

Issue: Group III Written Notice with Termination (client abuse); Hearing Date: 01/29/14; Decision Issued: 02/05/14; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10234; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10234

Hearing Date: January 29, 2014

Decision Issued: February 5, 2014

PROCEDURAL HISTORY

On October 11, 2013, Grievant was issued a Group III Written Notice of disciplinary action with removal for client neglect.

On October 22, 2013, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On December 30, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 29, 2014, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency's 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. 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 Licensed Practical Nurse at one of its facilities until her removal effective October 11, 2013. She had been employed by the Agency for approximately 3.5 year. No evidence of prior active disciplinary action was introduced during the hearing.

As part of the duties of nursing staff at the Facility, nursing staff will "pull" liquid medication from a vial using a syringe. A sterile vial is opened and the syringe needle is inserted into the top of the vial thereby breaking the "skin" at the top of the vial. The nurse removes only the amount of medication needed to comply with the doctor's order. Once the medication is inside the syringe, any medication remaining in the vial must be destroyed with two nurses witnessing the destruction. The vial is then placed in a "sharps" container with other discarded medical items.

On August 28, 2013, Grievant, the LPN, and other employees responded to an emergency involving the Patient in the Unit. A doctor concluded that the Patient needed to take medication. The doctor prescribed an injection of 1 mg of Ativan. The LPN opened a vial containing Ativan and used a syringe to remove 1 mg of Ativan. Additional medication remained in the vial. The LPN threw the vial into a trash can. The trash can contained other trash including food items discarded by employees after their meals that day. The LPN handed the syringe to Grievant and she assumed responsibility for the syringe. Before the medication could be given to the Patient, the Doctor concluded that the dosage should be increased to 1.5 mg instead of 1 mg. The

LPN indicated he wanted to obtain the additional medication from the discharged vial.¹ He began looking into the trash can and sorting through the trash inside to find the vial. Grievant assisted the LPN. He asked her to bring a smaller trash can to him so that he could move some of the items in the larger trash can into the smaller can and improve his ability to find the vial. At one point, she helped hold the bag as the LPN continued to look for the vial. After a few minutes, the LPN located the discarded vial and attempted to clean the vial.² Grievant and the LPN went into another room where cameras could not record what they were doing. An additional .5 mg was pulled into the syringe. During the process of pulling the .5 mg, the medication could have become contaminated. Any germs from the discharged food items could have attached to the outside of the discharged vial. When the needle pierced the “skin” of vial for the second time, the germs could have entered the vial and mixed with the medication inside.

Grievant took the syringe containing the 1.5 mg dosage and injected the medication into 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 defines³ client abuse as:

Abuse means any act or failure to act by an employee or other person responsible for the care of an individual that was performed or was failed to be performed knowingly, recklessly or intentionally, and that caused or might have caused physical or psychological harm, injury or death to a person receiving care or treatment for mental illness, mental retardation or substance abuse.

For the Agency to meet its burden of proof in this case, it must show that (1) Grievant engaged in an act that she performed knowingly, recklessly, or intentionally and (2) Grievant’s act caused or might have caused physical or psychological harm to the Client. It is not necessary for the Agency to show that Grievant intended to abuse a client – the Agency must only show that Grievant intended to take the action that caused the abuse. It is also not necessary for the Agency to prove a client has been injured by the employee’s intentional act. All the Agency must show is that the Grievant might have caused physical or psychological harm to the client.

¹ The LPN acted to retrieve the vial in part because he was concerned it would be discovered that he failed to follow the proper procedure to dispose of the unused medication.

² The LPN’s attempts to clean the exterior of the vial would not be sufficient to eliminate the risk of contamination.

³ See, Va. Code § 37.1-1 and 12 VAC 35-115-30.

Client abuse is a Group III offense.⁴ On August 28, 2013, Grievant injected the Patient with 1.5 mg of Ativan that was no longer sterile and could have been contaminated. Bacterial from the food items in the trash can could have been in the medication that Grievant injected into the Patient. Grievant knew she was injecting the Patient with medication taken from the discarded vial. Based on her medical training and the Agency's practices for separating sterile and waste medical supplies, Grievant should have realized she was placing the Patient at risk of receiving contaminated medication. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for client abuse.⁵ 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.⁶

Grievant argued that the LPN was responsible for making the decision to pull medication from the discarded vial and that she wanted to use an unopened vial instead. She argued that she only injected the Patient because she had a better relationship with the Patient than did the LPN. If the Hearing Officer assumes Grievant's assertions are true, the outcome of this case does not change. Grievant admitted that she was the one who injected the medication into the Patient. She knew that the .5 mg was pulled from the discarded vial and not from a new one.

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"⁷ 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.

⁴ See, Attachment A, DHRM Policy 1.60.

⁵ The Agency alleged that Grievant engaged in client neglect. Client neglect requires the Agency to show a failure to provide services. Grievant provided services. The services she provided constituted client abuse. The Agency's failure to correctly style the written notice is harmless error. Both client neglect and client abuse are violations of DI 201. The Agency has established that Grievant violated DI 201.

⁶ The Agency made other allegations supporting its disciplinary action. Those other allegations were not established.

⁷ 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**.

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.⁸

[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].

Carl Wilson Schmidt, Esq.
Hearing Officer

⁸ Agencies must request and receive prior approval from EDR before filing a notice of appeal.