

Issue: Group III Written Notice with Termination (client neglect); Hearing Date: 03/06/14; Decision Issued: 03/07/14; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10270; 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: 10270

Hearing Date: March 6, 2014

Decision Issued: March 7, 2014

PROCEDURAL HISTORY

On December 13, 2013, 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 February 3, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 6, 2014, 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. 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 his removal effective December 13, 2013. He had been employed by the Agency for approximately two years. 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 disposed of by being placed in a drop box with two nurses witnessing the destruction.

On September 3, 2013, Grievant, the LPN, and several other employees responded to an emergency involving the Patient in the Unit. The Doctor concluded that the Patient needed to take medication. The Doctor prescribed an injection of 1 mg of Ativan. A vial containing Ativan was opened and 1 mg of Ativan was removed from the vial into the syringe. Additional medication remained in the vial. Grievant threw the vial into a trash can. Grievant knew he was acting contrary to nursing practices when he threw the vial into the trash can. The trash can contained trash including towels, gloves, and other waste. The LPN 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. Grievant told the LPN she should obtain the additional medication from a new vial, but she insisted on using the medication from the

discarded vial. Grievant began looking into the trash can and sorting through the trash inside to find the vial. The LPN assisted Grievant. The LPN brought a smaller trash can to Grievant 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, the LPN helped hold the bag as Grievant continued to look for the vial. After a few minutes, Grievant located the discarded vial, removed it from the trash bag, and placed the vial under a stream of water in a sink.¹ 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 discarded trash could have attached to the outside of the discarded 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.

The LPN 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 defines² 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.

Client abuse is a Group III offense.³ On September 3, 2013, the LPN injected the Patient with 1.5 mg of Ativan that was no longer sterile and could have been

¹ The LPN’s attempts to clean the exterior of the vial were not sufficient to eliminate the risk of contamination.

² See, Va. Code § 37.1-1 and 12 VAC 35-115-30.

³ See, Attachment A, DHRM Policy 1.60.

contaminated. Bacteria from items in the trash can could have been in the medication that the LPN injected into the Patient. Grievant actively participated in the LPN's decision to inject the Patient with potentially contaminated medication. Grievant went to the trash can and searched for the vial. He knew the vial had been surrounded by and had touched trash. He washed the vial but should have recognized that the vial possibly remained exposed to harmful bacteria. He assisted the LPN to remove medication from the vial and into the syringe. Grievant knew the LPN intended to inject the Patient with the medication from the vial. Grievant should have realized that his actions would facilitate the injection of potentially contaminated medication into the Patient. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for client abuse.⁴ 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.

Grievant argued that the disciplinary action was too severe given that he did not make the decision to inject the Patient. He argued that the LPN was the one who insisted on using the remaining medication from the vial. He argued his responsibility was limited because the LPN was the one who removed the medication from the vial and into the syringe and then injected the Patient. Grievant argued that only the LPN was responsible for client abuse. This argument fails. Grievant knew the LPN was in the process of injecting medication from the discarded vial into the Patient. He could have refused to obtain the vial from the trash. He could have refused to witness the removal of the medication from the discarded vial into the syringe. Instead, he engaged in behavior that facilitated the LPN's injection of possibly contaminated medication into the Patient.

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"⁵ 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

⁴ 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 he 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.

⁵ Va. Code § 2.2-3005.

consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive.

Grievant argued that the disciplinary action should have been reduced because he “self-reported” the incident because he knew the LPN’s decision to inject the Patient was wrong. The evidence showed that the Agency’s Manager fully considered the facts surrounding Grievant’s behavior including whether the discipline should be reduced because Grievant reported the incident. The Manager did not agree with Grievant’s assertion that the Agency would not have discovered the incident had he not reported it. Indeed, Grievant’s written statement indicated that the LPN asked him to lie about what they were looking for in the trash can because the Registered Nurse wanted to look at the video tapes of the pharmacy for that day. Thus, Grievant must have suspected his actions might have been discovered by the Registered Nurse prior to his action to report the incident. In light of the standard set forth in the Rules, 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 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.⁶

[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

Carl Wilson Schmidt, Esq.
Hearing Officer

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