

Issue: Group III Written Notice with Termination (patient neglect); Hearing Date: 08/22/14; Decision Issued: 09/11/14; Agency: DBHDS; AHO: Ternon Galloway Lee, Esq.; Case No. 10418; Outcome: No Relief – Agency Upheld.

DECISION OF HEARING OFFICER

In the matter of

Case Number: 10418

Hearing Date: August 22, 2014

Decision Issued: September 11, 2014

SUMMARY OF DECISION

The Agency had found Grievant engaged in misconduct by abusing/neglecting residents of the Agency. The Agency then issued Grievant a Group III Written Notice with termination. The Hearing Officer found Grievant engaged in the misconduct as alleged and the discipline is consistent with policy and law. Thus, the Hearing Officer upheld the Agency's termination.

HISTORY

On June 27, 2014, the Agency issued Grievant a Group III Written Notice with termination for neglect of residents. Grievant timely filed her grievance to challenge the Agency's action. On July 18, 2014, the Office of Employment Dispute Resolution ("EDR") assigned the undersigned as the hearing officer to this appeal.

Based on the parties' availability, the Hearing Officer held a telephonic prehearing conference (PHC) on July 23, 2014.¹ Based on discussions during the PHC, the Hearing Officer found the first available date for the hearing was August 22, 2014.² Accordingly, on July 23, 2014, the Hearing Officer issued a scheduling order that (i) set the hearing as agreed to and (ii) addressed other matters discussed and ruled on during the PHC.

On the date and scheduled time for the hearing, the Agency appeared, but Grievant did not. Before beginning the hearing, the Hearing Officer telephoned Grievant and left her a voice mail message informing Grievant that the Agency's Advocate and Hearing Officer were located at the hearing site and ready to commence the grievance hearing. The hearing was postponed for about 20 minutes to allow Grievant time to arrive or make telephone contact. Grievant did not call in nor show for the proceeding. Thus, the Hearing Officer held the hearing in her absence.

During the course of the hearing proceedings, the Agency was given an opportunity to present matters of concern to the Hearing Officer, make opening and closing statements, and call witnesses. Moreover, the Hearing Officer admitted Agency Exhibits 1 through 12 and the Hearing Officer's exhibit.

During the hearing, an advocate represented the Agency.

¹ This was the parties' first date available for the PHC.

² The parties agreed to this hearing date.

APPEARANCES

Advocate for Agency
Witnesses for the Agency (3 witnesses)
Grievant failed to appear³

ISSUE

Was the written notice warranted and appropriate under the 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 Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual (“GPM”) §5.8(2). 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 all the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

1. Grievant had been an employee of the Agency for at least three years. She was assigned to Home # 1 of the Agency to provide direct care services to the home’s residents. Five individuals live in the home. Staff who work in Home # 1 do not have meal breaks. They have elected to work and eat at the same time so that their work shift would be shortened by 30 minutes. That is, the normal 30 minutes for a meal break would not be added to their eight hour work period. (A Exhs. 8 and 2; Testimony of Team Leader).
2. On June 7, 2014, Grievant was seated at a table in the living room area in Home # 1 near the kitchen. She was eating a meal. Grievant was the only staff person in the living room at the time. Resident 2 was seated on the floor across the room from Grievant. At that time Resident 1 entered the area naked. Grievant observed him and then continued to eat her meal. Resident 1 then walked over to Resident 2 and began to pull on Resident 2’s shirt. He continued to do so, to the annoyance of Resident 2. Meanwhile, Grievant continued to eat. Eventually, Resident 2 freed himself from Resident 1. Resident 2 then went to the couch, took a seat, and threw his shoe toward Resident 1. Within seconds, Resident 1 followed Resident 2 to the couch. He stood over Resident 2 and resumed pulling on Resident 2’s shirt. Resident 2 tried moving to the opposite side of the couch to avoid Resident 1, but Resident 1 moved over by Resident 2 and continued to pull on Resident 2’s shirt. Grievant continued eating. Eventually, a co-worker of Grievant heard noises in the living room area. He then came into the area. He did not observe Resident 1 pulling on the other resident; however, he did note that Resident 1 was naked. He then approached Resident 1 and led him back to the bedroom area. The entire incident lasted

