

Issues: Group II Written Notice (failure to follow policy), Group II Written Notice (failure to follow policy), Group III Written Notice (Client Neglect), and Termination; Hearing Date: 08/14/17; Decision Issued: 08/15/17; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 11043; Outcome: Partial Relief; **Administrative Review: Ruling Request received 08/21/17; EEDR Ruling No. 2018-4609 issued 08/30/17; 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: 11043

Hearing Date: August 14, 2017

Decision Issued: August 15, 2017

PROCEDURAL HISTORY

On May 16, 2017, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow policy regard a conversation with a nurse during which Grievant was rude and disrespectful. On May 19, 2017, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow policy governing her obligation to complete fifteen minute patient checks. On May 19, 2017, Grievant was issued a Group III Written Notice with removal for client neglect.

On May 30, 2017, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On June 19, 2017, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On August 14, 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 Safety Service Treatment Technician at one of its facilities. Grievant had good attendance. No evidence of prior active disciplinary action was introduced during the hearing.

On April 22, 2017, Grievant was responsible for checking the status of two patients. She had a Patient Monitoring Sheet on a clipboard on a table in the room where she was working.

To complete a fifteen minute check, Grievant was obligated to observe a patient and determine his condition. Grievant was then expected to write her observation on a Patient Monitoring Sheet.

On April 22, 2017, Grievant wrote on the Patient Monitoring Sheet that she completed a fifteen minute checks every fifteen minutes from 7:30 a.m. until 6:15 p.m. (except for during her lunch break). Grievant did not perform fifteen minute checks for Mr. C at 7:45 a.m., 8:15 a.m., 9 a.m., 9:30 a.m., 9:45 a.m., 3:30 p.m., 3:45 p.m., 5:30 p.m., 5:45 p.m., 6 p.m., 6:15 p.m.

CONCLUSIONS OF POLICY

The Agency issued three written notices.

Group II Written Notice -- Rude Conversation

The Agency alleged that Grievant had a conversation with a nurse and was rude and disrespectful. The Agency failed to present the nurse as a witness and Grievant denied the allegation. The Agency has not presented sufficient evidence to support the disciplinary action and it must be reversed.

Group II Written Notice -- Failure to Follow Policy

The Agency alleged that Grievant failed to complete fifteen minute checks as required by policy. Grievant failed to comply with the policy. The Group II Written Notice must be reversed, however, because the policy¹ and underlying events form the basis for issuance of the Group III Written Notice for neglect. It appears that the Agency has issued two written notices to address the same behavior.

Group III Written Notice -- Neglect

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.² Grievant was obligated to check Mr. C every fifteen minutes to monitor his condition. The checks were for Mr. C's safety. Grievant failed to perform all of the required fifteen minute checks thereby neglecting a patient. 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.

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

¹ Although the Written Notice refers to "falsification of record", the disciplinary action appears to be based on failure to follow policy regarding fifteen minute checks. The Agency relies on disciplinary code "13" instead of "74" for falsifying records.

² See, Attachment A, DHRM Policy 1.60.

“in accordance with rules established by the Department of Human Resource Management”³ 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 she was ill on April 22, 2017 and asked to leave the Facility. Grievant claimed the supervisor told her she could not leave because the Facility was short staffed. Grievant conducted some of the fifteen minute checks on April 22, 2017. The Hearing Officer does not believe that Grievant was so sick that she could not have completed the other checks.

Grievant argued that she was discriminated against when compared to another employee. Ms. L failed to perform fifteen minute checks. When her supervisors discovered her client neglect, they told her she should resign so that she would not be disciplined. Ms. L resigned and was able to re-apply for positions with the Agency. Although Grievant was not afforded a similar option, this inconsistency is not a mitigating circumstance. It is not clear that Agency managers were aware of this action and intended to treat Ms. L differently from Grievant.

Grievant argued that she was treated differently from Ms. H. Ms. H was supposed to remain within two arms lengths of a client but failed to do so. Grievant was not disciplined for failing to remain within arm’s length of a client and, thus, she and Ms. H were not similarly situated.

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 II Written Notice for a rude conversation is **rescinded**. The Agency’s issuance to the Grievant of a Group II Written Notice for failure to follow policy is **rescinded**. The Agency’s issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is **upheld**.

³ Va. Code § 2.2-3005.

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.