

Issue: Group III Written Notice with Termination (client neglect); Hearing Date: 01/13/16; Decision Issued: 02/02/16; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10731; Outcome: No Relief – Agency Upheld; **Administrative Review**: EDR Ruling Request received 02/17/16; EDR Ruling No. 2016-4306 issued 03/18/16; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 02/17/16; DHRM Ruling issued 03/23/16; Outcome: AHO's decision affirmed.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10731

Hearing Date: January 13, 2016
Decision Issued: February 2, 2016

PROCEDURAL HISTORY

On October 5, 2015, Grievant was issued a Group III Written Notice of disciplinary action with removal for client neglect.

On October 20, 2015, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On December 1, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 13, 2016, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency's 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 Licensed Practical Nurse at one of its facilities. She had been employed by the Agency for approximately six years. Grievant had prior active disciplinary action. On May 14, 2015, she received a Group I Written Notice for disruptive behavior and use of obscene language in the workplace during work hours.

Grievant received training regarding the Agency's client abuse policy. She knew or should have known to report allegations of client neglect to the Facility Director as required by policy DI 201.

On July 29, 2015, two Agency employees were providing services to the Patient who resided at the Facility. The Patient was being combative. Ms. D walked into the area and observed the employees. She saw the Patient being sprayed with water and being struck in the forehead.

Grievant usually worked on a different floor from where Ms. D worked. Grievant was not working on July 29, 2015. She did not observe how the Patient was treated by the two employees.

On August 4, 2015, Grievant and Ms. D met for dinner. Ms. D was reluctant to discuss the incident. Ms. D said she was working when she heard a commotion on the other side of the floor. Ms. D walked to the other area and observed two staff and the Patient. Ms. D then told Grievant that a patient had been "tortured" in the whirlpool by

two employees. Ms. D would not give Grievant details of the incident. Ms. D said she needed to “get it off of her chest” as she was crying. Grievant also began crying and told Ms. D she needed to report the incident. Ms. D said she was concerned of being threatened by the two other staff and said she did not know to whom she should report. Grievant also said she did not know to whom to report the matter. They discussed an option of placing an anonymous note under the Director’s office door. Grievant believed Ms. D would report the incident.

Grievant worked at the Facility on August 5, 2015. Grievant did not work on August 6, 2015. She spoke with Ms. D that evening and learned that Ms. D had not reported the incident. When Grievant returned to work on August 7, 2015, Grievant asked to meet with the Unit Manager. Grievant asked the Unit Manager if there was a way to report abuse anonymously. The Unit Manager said she did not know. Grievant said she did not know as well and speculated the Patient Advocate should be notified.

The Unit Manger reported Grievant’s conversation through her chain of command. Grievant was summonsed to speak with the Facility Investigator. At approximately noon on August 7, 2015, she answered the Investigator’s questions. Grievant wrote a statement saying “I was not working when any of this happened and I was not told the details. I was told the patient’s name ... and that he was tortured one evening during a whirlpool. Down the road, I was told the patient was sent out and died.”

The Patient died at the Hospital on August 5, 2015 at 2:44 a.m. Because of his death, the Agency investigator was unable to determine whether the Patient had been abused physically.

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. DI 201 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.

DI 201-5 provides:

All occurrences or events that may involve abuse or neglect of individuals in facilities and any information regarding such shall be reported directly to the facility director, or his designee, as appropriate, so that immediate action may be taken to safeguard individuals receiving services.

“[A]buse or neglect of clients” is a Group III offense.¹

Once Grievant learned from Ms. D that the Patient may have been “tortured”, Grievant was obligated to report immediately this information to the Facility Director or his designee. Grievant did not report her conversation with Ms. D. Grievant asked the Unit Manager how an employee could anonymously report a claim of abuse. Had the Unit Manager not disclosed Grievant’s conversation with her to others in the Facility, it is not clear if or when the events of July 29, 2015 would have reported. Grievant failed to immediately report the information she learned from Ms. D thereby acting contrary to DI 201.

Grievant was responsible for ensuring the safety and welfare of every patient at the Facility even if she was not assigned specific responsibilities with each patient. The Agency’s abuse investigation process is designed to ensure the safety and welfare of patients. Grievant’s failure to immediately report information to the Facility Director undermined the Patient’s safety and welfare because the Agency was unable to timely investigate the abuse allegations. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for client neglect. Upon the issuance of a Group III Written Notice, an employee may be removed. Accordingly, Grievant’s removal must be upheld.

Grievant argued that she did not provide treatment to the Patient and, thus, had no obligation to report what amounted to rumor or hearsay from Ms. D. All employees at the Facility were obligated to ensure the safety and welfare of Facility patients even if those patients were not assigned to the employees. Grievant’s obligation to protect the Patient existed regardless of whether she provided medical services to the Patient.

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”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.

¹ See, Attachment A, DHRM Policy 1.60.

² Va. Code § 2.2-3005.

Grievant argued that several other nurses were not disciplined for abuse. Ms. D was the only other nurse charged with failing to report the incident and she received disciplinary action. The other employees did not allege abuse and the Agency was unable to determine whether the Patient was abused in part because of delays in the reporting. The Agency's failure to discipline employees other than Ms. D, is not a basis to mitigate the disciplinary action. 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 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

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR 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:

Office of Employment Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

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 provide a copy of all of your appeals to the other party, EDR, 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.

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 EDR before filing a notice of appeal.