

Issues: Group III Written Notice (disruptive behavior and insubordination), Group I Written Notice (excessive tardiness), and Termination; Hearing Date: 06/16/16; Decision Issued: 06/20/16; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10807; Outcome: No Relief – Agency Upheld; **Administrative Review: EDR Ruling Request received 06/30/16; EDR Ruling No. 2016-4387 issued 07/12/16; 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: 10807

Hearing Date: June 16, 2016

Decision Issued: June 20, 2016

PROCEDURAL HISTORY

On March 25, 2016, Grievant was issued a Group III Written Notice of disciplinary action with removal for disruptive behavior and insubordination. On March 25, 2016, Grievant was issued a Group I Written Notice of disciplinary action for excessive tardiness.

On April 5, 2016, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On May 2, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 16, 2016, a hearing was held at the Agency's office. Grievant did not appear at the hearing.

APPEARANCES

Agency Representative

Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notices?
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 II at one of its facilities. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant was responsible for providing services to adolescent patients at the Facility. She received training regarding respecting professional boundaries with patients and client abuse.

Grievant was instructed to monitor a Patient P in a one on one relationship. Grievant told the Supervisor and Manager that she would not work with Patient P. Patient P had autism and spectrum disorder. Grievant made derogatory comments about Patient P's diagnosis and facial wounds. Grievant said she would not work the Patient P because of his condition. Grievant said Patient P was "gross" and "disgusting". Grievant did not work with Patient P.

Grievant displayed negative attitudes when speaking to patients. For example, Grievant discussed withholding medication to patients. Grievant told patients that clinicians did not know what they were doing and were sitting in the office doing nothing all day.

Grievant made untruthful and harmful statements to patients including Patient T. Patient T was a 15 year old female with acute and severe psychotic mania. She had rapid mood swings. Within an hour, she could have ten cycles in mood. She would

change from angry to crying to euphoric and then to aggressive within an hour. She had delusions. Grievant told Patient T that clinicians at the Facility were withholding her medication and that they did not know what they were doing when treating her. Grievant's statements were untrue and contrary to professional standards for treatment of patients. Grievant made statements about decisions to place Patient T in ambulatory restraints. These statements fed into Patient T's paranoia.

Grievant's untruthful statement to Patient T contributed to her violent behavior. On March 23, 2016, Patient T was in ambulatory restraints. She was enraged by statements Grievant made to her. She burst into a conference room where parents were meeting with staff about their child. Patient T threatened violence against staff because she believed they were withholding medication from her. Patient T grabbed the table in the conference room and lifted it upwards and pushed the table causing papers on the table to "fly." Visitors and staff in the conference room were fearful of Patient T's behavior.

On March 21, 2016, Grievant was in a room with other staff chatting and eating when they should have been working. Patient T2 walked to the window of the office. Grievant knew she was supposed to respond to the patient's needs. Grievant did not acknowledge Patient T2. Patient T2 began banging his forehead against the window in frustration. Grievant continued to ignore Patient T2. A Supervisor observed Patient T2. She approached him and asked what he needed.

In the first week of March 2015, Patient 3 had a psychiatric emergency. He removed his clothing and was seeking assistance. Grievant observed the patient and began laughing and clapping her hands. She should have spoken to Patient 3 to intervene. Patient 3 observed Grievant's inappropriate behavior.

As of February 9, 2016, Grievant had accumulated 498 minutes of tardiness. She had more than three periods of tardiness in the prior three months.

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."

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

Group III Written Notice²

Grievant engaged in client neglect by refusing to render assistance to two patients. Grievant engaged in client abuse by making untruthful statements to patients about staff withholding medication from them and being unable to render proper treatment to patients. Grievant's behavior rises to the level of a Group III offense. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

Group I Written Notice

Under the Facility's attendance policy, an employee who arrives more than 10 minutes after the start of his or her shift is tardy. "Employees with excessive tardiness (i.e. more than three tardies of more than 10 minutes over a three month period) may be subject to ... a Group I Written Notice according to the Standards of Conduct Policy."

Grievant was tardy more than three times in a three month period thereby justifying the issuance of a Group I Written Notice.

Mitigation

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. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

² The Agency incorrectly described Grievant's offenses. The Agency claimed Grievant engaged in disruptive behavior and was insubordinate. Disruptive behavior is a Group I offense. Insubordination is a Group II offense. The Agency should have alleged Grievant engaged in client abuse/neglect. The Hearing Officer will uphold a Group III offense in this case for two reasons. First, the Agency presented sufficient evidence to support the issuance of a Group III Written Notice and Grievant had due process regarding the facts supporting that notice. Second, Grievant did not appear at the hearing to contest the Agency's case. The Agency's claim of a Group III Offense remains un rebutted by any evidence.

³ *Va. Code § 2.2-3005.*

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**. The Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action 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.