

Issue: Group III Written Notice with termination (patient neglect); Hearing Date: 09/01/10; Decision Issued: 09/02/10; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 9388; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9388

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

PROCEDURAL HISTORY

On June 17, 2010, Grievant was issued a Group III Written Notice of disciplinary action with removal for client neglect.

On June 18, 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 August 9, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 1, 2010, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party 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 June 17, 2010. She had been employed by the Agency for approximately 5 years. Grievant had a prior active disciplinary action consisting of a Group III Written Notice of disciplinary action issued September 22, 2009. Grievant cared deeply about the individuals she assisted as part of her work duties.

On May 26, 2010, Grievant was working as the Charge Aid on her unit. She assigned herself responsibility to work in a one on one relationship with the Individual. The Individual is a 62-year-old woman with profound intellectual disabilities who has resided at the Facility since 1953. She is nonambulatory and uses a wheelchair for mobility. She has a pica protocol due to her behavior of ingesting inedible materials and placing foreign objects in her ear canals. This problem is so severe that in order to keep her safe from harm, she requires a staff member to monitor her one on one at all times when she is sitting in her wheelchair. At approximately noon, Grievant was seated in a chair next to the Individual. The Individual was seated in a wheelchair with a lap board attached to the wheelchair. Grievant was resting on the Individual's lap board with her head in the palm of her hand. Grievant's eyes were closed and she was asleep. A Trainee observed Grievant and called Grievant's name several times. Grievant did not respond. Ms. L observed this and notified the Shift Supervisor. The Shift Supervisor approached Grievant and observed Grievant from approximately 10 to 12 feet away. The Shift Supervisor observed Grievant resting her head on the palm of her hand. Grievant's eyes were closed and the Shift Supervisor believed Grievant was

asleep. The Shift Supervisor called Grievant's name several times but Grievant did not respond. After Grievant's name was called a sufficient number of times, Grievant finally awoke.

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 noon, 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 was not asleep. This argument fails. Grievant was observed in a position consistent with someone who was not actively engaged in her work duties. Grievant was observed with her eyes closed for several minutes. Grievant did not respond to repeated calls of her name that she would have heard if she was awake. The Agency has presented sufficient evidence to support its assertion that Grievant was asleep.

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

¹ Agency Exhibits 4.

² *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 argues that she was taking medication that made her drowsy and that she could not control the side effects of her medication. Grievant presented notice from her medical providers confirming that she has a diagnosis of depression and migraine headaches for which she takes medication to treat. To the extent this is a mitigating circumstance, however, an aggravating circumstance exists. The Agency has a written policy requiring its employees to notify their supervisors before the beginning of their shifts if they are taking medication that might adversely affect their work performance. The Agency provides annual training regarding this expectation and Grievant knew of her obligation to notify her supervisor that she was taking medication. In this case, Grievant did not notify her supervisor that she was taking medication which would make her drowsy prior to the beginning of her shift on May 26, 2010. Grievant's failure to comply with the Agency's policy serves to counter any mitigating circumstances that may exist in this case. 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 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.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].

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.