

Issue: Group III Written Notice with Termination (falsifying documents); Hearing Date: 07/28/14;  
Decision Issued: 08/07/14; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10401;  
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: 10401**

Hearing Date: July 28, 2014  
Decision Issued: August 7, 2014

#### **PROCEDURAL HISTORY**

On May 19, 2014, Grievant was issued a Group III Written Notice of disciplinary action with removal for failing to perform a security check.

On May 29, 2014, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On June 24, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 28, 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 RSS II at one of its facilities. Grievant was obligated to perform safety checks on clients every 30 minutes. To complete a safety check, Grievant was expected to go to a client's location, observe the client, and then record that observation on a Patient Monitor Sheet.

The Client is a 41 year old male admitted to the Facility on March 26, 1999. He has an Axis I diagnosis of Schizoaffective Disorder, Cannabis Abuse and Alcohol Abuse.

On April 12, 2014, Grievant was working at the Unit. At 8:07 p.m., the Client went into his room. At 8:33 p.m., Grievant left the computer room and walked in a direction away from the Client's room. He did not approach the Client's room and did not perform a 30 minute safety check. At 8:40 p.m., Grievant walked in and out of the kitchen. At 9:11 p.m., Grievant entered the computer room and exited at 9:12 p.m.

Grievant completed a Patient Monitor Sheet reporting that he had conducted a safety check at 8:30 p.m. and that the Client was in his bedroom with his eyes open. The Agency issued Grievant a Group III Written Notice with removal for falsifying records. Grievant did not appeal that disciplinary action.

### **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>1</sup> client neglect as:

This means failure by a person or a program or facility operated, licensed, or funded by the Department, excluding those operated by the Department of Corrections, responsible for providing services to do so, including nourishment, treatment, care, goods, or services necessary to the health, safety, or welfare of an individual receiving care or treatment for mental illness, intellectual disability, or substance abuse.

Grievant was obligated to perform safety checks every 30 minutes on the Client when he was in the Unit. Safety checks were necessary for the Client’s safety. On April 12, 2014, Grievant was expected to perform a safety check of the Client at 8:30 p.m. Grievant did not go to the Client’s room and did not observe the Client within several minutes before or after 8:30 p.m. The Agency has established that Grievant neglected the Client’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, the Agency’s decision to remove Grievant from employment must be upheld.

Grievant questioned which employee had responsibility for the 8:30 p.m. check of the Client. The evidence showed that Grievant was assigned responsibility and was in a position to perform the check but failed to do so.

*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>2</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 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.

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

<sup>2</sup> *Va. Code § 2.2-3005*.

## 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>3</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>3</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.