

Issue: Group III Written Notice (sleeping during work hours); Hearing Date: 07/25/12;  
Decision Issued: 07/31/12; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.;  
Case No. 9851; 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: 9851**

Hearing Date: July 25, 2012

Decision Issued: July 31, 2012

#### **PROCEDURAL HISTORY**

On April 3, 2012, Grievant was issued a Group III Written Notice of disciplinary action for client neglect.

On April 4, 2012, 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 July 2, 2012, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 25, 2012, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
Grievant's Representative  
Agency Party Designee  
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 employs Grievant as a Forensic Mental Health Technician at one of its Facilities. The purpose of her position is:

To provide competent nursing care to an adult population ranging from ages 18 to 64 in the Forensic/civil setting to maintain a safe, clean, and therapeutic environment and to participate and encourage patients to participate in their prescribed treatment programs.<sup>1</sup>

No evidence of prior active disciplinary action was introduced during the hearing.

On January 25, 2012, Grievant was seated at a table in the day room. Attached to the day room were two hallways – hallway 1 and hallway 2. The two hallways formed a 90° angle with the desk where Grievant sat serving as the point in the middle of the angle. Grievant sat at the table and faced hallway 1. From that position, Grievant could see down the hallway 1 when looking forward. In order for Grievant to look down the hallway 2 from that position, Grievant would have had to turn her head to her left as far as her head could turn and look over her left shoulder or she would have had to turn her body to her left and face hallway 2.

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<sup>1</sup> Agency Exhibit 5.

Many of the patients at the Facility were sent to the Facility because of criminal behavior. The Facility's policy is not to permit patients to lock the doors to their rooms. This means that patients could awaken during the night, leave their rooms, enter another patient's room, and harm that patient. One of Grievant's duties was to look down each hallway to ensure that patients did not leave their rooms to enter the rooms of other patients.

A video recording of the day room on January 25, 2012 shows that from approximately 4:43 a.m., Grievant sat at the desk with her right elbow on the desk and her head resting on her right hand. She sat facing hallway 1. She displayed little or no movement until 5:01 a.m. She did not turn her head to her left and look over her left shoulder to look down a hallway 2. She did not turn her body to face hallway 2. During that time period, several patients walked through hallway 2. Grievant was not alert during that time period.

### **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 authorized removal for neglect. Va. Code § 37.2-100 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 can be a Group III offense.<sup>2</sup> Grievant was responsible for providing care to the Agency's mental health patients. She was responsible for watching patients walking through hallway 2. For over 18 minutes, Grievant did not turn her head to look over her left shoulder or turn her body to face hallway 2. A patient could have left her room, walked through hallway 2, and entered another patient's room without any chance of Grievant being able to observe and respond to the patient's action. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for client neglect.

Grievant argued that she was awake and alert. The Agency did not discipline Grievant for being asleep and it was not necessarily for the Agency to prove Grievant was asleep. The Agency has established that Grievant was not alert. Grievant argued that she could see to her left using her peripheral vision which was not obstructed by the hood on the coat she was wearing. Even if the Hearing Officer assumes for the

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<sup>2</sup> See, Departmental Instruction 201.

sake of argument that the hood on her coat did not block her peripheral vision, it would not have been possible for Grievant to see down hallway 2 given how her body was positioned at the table. To see down hallway 2, Grievant would have had to turn her head to her left and look over her left shoulder or have turned her body to face hallway 2. She did neither.

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 Employment Dispute Resolution...”<sup>3</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.

## DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group III 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 have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. 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

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<sup>3</sup> Va. Code § 2.2-3005.

101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by fax to (804) 371-7401, or email.

3. 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 the Office of Employment Dispute Resolution to 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 email 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 give a copy of all of your appeals to the other party and to EDR. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for 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>4</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>4</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.