

Issue: Group III Written Notice with Termination (client neglect); Hearing Date: 02/04/19; Decision Issued: 02/05/19; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 11297; 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: 11297

Hearing Date: February 4, 2019

Decision Issued: February 5, 2019

PROCEDURAL HISTORY

On October 12, 2018, Grievant was issued a Group III Written Notice of disciplinary action with removal for client neglect.

On November 8, 2018, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On November 26, 2018, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On February 4, 2019, 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 Psychiatric Technician III at one of its facilities. She had been employed by the Agency for over a year. No evidence of prior active disciplinary action was introduced during the hearing.

The Patient had a history of self-injurious behavior. He had injured himself three times in the two weeks before coming to the Facility on September 20, 2018. The Patient was wearing a bandage on his arm because he had cut himself.

On September 26, 2018, Grievant was assigned to work in a one-to-one relationship with the Patient in accordance with a physician's order. She was to remain within arm's length plus ten inches of the Patient at all times between 12:30 a.m. and 1:30 a.m. She was to have a full view of the Patient at all times.

At approximately 1:16 a.m., the Patient left the nurse station window and walked to a chair in the corner of the dayroom. He sat in the chair. Grievant walked to a table in the dayroom. She sat at the table which was at least ten feet away from the Patient. She remained seated at the table. She did not position herself to look directly at the Patient. At one point, Grievant sat with part of her back towards the Patient and, thus, was not looking at the Patient.

At approximately 1:21 a.m., the Patient got up from the chair and left the dayroom. Grievant got up from her seat and followed the Patient.

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.

Facility Policy CP-39b governs Special Observation, Special Staffing for High Risk Patients. This policy defines the terms of a one-to-one relationship to include:

Arm’s Length: For the purposes of a 1:1 this term allows for ‘arms’ length plus 10 inches to lessen the chance of injury to the assigned staff. ***

Full View: means that if the patient is showering, using the toilet or getting dressed or undressed, they must be observed. The staff must be able to see the entire person, not just a part of their body. Attempts should be made to assign same gender staff to observe the patient while dressing and/or toileting, if possible.¹

“[N]eglect of clients” is a Group III offense.² On September 26, 2018, Grievant was assigned responsibility to remain within arm’s length plus ten inches of the Patient and to keep the Patient in full view. For approximately four minutes she was farther than arm’s length plus ten inches and did not always have the Patient in full view. The Patient could have started to hurt himself without Grievant being in position to immediately prevent the harm. Grievant failed to provide services to the Patient to ensure the Patient’s health, safety, and welfare. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for client neglect.

Grievant did not present any evidence but argued that the investigation arose out of an incident beginning in the restroom. The Patient was in the restroom and began hurting himself. The Agency was unable to determine whether Grievant or another employee was responsible for the Patient at the time of the incident and, thus, did not take disciplinary action against Grievant or the other employee for failing to stop the Patient from hurting himself in the restroom. The Agency’s discipline for Grievant’s

¹ Agency Exhibit 6.

² See, Attachment A, DHRM Policy 1.60.

failure to properly observe the Patient in the dayroom does not depend on the reason for the investigation. The Agency has presented sufficient evidence to support the issuance of the Written Notice.

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.

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.

³ *Va. Code § 2.2-3005.*

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.