

Issue: Group III Written Notice with Termination (client neglect); Hearing Date: 10/31/14; Decision Issued: 11/03/14; Agency: DBDHS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10473; 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: 10473

Hearing Date: October 31, 2014
Decision Issued: November 3, 2014

PROCEDURAL HISTORY

On August 18, 2014, Grievant was issued a Group III Written Notice of disciplinary action with removal for client neglect.

On September 12, 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 31, 2014, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Representative
Agency's 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 Direct Support Associate II at one of its facilities. Grievant's duties included providing assistance, support, and supervision of the Agency's clients. No evidence of prior active disciplinary action was introduced during the hearing.

The Resident was one of five residents living at the House at the Facility. He required monitoring by staff to ensure his health and safety. Residents living in the House had a diagnosis of autism and most including the Resident did not communicate using words. The five residents had to be transported to another location to perform their work duties.

On August 4, 2014, Grievant was the shift leader and responsible for supervising the two residents including the Resident at a House in the Facility. One of her duties included transporting residents from the House to their work location. At approximately 9:45 a.m., Grievant assisted with moving four residents from the House into a van to take them to work. Grievant forgot to have the Resident leave the House and enter the van. Grievant left the House with all of the residents except the Resident. The House was locked and the Resident would not have been able to exit the building in the case of an emergency.

At approximately 10:05 a.m., the Supply Supervisor entered the House and observed the Resident alone. The Supply Supervisor searched throughout the House

to locate any employee responsible for supervising the Resident. He was unable to locate any employee inside the House.

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. 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.

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 4, 2014, Grievant was responsible for ensuring the safety and well-being of the Resident. She left the Resident alone in the House thereby potentially jeopardizing his health and safety. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for client neglect. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, the Agency’s decision to remove Grievant must be upheld.

Grievant argued that she did not intend to leave the Resident behind. She was distracted by her concerns about inexperienced staff and completing paperwork. It is not necessary for the Agency to show that Grievant intended to neglect the Resident in order to establish client neglect.

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-

¹ See, Attachment A, DHRM Policy 1.40.

² 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.

Grievant argued that the disciplinary action should be mitigated because she was a good employee and the Agency could have issued a lesser disciplinary action to sanction her. These reasons do not provide a sufficient basis for the Hearing Officer to mitigate the disciplinary action. In light of the standard set forth in the Rules, 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.