachment A, DHRM Policy 1.60.

<sup>4</sup> Ms. A was not employed by the Agency at the time of the hearing.

<sup>5</sup> *Va. Code § 2.2-3005.*

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 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto: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.<sup>[1]</sup>

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<sup>[1]</sup> Agencies must request and receive prior approval from EEDR 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, Esq.*

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Carl Wilson Schmidt, Esq.  
Hearing Officer