

Issue: Group III Written Notice with Termination (client neglect/abuse); Hearing Date: 02/24/14; Decision Issued: 02/25/14; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10269; 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: 10269**

Hearing Date: February 24, 2014

Decision Issued: February 25, 2014

#### **PROCEDURAL HISTORY**

On January 6, 2014, Grievant was issued a Group III Written Notice of disciplinary action with removal for client neglect.

On January 7, 2014, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On January 28, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 24, 2014, a hearing was held at the Agency's office. Grievant did not appear at the hearing.

#### **APPEARANCES**

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 Behavioral Health and Developmental Services employed Grievant as a Direct Service Associate II at one of its facilities. Grievant was responsible for providing services to mental health patients.

The Patient suffered from Grand Mal Seizures. If he suffered a seizure, he needed immediate medical attention otherwise his life might be placed in jeopardy. The Patient resided in a room at the Facility. At the end of the hallway connecting his room was a day hall where he and other patients engaged in activities including eating meals.

On August 15, 2013, Grievant was responsible for conducting status checks of the Patient at noon and 12:30 p.m. He was responsible for documenting the Patient's status on the Patient Monitoring Sheet. At noon, the Patient was in the day hall eating his lunch. Grievant correctly documented his observation of the Patient eating lunch in the day hall. At 12:11 p.m., the Patient left the day hall and walked down the hallway to his room. He went inside his room. Grievant did not go to the Patient's room and check on his status after the Patient left the day hall. Grievant wrote on the Patient Monitoring Sheet, however, that at 12:30 p.m. the Patient was in his bedroom with his eyes open.<sup>1</sup> Sometime after the Patient went to his room, he suffered a grand mal seizure that caused his death. Facility staff discovered the Patient at 3:26 p.m.

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<sup>1</sup> The Agency did not charge Grievant with falsification of a document. Thus, the Hearing Officer will not address that behavior.

## 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<sup>2</sup> client neglect as:

the failure of by a person, 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 for the health, safety, or welfare of a person receiving care or treatment for mental illness, mental retardation, or substance abuse.

Client neglect is a Group III offense.<sup>3</sup> The Department required patients at the Facility to be observed every 30 minutes in order to determine their condition. If an employee observed a patient and concluded the patient might need assistance, the employee would be able to take action to assist the patient. On August 15, 2013, Grievant was responsible for providing services to the Patient by monitoring his condition every 30 minutes including 12:30 p.m. Grievant did not monitor the Patient after the Patient left the day hall at 12:11 p.m. Grievant did not monitor the employee at 12:30 p.m. even though Grievant documented that he had done so. Grievant failed to provide care and services required to ensure the Patient’s safety. Although it is possible that if Grievant had observed the Patient at 12:30 p.m., he would have observed the Patient in time to obtain medical assistance preventing the Patient’s death, the Agency is not obligated to establish that fact in order to support the issuance of a Group III Written Notice. The fact that Grievant’s failure to provide care may have resulted in harm to the Patient is sufficient to support disciplinary action. 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 ....”<sup>4</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 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

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<sup>2</sup> See, *Va. Code § 37.1-1* and *12 VAC 35-115-30*.

<sup>3</sup> See, Attachment A, DHRM Policy 1.60.

<sup>4</sup> *Va. Code § 2.2-3005*.

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 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>5</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>5</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.