

Issue: Group III Written Notice with Termination (client neglect); Hearing Date: 12/07/18; Decision Issued: 01/15/19; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 11274; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11274

Hearing Date: December 7, 2018

Decision Issued: January 15, 2019

PROCEDURAL HISTORY

On September 24, 2018, Grievant was issued a Group III Written Notice of disciplinary action with removal for neglect.

On September 26, 2018, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On October 8, 2018, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On December 7, 2018, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
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 Forensic Mental Health Tech at one of its facilities.

Grievant had prior active disciplinary action. She received a Group II Written Notice with a ten work day suspension on August 9, 2017. The Agency could have given Grievant a Group III Written Notice with removal for client abuse, but chose to mitigate the disciplinary action to a Group II Written Notice with a ten work day suspension.

The Patient was admitted to the Facility on May 26, 2018. He had a primary diagnosis of Schizoaffective Disorder.

When patients are moved from one building to another building, the Facility assigns three staff to escort the patients. Before leaving a location, patients are to move near the exit point while two employees search the other parts of the building to make sure no patients remain away from the group. After assembling all of the patients, the three employees separately count each patient and conclude that all of the patients are present. The three employees then walk with the patients towards the second location. One employee is in the front, middle, and back of the line. When they reach the second location, the three employees again count the patients to ensure all of the patients are present.

The employee in the front is responsible for completing a visual roll call using a monitoring sheet. A visual roll call using a monitoring sheet involves the employee observing and identifying each patient and then checking a box on the monitoring sheet to show that the patient is present in line. If a patient is not present, the employee is supposed to notify other employees to find the missing patient.

On August 4, 2018, Grievant, Ms. R, and Mr. T were working at the Facility and responsible for escorting approximately 25 patients from the dining hall in Building 1 to the dayroom in Building 2. As patients were finishing their lunches, the Patient got up from the table and went to the restroom. The patients began assembling near the exit point but the Patient remained in the restroom. Grievant obtained a cart. Ms. R went to the women's restroom and made sure no one was inside. Mr. T went to the men's restroom and opened the door. Mr. T asked "Is anyone in here?" The Patient did not answer. Mr. T assumed the restroom was empty and locked the restroom door with the Patient inside. Grievant did not see Ms. R or Mr. T search the restrooms.

Ms. R began counting the patients but one of them asked her a question and she forgot her count.

Grievant began counting the patients as they left the dining room.¹ A patient asked Grievant about her shirt and this caused Grievant to lose her count. Grievant did not recount the patients.

Once the patients were inside the dayroom, a nurse realized one of the patients was missing. Two staff went to the dining room and located the Patient inside the restroom.

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 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.

On August 4, 2018, Grievant was responsible for the safety of the Patient. This included ensuring that he remained with the group of patients. If the Patient was by

¹ Grievant did not have the monitoring sheet with her but she remained obligated to correctly count the number of patients.

himself without supervision, he could have harmed himself. The Agency's policy requiring staff to count the number of patients was intended to avoid leaving patients unsupervised. Mr. T locked the Patient in a restroom because Mr. T failed to properly search the restroom. Grievant failed to count all of the patients before they left the dining hall. If she had properly counted all of the patients, she would have realized the Patient was missing. Grievant left the dining hall leaving the Patient behind. Grievant failed to provide the necessary services to ensure the health, safety and welfare of the Patient. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for patient neglect. 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 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.

Grievant argued that she should not be removed from employment because Ms. R remained employed and Mr. T resigned without being disciplined. The Agency elected not to mitigate Grievant's Group III Written Notice with removal because it had previously mitigated a Group III to a Group II Written Notice. The Agency mitigated Ms. R's disciplinary action because she had not been previously disciplined for client abuse. Grievant and Ms. R were not similarly situated because Grievant had a prior client abuse charge that was mitigated, but Ms. R did not have a prior mitigated charge of client abuse. Mr. T resigned and, thus, was not subject to 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**.

² *Va. Code § 2.2-3005.*

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 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 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 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.^[1]

[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

^[1] Agencies must request and receive prior approval from EEDR before filing a notice of appeal.