

Issue: Group III Written Notice with Termination (client neglect); Hearing Date: 04/16/12; Decision Issued: 04/23/12; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 9789; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9789

Hearing Date: April 16, 2012
Decision Issued: April 23, 2012

PROCEDURAL HISTORY

On January 31, 2012, Grievant was issued a Group III Written Notice of disciplinary action with removal for client neglect.

On February 8, 2012, 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 March 13, 2012, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 16, 2012, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee
Agency Advocate
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 Direct Support Associate at one of its facilities. The purpose of Grievant's position was:

Provides direct care for assigned individuals of [Facility] by assisting with all phases of general hygiene and daily living. Places emphasis on maintaining the self-esteem and personal dignity while increasing the self-reliance of individuals.¹

She had been employed by the Agency for approximately 15 years prior to her removal effective January 31, 2012. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

Grievant worked with several clients at the Facility. If a client weighed more than 50 pounds, two employees had to lift the client to move the client, for example, from a wheelchair to a bed. If a client weighed more than 100 pounds, three employees were required when lifting the client. All of the clients Grievant worked with required at least two employees to lift them.

¹ Agency Exhibit 3.

The Client resides at the Facility and relies on employees for all of her care. She has profound mental retardation, is non-ambulatory, and is mostly non-verbal. She can communicate with single words and gestures. The Client had a Physical Management Plan that served as a physician's order governing the care she was to receive. At one point in time, the Client required only two employees to lift her. She gained weight such that she weighed more than 100 pounds. Three employees were required in order to lift her. The Agency placed a card on the back of the Client's wheelchair indicating that the Client was to be lifted by three people at a time.

On December 5, 2011, the Client was crying. Grievant believed that the Client might feel better if the Client was placed in her bed. The Client was sitting in her wheelchair. Grievant moved the Client to the Client's bedroom. Grievant placed one arm under the middle of the Client's body and the other arm under the back of the Client's body. Grievant then moved the Client out of her wheelchair and into her bed. Grievant did not have a second or third person help her lift the Client.

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 defines² client 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, good, 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 engaged in client neglect because she failed to comply with the requirements of the Client's physical management plan. The Client's physical management plan established part of the treatment she was to receive and that treatment included being lifted by more than one person. Grievant was aware of the plan and knew that she was not permitted to lift and transfer the Client by herself. 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 "in accordance with rules established by the Department of Employment Dispute Resolution...."³ Under the *Rules for Conducting Grievance Hearings*, "[a] hearing

² See, Va. Code § 37.1-1 and 12 VAC 35-115-30.

³ Va. Code § 2.2-3005.

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.

Grievant argued that the Agency failed to properly mitigate the disciplinary action. Whether an Agency mitigates disciplinary action is within its discretion. No credible evidence was presented showing that the Agency failed to mitigate the disciplinary action for an improper purpose such as in order to retaliate against Grievant or because of some protected status held by Grievant. The Hearing Officer cannot circumvent the Agency's refusal to mitigate the disciplinary action in this case.

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.