

Issue: Group III Written Notice (sleeping during work hours); Hearing Date: 07/24/12;
Decision Issued: 07/26/12; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.;
Case No. 9855; 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: 9855

Hearing Date: July 24, 2012

Decision Issued: July 26, 2012

PROCEDURAL HISTORY

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

On April 16, 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 3, 2012, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 24, 2012, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
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 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.¹

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

On February 6, 2012, Grievant was assigned to sit at a post near a bathroom. She was responsible for maintaining the Bathroom Monitoring Sheet by writing down the names of patients and the times they entered and left the bathroom. Many of the patients at the Facility had been sent there because of criminal behavior. Grievant was responsible for patient safety by ensuring that patients who did not like one another did not enter the bathroom and remain there at the same time. A video recording of the morning of February 6, 2012 showed that from 4:40 a.m. until 5:15 a.m. Grievant was seated at a table slumped forward in her chair. Grievant displayed little or no movement during that time. The video showed several patients entering and leaving the bathroom from 4:40 a.m. through 5:15 a.m. For example, one patient entered at approximately 5

¹ Agency Exhibit 5.

a.m. and left at approximately 5:07 a.m. (without obtaining a towel.) Grievant did not make any entries in the Bathroom Monitoring Sheet regarding this patient. Grievant was not alert while working at her post.

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.² Grievant was responsible for providing care to the Agency’s mental health patients. She was responsible for ensuring patient safety by monitoring the times patients entered and exited the bathroom at the Facility. On February 6, 2012 from approximately 4:40 a.m. through 5:15 a.m., Grievant was not alert at her post in front of the entry to the bathroom. Grievant displayed little or no movement for over 30 minutes without making entries on her Bathroom Monitoring Sheet even though several patients entered the bathroom. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice of disciplinary action for client neglect.

Grievant argued that she did not make entries onto the log because she was responsible only for recording when patients entered the bathroom and not when they entered the shower. Grievant argued that Ms. C was responsible for recording when patients entered the shower. She contends that she was alert. This argument fails. The shower and bathroom were located inside the entryway monitored by Grievant. The video shows patients who obtained towels and patients who did not obtain towels. Patient who obtained towels were using the shower. If the Hearing Officer assumes for the sake of argument that Grievant was only responsible for recording the activity of patients who entered the bathroom and did not use the showers, the video shows patients without towels passing in front of Grievant and entering the bathroom. The evidence is sufficient for the Hearing Officer to conclude that Grievant was not alert because she failed to record the entry and exit of patients going to the bathroom and not the showers.

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

² See, Departmental Instruction 201.

“in accordance with rules established by the Department of Employment Dispute Resolution...”³ 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
101 North 14th St., 12th 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

³ Va. Code § 2.2-3005.

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 email 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 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.⁴

[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

⁴ Agencies must request and receive prior approval from EDR before filing a notice of appeal.