

Issue: Group III Written Notice with Termination (client neglect); Hearing Date: 08/27/13; Decision Issued: 08/29/13; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10144; 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: 10144

Hearing Date: August 27, 2013
Decision Issued: August 29, 2013

PROCEDURAL HISTORY

On June 12, 2013, Grievant was issued a Group III Written Notice of disciplinary action with removal for client neglect.

On July 11, 2012, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On July 30, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 27, 2013, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency Advocate
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 RN Supervisor at one of its facilities. She had been employed by the Agency for approximately four and a half years prior to her removal. The purpose of her position was;

Supervises staff engaged in direct nursing care and implementation of treatment plans for multiple patient areas on assigned shift. Serves as single shift supervisor for all nursing services facility-wide. Assists Director of Nursing in the daily management of the department, including the administration, organization, supervision and evaluation of all activities and patient care. Assists in quality assurance activities and assures compliance with Agency, Departmental and accrediting Agencies policies, procedures, rules, and regulations.¹

The Patient was a 55 year old woman admitted to the Facility from another facility. Her treatment was court ordered. She has a clinical history of schizoaffective disorder. She had an incident history of violent and disruptive behavior against staff and property.

¹ Agency Exhibit 4.

On May 13, 2013, the Patient was in her bedroom being supervised by two staff. One of the staff left the room to go on break, leaving Ms. W to supervise the Patient. The Patient became disruptive and attempted to leave the room. Ms. W attempted to re-direct the Patient and have the Patient return to her bed. The Patient knocked over a table. The Patient threw water and grabbed other items in the room as Ms. W continued to re-direct the Patient. The Patient pulled the sheets off of her bed. She took one sheet and placed the middle of the sheet behind her neck and took the two ends and tied them around her neck "like a scarf". The sheet was not tied tightly around the Patient's neck. The Patient walked towards a wall with a nozzle valve located a few inches above the Patient's eye level. She wrapped one end of the sheet around the nozzle. If the Patient had fallen down while the end of the sheet was attached to the nozzle, the sheet would have tightened around her neck and possibly caused her injury. Ms. W attempted to unwrap the end of the sheet. The Patient continued to re-wrap the end of the sheet.

While the Patient was wrapping and unwrapping the end of the sheet on the nozzle, Grievant approached the Patient's room and stood near the door way. Grievant observed the Patient with the sheet around her neck and attempting to wrap the end on the nozzle. She observed Ms. W attempting to unwrap the end of the sheet from the nozzle. Grievant watched for approximately 10 seconds. Grievant spoke with Ms. W. Ms. W initially reported to the Investigator that she asked Grievant for help but during the hearing Ms. W testified that she could not recall the conversation because she was focused on trying to re-direct the Patient away from the nozzle. Grievant did not call for help or enter the room to assist Ms. W. Security employees were watching the activities in the room through a security camera located in the room. After Grievant left the doorway, security staff entered the room and provided Ms. W with assistance and moved the Patient away from the nozzle.

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."

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 201 defines client neglect as:

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

Neglect means failure by an individual, program, or facility responsible for providing services to provide 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.

Administrative Policy 19-C(1)(4)(a) provides that “[a]ny staff member ... present shall take immediate action to prevent a resident from inflicting self injury.”

Neglect of clients is a Group III offense.³ On May 13, 2013, Grievant observed the Patient with a sheet tied around her neck attempting to attach an end of the sheet to a nozzle on a wall. The nozzle was located above the Patient’s eye level and if the Patient had fallen with the end attached to the nozzle, the Patient could have suffered serious injury. The Patient was at risk of falling as she struggled with Ms. W who was attempting to unwrap the sheet from the nozzle. The Patient was in need of services from Grievant in the form of assistance to Ms. W. Grievant failed to enter the room and provide assistance to Ms. W to re-direct the Patient. Grievant failed to call for help so that others could provide assistance. The Agency has established that Grievant engaged in client neglect thereby justifying the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an employee may be removed from employment. Accordingly, Grievant’s removal must be upheld.

Grievant argued that she could not see the nature of the risk to the Patient because Ms. W was blocking Grievant’s line of sight. A video recording of the incident shows that Grievant was in a position to observe the interaction between the Patient and Ms. W. Grievant watched them for over ten seconds and could observe that the Patient was at risk of injury during that time.

Grievant argued that she asked Ms. W if Ms. W needed assistance and Ms. W declined assistance. Grievant did not testify. Ms. W could not recall the conversation with Grievant. No credible evidence was presented suggesting that Ms. W declined assistance from Grievant.

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”⁴ 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-

³ See, Attachment A, DHRM Policy 1.60.

⁴ *Va. Code § 2.2-3005.*

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.

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.⁵

[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

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