

Issue: Group III Written Notice with Termination (client neglect); Hearing Date: 01/31/19; Decision Issued: 02/01/19; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 11290; 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: 11290

Hearing Date: January 31, 2019

Decision Issued: February 1, 2019

PROCEDURAL HISTORY

On October 9, 2018, Grievant was issued a Group III Written Notice of disciplinary action with removal for client neglect.

On October 30, 2018, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On November 19, 2018, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On January 31, 2019, 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 Psych Tech that one of its facilities. No evidence of prior active disciplinary action was introduced during the hearing. Grievant presented statements from co-workers showing that Grievant was a "team player" "level headed" and "trustworthy" employee.

When a patient leaves the Facility and goes to the Hospital for treatment, the Agency sends an employee to remain with the patient at all times to provide security to the patient and hospital staff.

The Patient was admitted to the Facility through a Temporary Detention Order. The Patient required treatment at the Hospital and was moved to the Hospital.

On September 4, 2018, Grievant was responsible for sitting with the Patient at all times to ensure the Patient's safety and the safety of Hospital employees. While at the Patient's bedside, Grievant fell asleep and began snoring. The Registered Nurse observed Grievant sleeping. The Registered Nurse left the Patient's room and entered the hallway. The Registered Nurse spoke with the Tech and asked the Tech to come to the Patient's room to observe Grievant sleeping. The Registered Nurse and the Tech went to the Patient's room and both observed Grievant sleeping. The Registered Nurse asked the Tech if the Tech could come back to the Patient's room after the Tech

finished her tasks so that they could complete a venipuncture treatment. The Tech left the Patient's room and performed a treatment on another patient. The Tech returned to the Patient's room. The Registered Nurse and the Tech completed the Patient's venipuncture as Grievant continued to sleep and snore. Only when the Radiology Tech knocked on the metal door frame prior to entering the room did Grievant awaken.

The Registered Nurse asked Grievant her name. Grievant told the Registered Nurse Grievant's first name. The Registered Nurse reported the matter to Facility managers.

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.

Neglect of clients is a Group III Offense.¹ On September 4, 2018, Grievant was responsible for observing the Patient to ensure the Patient's safety. By falling asleep, Grievant was unable to monitor the Patient. Grievant did not provide services to the Patient that were necessary for the safety of the Patient. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

Grievant argued but did not testify that she did not fall asleep on September 4, 2018. The Agency has presented sufficient evidence to show that Grievant fell asleep on September 4, 2018 for several reasons. First, two Hospital employees reported that Grievant was asleep. Second, there is no reason to believe that the two Hospital employees had any motive to falsely report that Grievant was asleep. Third, a sufficient amount of time passed from the time Grievant was observed asleep to the time she awoke. In particular, the Registered Nurse had time to leave the room and ask the Tech to corroborate the Registered Nurse's observation. The Registered Nurse and Tech had time to perform a treatment on the Patient as they talked.

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

¹ See, Attachment A, DHRM Policy1.60.

Management² 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 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.

² Va. Code § 2.2-3005.

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.