Issue: Group III Written Notice with Termination (client neglect/abuse); Hearing Date: 06/14/16; Decision Issued: 06/23/16; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10790; Outcome: No Relief – Agency Upheld.

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10790

Hearing Date: June 14, 2016
Decision Issued: June 23, 2016

PROCEDURAL HISTORY

On March 7, 2016, Grievant was issued a Group III Written Notice of disciplinary action with removal for client neglect.

On March 9, 2016, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On March 28, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 14, 2016, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Representative
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 DSA II at one of its facilities. She had been employed by the Agency for approximately nine years.

Employees working in the Unit performed Q15 checks. To perform a check, the employee must observe the patient's location and observe the patient's condition and then write that information onto a monitoring sheet. The check must be completed every 15 minutes for every patient in the unit.

When an employee cannot make a Q15 check, another employee may be asked to perform that check. If the second employee performs the check, he or she must write his or her initials to document the check. The second employee would not write the initials of the employee would otherwise have been responsible for the check.

Approximately 18 to 20 patients resided in the Unit. Patient B was one of those patients. Approximately 4 or 5 staff worked in the Unit providing services to patients.

On February 9, 2016 at 6:25 p.m., Patient B went to her room and closed the door. The door remained closed from 6:25 p.m. until 6:53 when Ms. M opened the door to observe Patient B. Ms. M closed the door and it remained closed until 7:22 p.m. when Patient B opened the door to the room and exited the room. The door to Patient B's room did not have a window.

Grievant was working in the Unit on February 9, 2016. Grievant was assigned responsibility to perform checks of Patient B at 6:30 p.m. and 6:45 p.m. Grievant did not go to Patient B's room, open the door, and observe Patient B's condition at or near 6:30 p.m. or 6:45 p.m. Grievant completed the Patient Monitoring Sheet relating to Patient B. Grievant indicated that at 6:30 p.m. Patient B was in her room with her eyes open. Grievant indicated that at 6:45 p.m. Patient B was in her room with her eyes open. Grievant initialed the Patient Monitoring Sheet. Grievant could not have known Patient B's status inside the room because Grievant did not open the door to Patient B's room and look inside. Grievant did not ask any other employee to perform these checks on her behalf. None of the other employees working with Grievant performed the checks on Grievant's behalf.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action."[1] Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

Facility Policy 050-057 addresses Reporting and Investigating Abuse and Neglect of Patients. This policy defines neglect as:

> The failure by an individual, program, or facility responsible for providing services to provide nourishment, treatment, care, goods, or services necessary to the health, safety, or welfare of a person receiving care or treatment in the facility.

Grievant was responsible for providing services to patients by completing 15 minute checks to verify their health and safety. Grievant did not perform Q15 checks for Patient B at 6:30 p.m. and 6:45 p.m. on February 9, 2016 even though she wrote in the Patient Monitoring Sheet that she had completed these checks. Grievant's behavior constituted neglect under the Agency's policy.

"[N]eglect of clients" is a Group III offense.[2] Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, the Agency's decision to remove Grievant must be upheld.

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[1] The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

[2] See, Attachment A, DHRM Policy 1.60, Standards of Conduct.

Grievant argued that she performed the 6:30 p.m. check because she observed the Patient walk to her room and go inside. Grievant claimed the wall clocks in the Unit were inaccurate. Even if the Hearing Officer assumes for the sake of argument that Grievant completed the 6:30 p.m. check, she clearly did not complete the 6:45 p.m. check but represented she had done so.

Grievant argued that the Unit was understaffed. If the Hearing Officer assumes for the sake of argument that the Unit was understaffed, that fact would not justify Grievant's writing that she performed a check she did not actually perform.

Grievant asserted that her behavior was common among employees because of the difficulty of completing 15 minute checks of many patients. If the Hearing Officer assumes for the sake of argument that Grievant's assertion is true, it would only be of significance if Agency managers were aware of the ongoing employee violations of policy. Grievant has not established that Agency managers were aware Q15 checks were not being conducted as required.

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 …."[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 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 the Agency inconsistently applied disciplinary action. Grievant showed that Ms. M was responsible for performing the 7 p.m. and 7:15 p.m. Q15 checks. The Agency initially accused Ms. M of failing to perform the 7 p.m. and 7:15 p.m. checks. Ms. M met with the Facility Director and was able to persuade him that she had completed the 7 p.m. check because she went into the Patient's room at 6:50 p.m. The Facility Director did not realize that Ms. M had also been charged with failing to perform the 7:15 p.m. check and had not presented evidence to show she performed that check. Based on this mistake, the Facility Director concluded Ms. M performed her duties and should be reinstated without disciplinary action. Ms. M was reinstated by the Agency.

It is unfair that Grievant and Ms. M were treated differently, but unfairness is not the only standard for the Hearing Officer to apply when determining whether to mitigate

[3] Va. Code § 2.2-3005.

disciplinary action. The question is whether the Agency intentionally distinguished between two similarly situated employees without justification. The Facility Director testified credibility that if he had realized that Ms. M also had not performed one of her Q15 checks, he would have removed Ms. M from employment just as he had done so with Grievant. It appears that the Agency did not intend to single out Grievant for harsher treatment than Ms. M but rather only did so unintentionally. Grievant was not singled out for 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.[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 EDR before filing a notice of appeal.