

Issue: Group II Written Notice (client neglect); Hearing Date: 09/09/14; Decision Issued: 09/12/14; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10419; 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: 10419

Hearing Date: September 9, 2014
Decision Issued: September 12, 2014

PROCEDURAL HISTORY

On May 21, 2014, Grievant was issued a Group II Written Notice of disciplinary action for client neglect.

On June 13, 2014, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On August 4, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 9, 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 employs Grievant as a Certified Nursing Assistant at one of its Facilities.

The Facility provides patients with geriatric chairs. These chairs are large padded chairs with wheeled bases, and are designed to assist patients with limited mobility. The chairs are cushioned and recline. The chairs have locks to prevent the wheels and chairs from rolling.

The Patient is a 73 year old woman admitted to the Facility in 1959. She resides in the Facility's Geriatric Treatment Center. She is chronically psychotic with severe cognitive impairment and functions at a low intellectual level. She often uses a geriatric chair.

On May 7, 2014, Grievant assisted the Patient to move from her geriatric chair to a chair at a table. Once the Patient was in the other chair, Grievant nudged the geriatric chair and it rolled backwards a few inches and away from the table. Grievant helped the seated Patient move closer to the table. Grievant stood to the Patient's right side and assisted the Patient. After a few minutes, Grievant moved the seated Patient away from the table and turned the Patient's chair towards the geriatric chair. The Patient began moving out of her chair and towards the geriatric chair. She placed her left hand on the side arm of the geriatric chair in order to shift her weight from the chair into the geriatric chair. The wheels of the geriatric chair were not locked and the geriatric chair moved backwards as the Patient tried to move into the geriatric chair. Because the

geriatric chair rolled a few inches backwards, the Patient was unable to support her weight and fell to the ground. Grievant was standing behind the Patient. She reached down and placed her arms under the Patient's arms in order to help lift the Patient from the floor and into the seat next to the table. Another employee also helped Grievant lift the Patient into the chair.

The Agency's maintenance employees investigated whether the wheels to the geriatric chair were functioning properly. Based on their review of the geriatric chair, they concluded that the geriatric chair's wheel lock system was working properly.

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."¹ 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."

Va. Code § 37.2-100 provides:

"Neglect" 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 responsible for providing services to the Patient by ensuring the Patient's safety. Grievant knew the geriatric chair had wheels that could be locked to prevent it from rolling. She knew of the Agency's expectation that she lock the wheels to the geriatric chair to provide safety when transferring a patient into a geriatric chair. Grievant failed to lock all of the wheels to the geriatric chair as the Patient transferred from a chair at the table into the geriatric chair. Because the wheels were not locked, the geriatric chair rolled away from the Patient thereby resulting in the Patient falling to the floor. The fall to the floor could have hurt the Patient. The Agency has presented sufficient evidence to show that Grievant engaged in client neglect. The Agency mitigated the disciplinary action from a Group III offense to a Group II offense. The Group II Written Notice must be upheld.

Grievant argued that she locked the geriatric chair because the video of the incident showed her using her foot to lock the geriatric chair. The Patient's geriatric

¹ The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

chair had locking mechanisms on both side of the chair. In order to lock all of the wheels of the geriatric chair, Grievant would have had to depress a bar on the left side above a wheel and a bar on the right side above a wheel. Grievant did not depress bars on both sides of the chair and, thus, not all four wheels of the geriatric chair were locked. Grievant did not properly lock the Patient's geriatric chair.

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"² 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 further the disciplinary action.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action 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 Va. Code § 2.2-3005.

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.³

[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

³ Agencies must request and receive prior approval from EDR before filing a notice of appeal.