

Issue: Group III Written Notice with Termination (client neglect); Hearing Date: 08/11/17; Decision Issued: 08/17/17; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 11032; 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: 11032**

Hearing Date: August 11, 2017  
Decision Issued: August 17, 2017

**PROCEDURAL HISTORY**

On April 18, 2017, Grievant was issued a Group III Written Notice of disciplinary action with removal for client neglect.

On May 15, 2017, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On June 5, 2017, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On August 11, 2017, a hearing was held at the Agency's office.

**APPEARANCES**

Grievant  
Grievant's Counsel  
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 CNA at one of its Facilities. Grievant had been working at the Facility for approximately 33 years without prior disciplinary action. Grievant was a good employee. When the Facility was short-staffed, Grievant was among the first employees called, and she was reliable. Grievant was described as a "wonderful worker."

The Patient lived in a room opening into the Living Area. The Living Area was adjacent to the Common Area. The Common Area had several tables and chairs.

Employees including Grievant were responsible for conducting 15 minute checks of patients. To complete a fifteen minute check on a patient resting in her room, an employee must identify the patient and make sure that she is safe and breathing. Employees were allowed to "stagger" their fifteen minute checks by approximately five minutes. In other words, a check scheduled for 11:15 a.m. could be completed between 11:10 a.m. and 11:20 a.m. Employees used a Patient Monitoring Form to record their observation of each patient every fifteen minutes.

On March 10, 2017 at 11:08 a.m., Grievant was seated at a table in the Common Area. Grievant was seated next to another employee Ms. T. Grievant was not working with any patients.

Ms. T was instructed by the Nurse to leave the unit to speak with another employee. Ms. T stood up from the table and said to Grievant, "can you do the round if I'm not back?" Ms. T was referring to the 11:15 a.m. round. Grievant agreed. Grievant became obligated to perform the 11:15 a.m. patient check.

Grievant remained seated at the table until approximately 11:21 when she got up from the table and walked a few steps to enter the staff break room in the Common Area. She exited the staff break room and returned to the table in the Common Area. She was not assisting any patients. At approximate 11:24 a.m., Grievant left the table and entered the Living Area and went to the Patient's room. Another employee had observed that the Patient was in distress. The Patient died.

Because a patient died, the Agency began an investigation which included reviewing video recordings of Living Area and Common Area. The Investigator observed that Grievant did not complete the 11:15 a.m. patient check.

When confronted by the Agency, Grievant said she thought she completed the 11:15 a.m. check but admitted she made a mistake by not doing so.

The Agency concedes that Grievant's failure to perform the fifteen minute check did not cause the Patient's death.

### **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.

"[N]eglect of clients" is a Group III offense.<sup>1</sup> Grievant agreed to do so and was obligated to complete the 11:15 a.m. patient check. Grievant failed to perform that check. She was seated at a table in the Common Area from approximately 11:12 a.m. when she agreed to assume Ms. T's task until 11:24 a.m. when she learned that the Patient was in distress and entered the Living Area and Patient's room. The Facility required fifteen minute checks to ensure the safety of its patients.<sup>2</sup> Grievant neglected

---

<sup>1</sup> See, Attachment A, DHRM Policy 1.60.

<sup>2</sup> The Facility Director testified that "rounds save lives."

the Patient because she failed to complete the fifteen minute check. 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.

The Hearing Officer does not agree with the level of discipline issued in this case. Grievant is clearly a long-term, capable, valuable, and honest employee who has been an asset to the Commonwealth of Virginia. She was the person the Facility called when it needed a reliable employee to complete an additional shift. She often worked additional overtime shifts. On March 10, 2017, Grievant made one simple mistake. She admitted to making the mistake. Her mistake could have been addressed with lesser disciplinary action than removal.

Although the Hearing Officer does not agree with Grievant's removal, the Hearing Officer's discretion is restricted by the EEDR *Rules for Conducting Grievance Hearings*. The Hearing Officer can only reduce the disciplinary action if "mitigating circumstances" exist, as that phrase is defined by EEDR.

*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>3</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 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 the Agency inconsistently applied disciplinary action. Ms. W was working at the Facility on March 10, 2017. Ms. W was also responsible for completing 15 minute patient checks. Ms. W failed to complete the 9:15 a.m. patient check. The Agency did not remove Ms. W from employment. The Facility Director testified that he offered Grievant several opportunities to provide him with an explanation of why he should reduce the disciplinary action. Grievant did not offer any excuses. When the Facility Director met with Ms. W as part of her disciplinary process, however, Ms. W asserted that she did not complete her fifteen minute check because she was distracted by other duties and the amount of the delay was only a few minutes. After further review, the Director concluded that there was a basis to reduce the disciplinary action against Ms. W. The Agency has established a rational distinction

---

<sup>3</sup> *Va. Code § 2.2-3005.*

between how it treated Grievant and Ms. W. The Hearing Officer cannot conclude that the Agency singled out Grievant for disciplinary action.

Grievant argued that she was “de-compressing” after two prior serious events in which she participated. The evidence showed, however, that Grievant got up at 11:21 and went to the break room. If she was de-compressing, getting up from the table would have given her an opportunity to recognize her responsibility to check patients. Instead, she returned to the table. To the extent Grievant was “de-compressing” this was not a mitigating circumstance.

Grievant argued that her 33 years of service without prior disciplinary action was a basis for mitigating the disciplinary action. Under the EEDR standard for mitigation, however, length of service and otherwise satisfactory work performance is rarely a basis for mitigation.

In light of the 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 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>

[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

---

<sup>[1]</sup> Agencies must request and receive prior approval from EEDR before filing a notice of appeal.