³ As noted previously here, Grievant had notice of the hearing and had agreed to the date, time, and location. However, she failed to appear for the hearing.

about four minutes. Surveillance cameras are placed in the congregate areas of the Agency's new homes, like Home # 1. Thus, the June 7, 2014 incident was recorded. (A Exh. 12; Testimonies of Team Leader and Risk Manager).⁴

3. The videos are routinely reviewed. On June 10, 2014, while looking at the video for Home # 1 for an unrelated occurrence, Risk Manager observed the incident that happened on June 7, 2014, involving Resident 1 and Resident 2. Risk Manager noticed that Grievant was on duty in the area at that time, but she did nothing to stop Resident 1 from bothering Resident 2. Risk Manager considered the incident one of peer-on-peer aggression. She then reported it to the facility director. She also asked Grievant's supervisor to review the video for his input. (Testimony of Risk Manager; A Exh. 6, p. 1).

4. As a result of reviewing the video, the Agency launched an investigation for neglect. Subsequently, Investigator found Grievant's behavior during the incident demonstrated neglect. Thereafter, Grievant was issued a Group III Written Notice with removal for neglecting residents. (A Exh. 1, p. 1; A Exh. 3, pp. 1-2; A Exh., 3, pp. 1-2; and A Exh. 6).

5. The group notice described the nature of the offense as follows:

On June 7, 2014, [Grievant] failed to implement an individual's Behavior Support Plan and failed to intervene during a peer to peer incident that lasted over an extended period of time. [Grievant] also failed to notify the Facility Director regarding the peer to peer incident. After careful review of the Investigator's report, and review of additional documentation, the charge of resident neglect has been substantiated.

(A Exh. 1, p. 1).

6. Because Resident 1 has a long history of aggressive behaviors, he has a written Behavioral Treatment Plan (BTP) of which Grievant was aware. (A Exh. 2, p. 2; A Exh. 7; Testimony of Team Leader).

7. In pertinent part, the BTP provides the following instructions when Resident 1 becomes aggressive:

"If [Resident 1] pulls peers, staff should ensure that [Resident 1] releases the peer and ideally move the peer out of [Resident 1's] reach. Typically, [Resident 1] will grab someone repeatedly if the opportunity presents itself."

"Each time [Resident 1] attempts to grab peers, staff will initiate a release using

⁴Team Leader has worked for the Agency for 18 years and he has worked with the residents of Home # 1 for several years. He is very familiar with Resident 1's behaviors. After reviewing the video of the incident, Team Leader concluded that when Resident 1 came to the congregate area naked, he wanted someone to help him dress. When there was not an immediate response, Resident 1 started pulling on Resident 2. Team Leader testified that Resident 1 is known to engage in this type behavior when he does not receive a quick response from someone to address his need. (Testimony of Team Leader).

approved physical release techniques to ensure others' safety.”

(A Exh. 7, p. 3).

8. When a peer- to- peer incident occurs, staff is required to notify the Agency's Director. Grievant did not notify the director of the June 7, 2014 incident. (Testimony of Team Leader; A Exh. 6, p. 4; A Exh. 11).

9. Departmental Instruction 201 states that it has a zero tolerance for abuse and neglect. (A Exh. 9, p. 1). This policy defines neglect as noted below:

... 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.

(A Exh. 9, p. 2).

10. On March 12, 2014, Grievant attended in-service training provided by the Agency. During that instruction, attendees were given training regarding, among other topics, abuse, neglect, and assuring the rights of patients/residents. (A Exh. 11, pp. 10 – 12).

11. Documentation from that training demonstrates that attendees received definitions for “neglect” and “peer-on-peer aggression.” The training's definition of *neglect* was identical to the definition provided in DI 201 referenced above in “Findings of Fact” # 7. Moreover, the in-service training materials defined *peer-on-peer aggression* as follows:

... a physical act, verbal threat or demeaning expression by an individual against or to another individual that causes physical or emotional harm to that individual.

(A Exh. 11, p. 10).⁵

12. Failing to take appropriate actions in a peer-on-peer aggression incident can be a form of abuse and/or neglect. (A Exh. 11, p. 10).

