

Issue: Group III Written Notice with Termination (client neglect); Hearing Date: 02/26/18; Decision Issued: 03/19/18; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 11155; Outcome: No Relief – Agency Upheld; **Administrative Review**: Ruling request received 03/27/18; EEDR Ruling No. 2018-4696 issued on 04/17/18; Outcome: AHO's decision affirmed.



**COMMONWEALTH of VIRGINIA**  
*Department of Human Resource Management*

**OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 11155**

Hearing Date: February 26, 2018  
Decision Issued: March 19, 2018

**PROCEDURAL HISTORY**

On November 22, 2018, Grievant was issued a Group III Written Notice of disciplinary action with removal for client neglect.

On November 22, 2017, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On January 10, 2018, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On February 26, 2018, a hearing was held at the Agency's office.

**APPEARANCES**

Grievant  
Agency 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. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. 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. No evidence of prior active disciplinary action was introduced during the hearing.

The Patient resided in one of at least four patient rooms opening into a living room. The Patient had the lights off her room but left her room door open. The living room was lighted and some of the light shown into the Patient’s room. Grievant could see inside the room as she walked past the Patient’s door.

On September 23, 2017 at approximately 5:33 a.m., the Patient got out of her bed, walked out of her room, and fell onto the floor of the living room. She was injured because of the fall. The Agency reviewed a video tape of the incident and times before the Patient fell.

Grievant was responsible for performing patient checks every 15 minutes. She was expected to look into the rooms of approximately four patients and observe that they were breathing and not in distress.

Grievant was supposed to complete patient checks at 3:45 a.m., 4 a.m., 4:15 a.m., 4:30 a.m., 4:45 a.m., 5 a.m., 5:15 a.m. and 5:30 a.m. Grievant looked into the Patient’s room to check on the Patient at approximately 3:44 a.m., 4:01 a.m., and 5:18 a.m. At 5:31 a.m., Grievant passed the Patient’s room, but did not look inside.<sup>1</sup>

---

<sup>1</sup> Grievant asserted she could look into the room when she first entered the living room.

## 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.”<sup>2</sup> 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.”

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 defines Neglect as:

The failure by an individual, 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.

“[N]eglect of clients” is a Group III offense.<sup>3</sup> Grievant was responsible for checking on the Patient every 15 minutes in order to ensure the Patient’s safety. Grievant should have checked on the Patient eight times from 3:45 a.m. to 5:30 a.m. She only checked on the Patient three times thereby neglecting the Patient. 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 agency may remove an employee. Accordingly, the Agency’s decision to remove Grievant must be upheld.

Grievant argued that the Agency’s video of the living room was not working properly and did not record all of the times she checked on the Patient. The Agency showed that the video was motion activated. The video only recorded when someone was in the living room and the camera detected motion. Since Grievant did not conduct checks every fifteen minutes there were times when the video did not record. This conclusion is confirmed by the video recording from approximately 4:28 a.m. to 4:43 a.m. During this time period, another patient entered the living room and remained there. The video recorded her in the living room, but Grievant did not enter the living room during that fifteen minute time period. Grievant should have conducted at least one check at approximately 4:30 a.m. but she did not enter the living room.

*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

---

<sup>2</sup> The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

<sup>3</sup> See, Attachment A, DHRM Policy 1.60.

“in accordance with rules established by the Department of Human Resource Management ....”<sup>4</sup> 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.

## 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 request an administrative review by EEDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EEDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Equal Employment and Dispute Resolution  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

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

You must also provide a copy of your appeal to the other party 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.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered

---

<sup>4</sup> Va. Code § 2.2-3005.

evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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.<sup>[1]</sup>

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

*/s/ Carl Wilson Schmidt*

---

Carl Wilson Schmidt, Esq.  
Hearing Officer

---

<sup>[1]</sup> Agencies must request and receive prior approval from EEDR before filing a notice of appeal.