

Issue: Group III Written Notice with Termination (Patient Neglect); Hearing Date: 07/01/10; Decision Issued: 07/02/10; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 9355; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9355

Hearing Date: July 1, 2010
Decision Issued: July 2, 2010

PROCEDURAL HISTORY

On April 1, 2010, Grievant was issued a Group III Written Notice of disciplinary action with removal for client neglect.

On April 20, 2010, 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 June 8, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 1, 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 April 1, 2010. Although the Agency alleged that Grievant had prior active disciplinary action, copies of the disciplinary action were not introduced as evidence. Accordingly, the Hearing Officer will consider Grievant as not having any prior active disciplinary action.

The Client resides at the Agency's Facility. He has profound mental disabilities.

On February 15, 2010, the Client was taken to the Hospital for treatment. Grievant was assigned responsibility to be in a one-to-one relationship with the Client while the Client was at the Hospital. At approximately 3 a.m., the Hospital Nurse entered the Client's room and observed Grievant sleeping in the recliner. The Hospital Nurse woke up Grievant and introduced herself. The Hospital Nurse advised Grievant that she was expected to stay awake while on duty in order to monitor the individual. The Hospital Nurse discussed with Grievant the harm that could result if the Client attempted to leave his bed during the night or encountered a problem while sleeping. The Hospital Nurse advised Grievant that Grievant should stand up a walk around the room if she became drowsy. Grievant responded that she was not asleep and only had her eyes closed for a few seconds. Grievant further divides that she had taken prescription pain pills. The Hospital Nurse reported the incident to the Agency.¹

¹ The Hospital Nurse observed Grievant asleep on two occasions that morning.

The Shift Supervisor called Grievant while Grievant was at the Hospital and asked if Grievant had been asleep. Grievant responded, "Yes, I guess I dozed off." Grievant also stated that she was on pain medication.

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-to-one assignment with an individual receiving services. This meant 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."² When Grievant fell asleep, 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 argued that she merely dozed off for a few minutes and was not asleep. Although Grievant may have slept for only a few minutes, employees in a one-to-one with a client are expected to observe the client at all times without exception. Even if the Hearing Officer assumes for the sake of argument that Grievant was sleeping for only a brief period of time, even the shortest period of time is sufficient to establish client neglect.

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..."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

² Agency Exhibit 5.

³ *Va. Code § 2.2-3005.*

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 contends the disciplinary action should be mitigated because she was taking pain medication. The degree to which taking medication or the withdrawal of medication is mitigating depends on the degree to which the medication or withdrawal of the medication controls the employee's behavior. For example, there is a difference, in terms of a basis for mitigation, between medication that may increase drowsiness and medication that has the primary and immediate effect of inducing sleep. The behavior of an employee disciplined for sleeping in the workplace may be explained by a medication creating drowsiness but may be excused by a medication inducing sleep. Only in the latter instance would mitigating circumstances exist.

In this case, Grievant was taking medication that might induce drowsiness but did not induce sleep. Grievant was capable of avoiding sleeping on the job and should have taken actions to counter the drowsiness such as walking around or standing. If the Hearing Officer assumes for the sake of argument that Grievant's medication was a mitigating circumstance, there exists an aggravating circumstance to counter the mitigating circumstance. Grievant was obligated under the Agency's policies to notify her supervisor that she was taking medication that might cause drowsiness. Grievant was released on February 10, 2010 by her doctor to return to work without restrictions. Grievant failed to notify her supervisor that she was taking pain medication. This denied the Agency the opportunity to determine what risk it would take with respect to Grievant being in a one-to-one relationship while on pain medication. When the facts of this case are considered as a whole, mitigating circumstances do not exist to a sufficient degree to justify reduction in the disciplinary action against Grievant.

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 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.⁴

[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

⁴ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.