

Issue: Group III Written Notice with Termination (client neglect); Hearing Date: 06/26/13; Decision Issued: 07/10/13; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10120; 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: 10120

Hearing Date: June 26, 2013

Decision Issued: July 10, 2013

PROCEDURAL HISTORY

On May 3, 2013, Grievant was issued a Group III Written Notice of disciplinary action with removal for client neglect.

On May 22, 2013, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On June 11, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 26, 2013, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
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 Forensic Mental Health Tech at one of its facilities. The purpose of his position was:

To provide competent nursing care to an adult population ranging from ages 18 to 64 in a Forensic/civil setting to maintain a safe, clean and therapeutic environment and to participate and encourage patients to participate in their prescribed treatment programs.¹

He was employed by the Agency for approximately four years prior to his removal effective May 3, 2013.

Grievant had prior active disciplinary action. He received a Group III Written Notice with a three day suspension on June 9, 2010 for falsification of a precaution/observation sheet. He received a Group II Written Notice on September 9, 2011 for unsatisfactory work performance and an inappropriate non-therapeutic behavior discovered as part of a client abuse investigation.

On April 8, 2013, Grievant and Ms. W were working in the dayroom supervising approximately ten patients. A hallway was attached to the dayroom. Along the hallway were patient rooms. Grievant, Ms. W, and the patients were in the dayroom. Ms. W

¹ Agency Exhibit 6.

gave some of the patients new items of clothing and permitted them to take the clothing to their rooms. Patient 1 was not one of the patients receiving clothing and Ms. W did not expect him to go to his room. As the patients went to their rooms, Patient 1 walked behind his roommate who had received clothing and entered into their room. As the patients finished placing the clothing in their rooms, they returned to the day hall. Ms. W closed and locked the door to each patient's room after the patient left the room. Patient 1 remained in his room while Ms. W closed and locked the door to Patient 1's room as Patient 1's roommate exited the room.

Grievant was responsible for counting each patient and filling out a Patient Observation – Routine Day sheet which served as an hourly attendance sheet. At 3 p.m., Grievant counted the number of patients and wrote the location of each patient with the exception of Patient 1. Grievant could not count Patient 1 because Grievant did not know Patient 1 was in his room. Grievant made no effort to walk down the hall and look into Patient 1's room. Grievant did not contact any supervisor to report the missing patient. When the oncoming shift began working, a nurse counted the patients and then located Patient 1 in his room.

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.”² 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.”

[N]eglect of clients” is a Group III offense.³ Departmental Instruction 201 defines neglect as:

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

Policy P-7 provides that, “[s]taff will be aware [of] the whereabouts of assigned patients at all times. All patients shall be maintained on routine checks 24 hours a day; hourly during the waking hours, and half-hourly during the sleeping hours.” Under this

² The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

³ See, Attachment A, DHRM Policy 1.60.

policy, “[t]he patient Monitoring Form shall be used to record and track patients on a 24 hour basis.” The policy also provides:

Staff should never guess or surmise where the patient is. If a staff member does not actually know where the patient is, the ward charge nurse or other staff should be contacted to ascertain the patient’s whereabouts. Staff should be particularly alert regarding patients who may leave the building and return at unpredictable times, for example from a grounds pass or medical appointment. Staff should also be alert to the movement of patients, so it is not assumed the patient is somewhere when he/she is not.⁴

Grievant was responsible for the safety of patients by supervising them. In order to supervise patients, Grievant had to know the location of each patient. Policy P-7 obligated Grievant to “never guess or surmise where the patient is”. Grievant was obligated to ascertain Patient 1’s whereabouts. Once Grievant realized Patient 1 was missing, he failed to notify the charge nurse or other staff that Patient 1 was missing. Patient 1 remained unsupervised for approximately 30 minutes. The Agency has established that Grievant failed to ensure Patient 1’s safety thereby justifying the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant’s removal must be upheld.

Grievant argued that the Investigator appeared to have his mind made up prior to completing the investigation. Grievant indicated he was not told that he was the subject of the investigation before being asked to provide a written statement. This hearing decision is based on the evidence presented during the hearing regardless of whether the Investigator formed an opinion prior to completing his investigation. The Agency was not obligated to inform Grievant that he was subject to an investigation prior to asking him for a witness statement.

Grievant argued that the Facility was not adequately staffed at the time of the missing patient. Grievant’s obligation to locate Patient 1 and report the missing patient to a supervisor did not depend on the Facility’s staffing levels.

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

⁴ Agency Exhibit 7.

⁵ Va. Code § 2.2-3005.

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.

Grievant argued that he was removed from employment whereas Ms. W remained employed. The evidence showed that Ms. W received a Group II Written Notice. Ms. W was not responsible for counting patients at a specific period of time and then locating them if they were missing. No evidence was presented showing that Ms. W knew Patient 1 was missing and was obligated to locate Patient 1. Ms. W was not similarly situated to Grievant such that the Hearing Officer can conclude that Grievant was singled out for disciplinary action.

Grievant argued his work performance was such that the Agency should not have removed him from employment. Grievant’s work performance was not sufficient to mitigate the disciplinary action in this case. Grievant’s work performance was not sufficient to establish that the Agency’s discipline exceeded the limits of reasonableness.

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.