DETERMINATIONS AND OPINION

⁵ The Agency withdrew its instruction number 2195 that was dated March 10, 2014, and was presumably in effect on June 7, 2014. The Agency did not provide the contents of the March 10, 2014 instruction. The Agency replaced that instruction with Agency Instruction # 2195 which is dated June 27, 2014, and presumably became effective on that date. This instruction pertained to Peer to Peer Aggression. (A Exh. 10). The Hearing Officer finds the evidence fails to show that the most current Instruction # 2195 was in effect at the time of the June 7, 2014 incident.

The General Assembly enacted the *Virginia Personnel Act*, VA. Code §2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his/her rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in, and responsibility to, its employees and workplace. *Murray v. Stokes*, 237 VA. 653, 656 (1989).

Va. Code § 2.2-3000 (A) sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints... To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

To establish procedures on Standards of Conduct and Performances for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the *Code of Virginia*, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60 (Policy 1.60). The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

Under the Standards of Conduct, Group I offenses are categorized as those that are less severe in nature, but warrant formal discipline; Group II offenses are more than minor in nature or repeat offenses. Group III offenses are the most severe and normally warrant termination. *See* Standards of Conduct Policy 1.60.

Va. Code § 2.2-3005 sets forth the powers and duties of a hearing officer who presides over a grievance hearing under the state grievance procedure. Va. Code § 2.2-3005.1 provides that the hearing officer may order appropriate remedies including alteration of the agency's disciplinary action. By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government. Implicit in the hearing officer's statutory authority is the ability to independently determine whether the employees alleged conduct, if otherwise properly before the hearing officer, justified termination. In *Tatum v. Virginia Department of Agriculture & Consumer Services*, 41 VA. App. 110, 123, 582 S.E. 2d 452, 458 (2003), the Court of Appeals of Virginia held in part the following:

While the Hearing Officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy ... the Hearing Officer reviews the facts de novo ... as if no

determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action. Thus the Hearing Officer may make a decision as to the appropriate sanction, independent of the agency's discipline.

On June 27, 2014, management issued Grievant a Group III Written Notice with termination for the reasons previously stated. Now, this Hearing Officer examines the evidence to determine the following:

- Did Grievant engage in the alleged conduct?
- Was the behavior misconduct?
- Was the discipline consistent with policy/law?
- Are there mitigating circumstances to reduce or remove the disciplinary action or aggravating circumstances to justify the disciplinary action?

I. Analysis of Issue before the Hearing Officer

Issue: Whether the discipline was warranted and appropriate under the circumstances?

A. Did the employee engage in the behavior described in the Group III Written Notice and did that behavior constitute misconduct?

The Agency contends that Grievant neglected residents. Specifically, the Agency asserts that Grievant (ii) failed to implement relevant provisions of Resident 1's BTP on June 7, 2014 and (ii) failed to intervene in a peer-to-peer aggression incident. The Hearing Officer examines the evidence to determine if the Agency has met its burden.

The evidence shows that DI 201 maintains zero tolerance for abuse and neglect. Specifically, this policy defines neglect as follows:

... 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.

The Agency is a facility of the Department and bound by DI 201. The evidence demonstrates that on June 7, 2014, while Grievant was having a meal during her work time, she observed Resident 1 repeatedly pulling on Resident 2. The video of the incident shows that Resident 2 was so annoyed with Resident 1's behavior that he got up off the floor from his initial position and moved to the couch to free himself from Resident 1. Resident 1 followed Resident 2 and resumed tugging on Resident 2. The evidence also shows that while Grievant observed this incident, she responded by ignoring it. This caused Resident 1's behavior directed at his

peer to continue for an extended time.

In addition, because of Resident 1's history of displaying aggressive behaviors, the Agency had implemented a BTP. Grievant was aware of this BTP and required, as staff, to follow it. The plan targeted Resident's disruptive behaviors. One such behavior was identified as "pulling others' clothing." In pertinent part, the plan requires staff to ensure that Resident 1 releases a peer he is pulling on and move the peer out of Resident 1's reach. Because Grievant was the staff on duty in the living room area at the time of the incident, she bore the responsibility of implementing the referenced provisions of the BTP. Despite this requirement, the video shows Resident 1's aggressive behavior continued for four minutes. The recording also makes it evident that there was ample space in the living room area of Home # 1 for Grievant to move Resident 2 out of Resident 1's reach. Yet, Grievant did nothing about Resident 1 pulling the clothing of his peer. She also neglected to report the incident as required by Agency policy. Eventually, a co-worker entered the living room and guided Resident 1 back to the bedroom area.

Moreover, the evidence illustrates that during the entire episode, Resident 1 was naked and Grievant took no action to assist him in getting dressed.

Grievant was the staff person on duty in the living room area and was responsible for attending to the needs of the residents and ensuring safety. By failing to intervene during the incident, Grievant did not provide services under Resident 1's BTP. Neither did she adhere to the Agency's safety policy aimed at preventing peer-on-peer aggression. What is more, Grievant failed to attend to Resident 1's need to be clothed.

Accordingly, the Hearing Officer finds Grievant engaged in the conduct alleged and it was misconduct.

Having made the above-noted findings, the Hearing Officer is cognizant of Grievant's written statement responding to the group notice. In it Grievant contends that she acted by summoning help from her co-worker. While Co-worker did appear and removed Resident 1 from Resident 2, the evidence does not show this action was initiated by Grievant, but rather by Co-worker responding to his hearing noises made by the residents.

Hence, as noted above, the Agency has met its burden and shown Grievant engaged in the behavior and it constituted misconduct.

B. Was the discipline consistent with policy and law?

The Agency is a facility of the Department. Therefore, consistent with the Department's policies, the Agency has a duty to provide a safe and secure environment for its residents. Neglect of residents is a serious offense as it has grave safety implications. Under DI 201, the Agency maintains a zero tolerance for this misconduct. Accordingly, the Hearing Officer finds the Agency's issuance of a Group III Written Notice in this matter is consistent with policy and law. Moreover, under Policy 1.60, the issuance of a Group III Written Notice, even if a first offense, normally warrants removal. The Agency terminated Grievant for her neglect, and the

Hearing Officer finds the removal is also consistent with policy.

II. Mitigation

Under statute, hearing officers have the power and duty to “[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with the rules established by the Office of Employment Dispute Resolution [“EDR”].”⁶ EDR’s *Rules for Conducting Grievance Hearings* provides that “a hearing officer is not a super-personnel officer” therefore, “in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy.”⁷ More specifically, the *Rules* provide that in disciplinary grievances, if the hearing officer finds that;

- (i) the employee engaged in the behavior described in the Written Notice.
- (ii) the behavior constituted misconduct, and
- (iii) the agency's discipline was consistent with law and policy, the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.⁸

Thus, the issue of mitigation is only reached by a hearing officer if he or she first makes the three findings listed above. Further, if those findings are made, a hearing officer must uphold the discipline if it is within the limits of reasonableness.

The Hearing Officer has found that Grievant’s behavior established that she committed a group III offense and that the termination for the offense is consistent with policy.

Next, the Hearing Officer considers whether the discipline was unreasonable and therefore should be mitigated. Although Grievant did not attend the grievance hearing, in her written response to the discipline, Grievant stated that she has worked for the Agency for over three years. Further, she reported no disciplinary history with the Agency. She states that Home # 1 is understaffed and that her supervisor has condoned Resident 1 walking around nude. While deliberating Grievant’s assertions, the Hearing Officer is also cognizant of the aggravating nature of Grievant’s offense. Because of her neglect, Resident 2 was harmed by the aggressive behavior of Resident 1. Moreover, Resident 1 was permitted to walk around and expose himself to others in the nude.

Hence, after a careful review of the evidence, the Hearing Officer finds the Agency’s discipline is reasonable.

⁶ Va. Code § 2.2-3005 and (c)(6)

⁷ *Rules for Conducting Grievance Hearings* VI(A)

⁸ *Rules for Conducting Grievance Hearings* VI(B)

After a thorough consideration of all the evidence, whether specifically mentioned or not, and based on her findings here, the Hearing Officer's decision is set forth below.

DECISION

Grievant engaged in the conduct alleged. It was misconduct and the discipline was consistent with policy/law and reasonable. Accordingly, the Hearing Officer upholds the Agency's discipline.

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
Departmental of Human Resource Management
101 N. 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 N. 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.⁹

Entered this 11th day of September, 2014.

Ternon Galloway Lee, Hearing Officer
cc: Agency Advocate/Agency Representative
Grievant
Hearings' Program Director of EDR

⁹ Agencies must request and receive prior approval from EDR before filing a notice of appeal.