

Issue: Group III Written Notice with Termination (client neglect); Hearing Date: 09/18/17; Decision Issued: 09/20/17; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 11064; 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: 11064**

Hearing Date: September 18, 2017  
Decision Issued: September 20, 2017

**PROCEDURAL HISTORY**

On June 19, 2017, Grievant was issued a Group III Written Notice of disciplinary action with removal for client neglect.

On June 30, 2017, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On July 24, 2017, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On September 18, 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 SSTT at one of its facilities. No evidence of prior active disciplinary action was introduced during the hearing.

On May 22, 2017, Grievant was working in the Dayroom where Resident C, Resident F, and Resident S were located. Resident F was watching the television. Resident C demanded that Resident F get up from the television. Resident F unplugged the television and told Resident C "You stay away from me and I'll stay away from you." The two residents began pushing and shoving each other. Grievant was standing approximately ten feet away from Resident F and Resident C as they began pushing each other. Grievant was looking at the two residents. Grievant took no action to separate the two residents. As one resident pushed the other resident away, Resident S placed himself between Resident F and Resident C. Resident S moved Resident F away and Grievant approached the Resident C. Grievant told the residents to go to their rooms. Resident C left the Dayroom and walked to his room. Resident F walked to his room as Resident S walked with him. Resident F went inside his room while Resident S remained outside. Resident C retrieved an altered pen that he intended to use as a weapon. He walked back to the Dayroom. Grievant observed Resident C walking into the Dayroom. Resident C walked to the front of Resident F's room where Resident S was standing. Resident C attempted to approach Resident F's closed door. Resident S blocked Resident C and Resident C shoved Resident S out of

the way. At some point, Resident C used the altered pen to puncture the upper right arm of Resident S. When Resident F would not exit his room, Resident C walked away into the Dayroom.

## **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.

Facility Instruction Number 110 governs Behavioral Emergency Response. This policy defines:

Code: A code is a medical or behavioral emergency. To call a “code” means to immediately notify the Medical Emergency Response Team or Behavioral Emergency Response Team of a medical or behavioral emergency.

Code 1033: The appropriate radio communication to “call”/communicate via radio to request assistance from the Behavioral Response Team.

Emergency: A situation that requires a person to take immediate action to avoid harm, injury, or death to an individual receiving services or others, including violent or self-destructive behaviors that jeopardize the immediate physical safety of the individual, to staff member, or others.

Immediately: Without lapse of time, without delay, instantly, at once. The response to a Behavioral Emergency may only be limited to the individual engaged in another medical or behavioral emergency. The individual shall as quickly as possible, appropriately secure their work area and respond to the incident when called.

The policy provides that Step 1 is Recognition:

Any staff person who identifies a behavioral emergency or a situation that may potentially escalate to a behavioral emergency shall activate the Behavioral Emergency Response system by calling a Code 1033.

The following situations are examples (not all inclusive) of when the behavioral emergency response code will be called immediately:

Peer on Peer aggression.  
Resident Self-Injurious Behaviors.  
Resident to Staff aggression.  
Property Damage that could pose a safety risk.

On May 22, 2017, Grievant observed peer on peer aggression when the two residents began shoving each other. Grievant did not intervene to stop the shoving. Grievant did not call a code 1033 emergency as required by policy. Had Grievant called a code 1033 other staff would have come to the Dayroom and ensured that Resident C remained separated from Resident F and Resident S. The opportunity for Resident C to harm Resident S likely would have been eliminated. The Agency has presented sufficient evidence that Grievant engaged in client neglect.

Client neglect is a Group III offense.<sup>1</sup> Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

Grievant argued that the Agency's disciplinary action was excessive. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. There is no basis to reverse that disciplinary action.

Grievant argued that he had been told to refrain from calling an emergency code unless absolutely necessary. The policy clearly provides that peer on peer aggression in a situation where calling an emergency code is required.

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>2</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. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

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

<sup>2</sup> Va. Code § 2.2-3005.

Grievant argued that the Agency retaliated against him for previously filing and winning a grievance challenging past disciplinary action. Grievant engaged in protected activity when he filed a grievance to challenge past disciplinary action. He has now suffered an adverse employment action consisting of a Group III Written Notice for neglect. Grievant has not established any connection between the prior protected activity and the Agency's disciplinary action in this case. The Agency did not take disciplinary action against Grievant for filing and winning a prior grievance.

## 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>

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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 EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

*/s/ Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer