

Issue: Group III Written Notice with Termination (client neglect); Hearing Date: 04/30/15; Decision Issued: 05/06/15; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10580; Outcome: Full Relief; **Administrative Review: EDR Ruling Request received 05/14/15; EDR Ruling No. 2015-4153 issued 05/28/15; Outcome: AHO's decision affirmed.**



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10580

Hearing Date: April 30, 2015

Decision Issued: May 6, 2015

PROCEDURAL HISTORY

On March 4, 2015, Grievant was issued a Group III Written Notice of disciplinary action with removal for client neglect.

On March 17, 2015, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On April 1, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 30, 2015, 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 DSA at one of its facilities. She was responsible for providing care to patients at the facility. No evidence of prior active disciplinary action was introduced during the hearing.

Patient 1 resided at the Facility and used a wheelchair. Patient 2 also resided at the Facility. On January 29, 2015, Patient 1 was at the medication window. Patient 2 was in the common area and began yelling at Patient 1. Patient 2 approached Patient 1 and made a punching motion over Patient 1 but without hitting Patient 1. Grievant yelled to Patient 2 to stop what he was doing and to sit down. She waved her hand to get the attention of another employee, Mr. H, but he did not see her. At some point, Grievant walked to the Nurse and informed her of Patient 2’s behavior.

Shortly after punching towards Patient 1, Patient 2 pushed Patient 1 from behind causing his mouth to hit the window sill and his body to fall to the floor. Staff approached Patient 1 to help him and Patient 2 continued to yell at Patient 1.

CONCLUSIONS OF POLICY

The Agency alleged that Grievant “failed to act to protect a patient from a physical assault by another patient who displayed aggressive behavior immediately prior to the incident.” The Agency has not presented sufficient evidence to support its allegation.

The Agency called the TOVA Coordinator as its witness. He testified that the Therapeutic Options of Virginia course teaches employees how to respond to aggressive patients. He testified that Patient 2’s act of swinging at Patient 1 was a

warning sign that Patient 2 was aggressive. He said an employee observing Patient 2 would be expected to make a “verbal intervention” and attempt to notify other staff to provide assistance. He indicated he did not expect an employee of Grievant’s size to respond with physical force to Patient 2 because Patient 2 was much larger in size than Grievant. He testified that he had observed a video (without audio) of the incident and assuming Grievant told Patient 2 to stop in response to Patient 2’s punch in the air that Grievant did nothing wrong.

In order to support disciplinary action, an agency must show that the employee did something wrong. In this case, the Agency’s witness testified that Grievant did nothing wrong. Based on this evidence, the Agency’s disciplinary action must be reversed.

The Agency argued that Grievant could have used a whistle to notify other staff of Patient 2’s punch into the air. The Agency did not present evidence that Grievant had sufficient time to use her whistle if she had one.

The Hearing Officer attempted to verify the facts of the incident by looking at the video presented by the Agency as Agency Exhibit 8. The video is for the date of November 3, 2014 and depicts a client being placed in a seclusion room. Agency Exhibit 8 has no relevancy to the Agency’s allegations in this case. The Hearing Officer cannot verify or clarify the testimony of the witnesses in this case.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group III Written Notice of disciplinary action is **rescinded**. The Agency is ordered to **reinstate** Grievant to Grievant’s same position prior to removal, or if the position is filled, to an equivalent position. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal and credit for leave and seniority that the employee did not otherwise accrue.

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.¹

[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

¹ Agencies must request and receive prior approval from EDR before filing a notice of appeal.