

Issues: Group III Written Notice (client neglect) and Termination; Hearing Date: 01/21/10; Decision Issued: 01/22/10; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 9256; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9256

Hearing Date: January 21, 2010
Decision Issued: January 22, 2010

PROCEDURAL HISTORY

On October 27, 2009, Grievant was issued a Group III Written Notice of disciplinary action with removal for neglecting an individual receiving services by sleeping while in a one on one assignment with the individual.

On November 17, 2009, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On January 5, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 21, 2010, a hearing was held at the Agency's regional 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. 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 DSA II at one of its Facilities until her removal effective October 27, 2009. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

The Client is an individual receiving services at the Facility. His behavior is referred to as PICA meaning that he will ingest inedible objects if left unattended. He has resided at the Facility for approximately one year. From the moment he moved to the Facility, members of the Agency's staff were assigned to a one on one relationship with the Client.

On August 17, 2009, Grievant was assigned responsibility for being in a one on one observation with the Client. At approximately 2 a.m., she was sitting in a recliner next to the Client's bed. As the RN Manager was making his rounds, he passed by the Client's room and noticed Grievant sleeping. In order to get a better view of Grievant, the RN Manager entered the room and stood within two or three feet of Grievant and watched her. The RN Manager observed Grievant sitting in the recliner with her feet up and her head tilted backwards. Grievant's eyes were closed and remained closed as the RN Manager observed her. Grievant's breathing was calm. Grievant was covered by a blanket because the room was cold. Grievant remained motionless while the RN Manager observed her. After approximately three minutes of watching Grievant, the RN Manager took his pen and tapped Grievant on the bottom of her foot to awaken her.

Grievant woke up. The RN Manager said, "You can't sleep here. He is a serious PICA." Grievant apologized.

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 authorized removal for neglect.

Va. Code § 37.2-100 defines neglect as:

This means the failure by a person, 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.

Grievant was in a one on one assignment with an individual receiving services. This means the client was to be "observed constantly by a staff member who must be within arm's reach (or within 'two steps'), if so specified on the physician's order) so that they may provide rapid intervention."¹ When Grievant fell asleep at 2 a.m., she was no longer constantly observing an individual in need of constant observation. Grievant was neglecting the individual. 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, Grievant's removal from employment must be upheld.

Grievant denies she was asleep. The evidence is clear that Grievant was sleeping. The RN Manager's testimony was credible. Grievant has offered no motive for the RN Manager to lie about what he observed. The RN Manager observed Grievant for a sufficient period of time to enable him to form the conclusion that Grievant was asleep.

The Agency presented evidence that at 4 a.m. Grievant failed to prevent the client from ingesting approximately a foot and a half of a bed sheet. Grievant contends she was observing the client and was waiting until he settled down in order to calmly remove the sheet to avoid being bitten. It is not necessary for the Hearing Officer to resolve this issue. If the Hearing Officer assumes for the sake of argument that Grievant was justified in delaying her response to the client's ingestion of the bed sheet, the outcome of this case remains unchanged. By proving that Grievant fell asleep while in a one on one assignment, the Agency has presented sufficient evidence to support the issuance of a Group III Written Notice with removal.

¹ Agency Exhibit 5.

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 Employment Dispute Resolution....”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-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 file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must

² Va. Code § 2.2-3005.

state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

Director
Department of Employment Dispute Resolution
600 East Main St. STE 301
Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must give a copy of all of your appeals to the other party and to the EDR Director. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for review have been decided.

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.³

[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

Carl Wilson Schmidt, Esq.
Hearing Officer

³ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.