

Issue: Group III Written Notice with Termination (client neglect); Hearing Date: 10/22/14; Decision Issued: 10/23/14; Agency: DBDHS; AHO: Carl Wilson Schmidt, Esq.; Case No.10472; 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: 10472

Hearing Date: October 22, 2014

Decision Issued: October 23, 2014

PROCEDURAL HISTORY

On August 26, 2014, Grievant was issued a Group III Written Notice of disciplinary action with removal for client neglect.

On September 11, 2014, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On October 6, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 22, 2014, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Representative
Witness

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 Direct Support Staff II at one of its facilities. Grievant was responsible for providing assistance and support to residents at the Facility.

One of Grievant's duties was to make "bed checks" every 30 minutes. To complete a bed check, Grievant was supposed to enter the room of each resident as the resident slept and observe the resident to ensure that the resident was not in distress or otherwise requiring assistance. Once Grievant completed his bed checks, he was supposed to write his observation on the Night Shift PMP/Bed Check Schedule. He was to circle the preprinted number 99 to indicate that he performed a bed check.

Grievant began his shift at 10 p.m. on August 13, 2014. His shift ended at 6 a.m. on August 14, 2014. Grievant was supposed to complete bed checks for five residents during his shift. He did not perform bed checks at 2:30 a.m., 3 a.m., 3:30 a.m., and 4 a.m. because he was either asleep or less than alert. He circled the number 99 for each of five residents on the Night Shift PMP/Bed Check Schedule to suggest falsely that he had completed bed checks during those time periods.

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

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DI 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.

Client neglect is a Group III offense.¹ On August 14, 2014, Grievant was responsible for providing care to individuals with intellectual disabilities. He was obligated to check on five residents at the Facility every 30 minutes to ensure their safety. Grievant failed to perform bed checks every 30 minutes from 2:30 a.m. until 4 a.m. His failure to provide bed checks constituted client neglect there by 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 it was difficult to get his work done when individuals were awake. No evidence was presented showing that individuals were awake at the time Grievant was expected to perform bed checks.

Grievant argued that he was addressing other individuals at approximately 6 a.m. and, thus, could not make bed checks around that time period. The Agency did not take disciplinary action with respect to Grievant’s behavior after 4 a.m. What Grievant was doing after 4 a.m. does not affect the outcome of this case.

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

¹ See, Attachment A, DHRM Policy 1.40.

² Va. Code § 2.2-3005.

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.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.