



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11388

Hearing Date: September 19, 2019
Decision Issued: October 8, 2019

PROCEDURAL HISTORY

On May 20, 2019, Grievant was issued a Group III Written Notice of disciplinary action with removal for client neglect.

On May 29, 2019, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On June 24, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 19, 2019, 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. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. 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 DSA II at one of its facilities. No evidence of prior active disciplinary action was introduced during the hearing.

The Patient was a 78 year old woman with a history of falling and being injured from the falls. The Patient had suffered a hemorrhage in March 2019 resulting from a fall. Dr. V ordered:

1:1 supervision to prevent unassisted ambulation and falls.¹

On April 30, 2019, Grievant was assigned a one-to-one relationship with the Patient. Grievant understood that ambulation meant to have one's hands on a patient.

Grievant and the Patient walked in the hallway towards the Patient's room. Grievant walked three to four feet in front of the Patient. Grievant and the Patient entered the Patient's room. The Grievant left the room and so did the Patient.

Grievant and the Patient began walking towards the Dayroom. The Patient turned around too quickly and lost her balance. She fell on her rear end and back. At the time

¹ Agency Exhibit 3. p. 43.

the Patient fell, Grievant was approximately eight or ten feet away from the Patient. Grievant was unable to catch or break the fall of the Patient because she was not close to the Patient. Grievant yelled for help and other staff came to provide assistance.

Grievant called the LPN as a witness. The LPN understood a one-to-one relationship to mean “right there with the patient at all times. Right beside patient; within hand reach.”

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 defines Neglect as:

The failure by an individual, 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.

“[N]eglect of clients” is a Group III Offense. On April 30, 2019, Grievant was in a one to one relationship with the Patient and was supposed to be beside the Patient to assist in the case the Patient fell. The Patient fell and Grievant was several feet away from the Patient at that time and unable to assist the Patient. Grievant failed to provide services necessary to the safety of the Patient thereby engaging in client neglect. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. 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 complied with the requirement for her to be in a one-to-one relationship because she was within the line-of-sight of the Patient. She pointed out that the definition of one-to-one meant:

Staff member constantly had patient within line-of-sight, with distance between staff and patient based on clinical judgment and assessment of patient risk.

Although Grievant was within the line-of-sight of the Patient, the definition of a one-to-one relationship included distance based on clinical judgment and assessment of patient risk. Dr. V’s order establishes that distance with the word “ambulation” which Grievant understood to be beside the Patient. No evidence was presented to suggest that being approximately eight to ten feet away would meet the standard of a one to one relationship.

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 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 request an administrative review by EDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EDR within 15 calendar days of the date the decision was issued.

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 must also provide a copy of your appeal to the other party 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.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a

² Va. Code § 2.2-3005.

specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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.^[1]

[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

^[1] Agencies must request and receive prior approval from EDR before filing a notice of appeal.