

Issue: Group III Written Notice with Termination (client abuse); Hearing Date: 12/11/17; Decision Issued: 12/29/17; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 11115; Outcome: No Relief – Agency Upheld; Administrative Review: Ruling Request received 01/10/18; EDR Ruling No. 2018-4668 issued 02/21/18; Outcome: AHO's decision affirmed.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11115

Hearing Date: December 11, 2017
Decision Issued: December 29, 2017

PROCEDURAL HISTORY

On September 21, 2017, Grievant was issued a Group III Written Notice of disciplinary action with removal for client neglect.

Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On November 6, 2017, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On December 11, 2017, 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 Licensed Practical Nurse at one of its facilities. She had been employed by the Agency for more than 13 years.

The Resident was a 65 year old man with a history of psychotic depression, poor functioning with impaired independent living due to cognitive impairment, post traumatic anxiety associated with dysfunctional obsessive and compulsive symptomology. Sometimes he would run and fall intentionally.

On July 29, 2017, Grievant was conducting rounds by visiting resident rooms. The rooms were connected by a hallway. Grievant was inside one of the rooms. The Resident began running down the hallway. Grievant stepped to the threshold of the room. She observed the Resident running from her left to her right down the hallway. As he passed her, he fell to the floor in front of her but to the right of the door threshold. Grievant knew the Resident had fallen to the floor. She walked out of the doorway, turned to her left and walked down the hallway away from the Resident. She did not provide any assistance to the Resident as he remained "lifeless" on the floor. She continued her rounds without asking anyone else to assist the Resident. A short time later, another employee who had observed the Resident fall walked down the hallway to speak with the Resident and assist him.

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.

Client neglect is a Group III Offense.¹ Grievant was responsible for providing services to the Resident when the Resident needed assistance. When the Resident fell to the ground, he could have been injured and in need of medical assistance. Grievant viewed the Resident falling to the ground but did not stop to ask the Resident if he was all right and assess whether the Resident needed help. By failing to provide assistance to the Resident, Grievant neglected the Resident thereby justifying the issuance of 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 asserted she did not see the Resident fall. The video of the incident shows the Resident falling in front of Grievant and Grievant being able to see the Resident fall. Grievant claimed she walked down the hall to contact another employee to provide assistance. The evidence showed that Grievant did not contact any other employee to ask for assistance.

Grievant made certain arguments regarding a denial of procedural due process. Grievant was aware of the allegations against her and had an opportunity to present her defenses during the hearing. Grievant received procedural due process.

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”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-

¹ See, Attachment A, DHRM Policy 1.60.

² Va. Code § 2.2-3005.

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 the disciplinary action was too harsh given her prior favorable work performance and the absence of disciplinary action. Although the Agency could have addressed Grievant's behavior with a lesser disciplinary action, its decision to remove Grievant was consistent with the Standards of Conduct and that decision cannot be disturbed by the Hearing Officer. In light of this standard set forth in the Rules, 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 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.