

Issue: Group III Written Notice with Termination (client neglect); Hearing Date: 01/28/14; Decision Issued: 02/28/14; Agency: DVS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10251; 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: 10251**

Hearing Date: January 28, 2014  
Decision Issued: February 28, 2014

#### **PROCEDURAL HISTORY**

On October 31, 2013, Grievant was issued a Group III Written Notice of disciplinary action with removal for Client Neglect.

On November 12, 2013, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On December 17, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 28, 2014, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
Grievant Representative  
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. 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 Veterans Services employed Grievant as a Certified Nursing Assistant. The purpose of his position was:

The Certified Nursing Assistant is responsible for providing direct care to residents during their shifts and for maintaining the quality of services to fulfill the objective of the facility in accordance with the policies and procedures set forth by the facility administration and established nursing standards. The Certified Nursing Assistant is responsible for ensuring the needs of the residents are met and/or providing treatments and care as instructed.<sup>1</sup>

The Client was 6'2" with his weight in proportion to his height. He resided at the Facility. Inside the Client's room was a call bell. When the call bell was activated, a light flashed and a bell in the nursing station at the end of the hallway sounded. An employee in the nursing station could speak with the person who activated the room call bell to determine the nature of the call. A second call bell was located inside the bathroom attached to the Client's room. The bathroom call bell made a different sound than the call bell in the bedroom but it did not have a speaker.<sup>2</sup>

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<sup>1</sup> Agency Exhibit 3.

<sup>2</sup> Grievant did not activate the call bell in the bathroom.

On October 21, 2013, Grievant was bathing the Client in the shower. The Client was in a plastic chair facing the wall with the shower head. To the Client's left was a wall with a horizontal safety bar attached to the wall. Behind the Client was another wall where the horizontal safety bar extended as well. The shower opened to the Client's right side when he was sitting in the chair. While Grievant was bathing the Client, the Client had a bowel movement and began slipping out of the chair and attempting to wipe feces away from his body. Grievant needed assistance. Grievant turned the chair 90 degrees counter clockwise so that it faced the wall. Grievant placed the Client flat on his back with his feet towards the wall with the shower head. The Client was resting one or two feet above the floor. Grievant told the Client to use his left hand to hold on to the safety bar. The back of the chair was now to the Client's right. Grievant told the Client to hold onto the back of the chair with his right hand and wait while Grievant tried to obtain assistance. Grievant pushed the call bell in the Client's room but did not get an answer. He checked on the Client and then pushed the call bell in the Client's room a second time. Nurse D was working at the nursing station and answered the call. Grievant asked for assistance. She did not treat Grievant's request as an emergency. Grievant waited approximately 15 minutes but no one came to assist him. Grievant went to the Client a second time and told the Client he was going to the Nursing Station to obtain assistance.

Grievant walked 800 to 1000 feet down a long hallway and spoke with the Charge Nurse. Grievant told the Charge Nurse that the Client had fallen and that blood was "all over the place." The Charge Nurse and other nursing staff reacted by stopping what they were doing and immediately responding to the Client's Room. When the Charge Nurse arrived at the Client's room, she observed the Client laying flat in the chair with his left hand on the horizontal bar and his right hand on the back of the chair. She observed that the Client had not fallen and that there was no blood anywhere. The Client was not in a state of distress but was wet and could have slipped out of the chair.

When the Evening Shift Supervisor asked Grievant why he lied about the situation, Grievant said that was the only way he could get help.

### **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>3</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."

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<sup>3</sup> The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

"[N]eglect of clients" is a Group III offense. "Neglect" means a failure to provide timely and consistent services, treatment or care to a resident or residents that are necessary to obtain or maintain the resident or residents' health, safety or comfort; or a failure to provide timely and consistent goods and services necessary to avoid physical harm, mental anguish, or mental illness.<sup>4</sup>

Grievant neglected the Client. Leaving the Client lying on his back in a wet chair placed the Client at risk of injury from falling out of the chair. Grievant needed assistance but the level of assistance needed did not result from a life or death emergency such that it would have been appropriate for Grievant to leave the Client alone. When Grievant left the Client and walked down the hallway, he left the Client at risk of slipping out of the chair and falling to the ground. 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, the Agency's decision to remove Grievant must be upheld.

DHRM Policy 1.60 lists numerous examples of offenses. These examples "are not all-inclusive, but are intended as examples of conduct for which specific disciplinary actions may be warranted. Accordingly, any offense not specifically enumerated, that in the judgment of agency heads or their designees undermines the effectiveness of agencies' activities, may be considered unacceptable and treated in a manner consistent with the provisions of this section."

Grievant was untruthful when he told the Charge Nurse that the Client had fallen and blood was all over the place. Grievant's untruthfulness was material and had the effect of creating urgency among staff and distracting them from their other duties. In the Agency's judgment, Grievant's false report forms a basis for disciplinary action. The Agency's judgment is supported by the evidence and supports the issuance of a Group III Written Notice with removal. Grievant's behavior is similar to the offense of falsifying documents which is a Group III offense.

Grievant argued that he had to be untruthful initially to get the attention of other staff who had ignored him. Once he got assistance, he admitted his statements were incorrect. The evidence showed that it was unnecessary for Grievant to be untruthful. If Grievant had stated that he needed immediate assistance, he would have received it.

*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 ...."<sup>5</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

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<sup>4</sup> 12 VAC 5-371-10.

<sup>5</sup> Va. Code § 2.2-3005.

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.

Grievant asserted that he was denied procedural due process. Grievant was given notice of the Agency's allegations against him with sufficient time to prepare for the hearing. He had the opportunity at the hearing to present evidence to support any defenses he had to the Agency's allegations against him. Grievant was not denied procedural due process.

### **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 14<sup>th</sup> St., 12<sup>th</sup> 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 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 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.<sup>6</sup>

[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].

*/s/ Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>6</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.