

Issue: Group III Written Notice with Termination (client neglect); Hearing Date: 07/11/16; Decision Issued: 07/15/16; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10827; Outcome: Partial Relief.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10827

Hearing Date: July 11, 2016

Decision Issued: July 15, 2016

PROCEDURAL HISTORY

On May 9, 2016, Grievant was issued a Group III Written Notice of disciplinary action with removal for client neglect.

On May 11, 2016, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On June 1, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 11, 2016, 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 employed Grievant as a Direct Support Associate 2 at one of its Facilities. The purpose of his position was:

This position serves as a lead worker or shift leader for a shift in an individual home. This position supports the facility's mission by working within a person-centered educational model as a member of an integrated team to provide support, education/training, and supervision of individuals with intellectual disabilities, autism, and other disabilities, and to collect and record data and document services provided to these individuals. Individual support, training, and supervision is performed in the house, on-campus training and leisure sites, on the Center grounds, and off-campus in leisure, training, and employment skills. Medication administration to assigned persons as needed.¹

Grievant had prior active disciplinary action. He received a Group III Written Notice with a three workday suspension on February 1, 2016.

The Resident and four other residents lived in the Housing Building. One of the residents required "in-sight" supervision. The others required "General" supervision.

¹ Agency Exhibit 10.

The Facility used a “Daily House Schedule” to identify which employee was assigned responsibility to supervise a particular resident, if that resident required supervision.

Grievant was responsible for reviewing the Daily House Schedule and assigning employees to supervise residents in the Housing Building. Grievant had two employees reporting to him. Grievant reviewed the Daily House Schedule but failed to recognize that only one resident required in-sight supervision. He believed that two of the residents required in-sight supervision. Grievant assigned himself responsibility for giving medication to residents. He thought that if he assigned his two staff to supervise each of the two residents requiring in-sight supervision, he would not have any staff to supervise the remaining residents. As a result, he decided staff would have general responsibility for supervising all of the five residents in the Housing Building.

Staff were required to check residents in the Housing Building every 15 minutes. Checking a resident meant observing a resident in order to determine the resident’s physical status.

The Resident sometimes needed to get away from other residents so he would enter the family room and remain there by himself. On April 16, 2016, the Resident entered the family room at 12:24 p.m. The door closed. The Resident remained in the family room by himself. At approximately 1:45 p.m., the Resident was found unresponsive. At 2:46 p.m., the Resident was pronounced deceased. No staff conducted a check of the Resident for one hour and 21 minutes.

The Agency investigated the incident and took disciplinary action against Grievant but took no action against his two subordinates.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “include acts of minor misconduct that require formal disciplinary action.”² Group II offenses “include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action.” Group III offenses “include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.”

“[U]nsatisfactory work performance” is a Group I offense.³ In order to prove unsatisfactory work performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

² The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

³ See Attachment A, DHRM Policy 1.60.

One of Grievant's duties was to assign staff to supervise residents in the Housing Building. On April 16, 2016, Grievant failed to properly assign any staff to supervise the Resident. His failure to assign staff was unsatisfactory to the Agency thereby justifying the issuance of a Group II offense.

In rare circumstances, a Group I may constitute a Group II where the agency can show that a particular offense had an unusual and truly material adverse impact on the agency. Should any such elevated disciplinary action be challenged through the grievance procedure, management will be required to establish its legitimate, material business reason(s) for elevating the discipline above the levels set forth in the table above. In this case, Grievant's failure to assign staff undermined the Agency's ability to monitor the health and welfare of its residents. Sufficient evidence has been presented to elevate the disciplinary action from a Group I to a Group II Written Notice.

Upon the accumulation of an active Group III Written Notice, any additional disciplinary action provides a basis for removal. Grievant has accumulated a Group III Written Notice and a Group II Written Notice. Accordingly, Grievant's removal must be upheld.

Grievant argued that the Agency was obligated to keep open the door to the family room. The door was a "fire door" meaning it had to be closed in case of fire in order to ensure the safety of residents and staff in the Housing Building. The Agency explained that it was the process of evaluating the need for and implementing a system which would hold the door to the family room open but the door would close in the event of an earthquake or other catastrophe. Grievant's argument is not persuasive. The Agency had discretion as to whether it wanted to let the door close regularly or hold it open. The Agency chose to have the door close automatically. The Agency's expectation that the Resident would be checked every 15 minutes did not depend on the existence of equipment holding open the door to the family room.

The Agency argued that Grievant engaged in neglect, a Group III offense. Neglect is defined 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.

Grievant assigned himself responsibility for passing out medication to residents and he complied with those responsibilities. In this case, Grievant did not fail or neglect to provide services to the Resident. He failed to assign other staff to provide those services to the Resident. When the facts of this case are considered as a whole, Grievant's behavior is better described as a failure to properly manage his subordinates rather than the failure to provide direct services to the Resident.

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”⁴ 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.

The Agency asserted that Grievant was responsible for client neglect because he failed to perform 15 minute checks of the Resident. If the Agency adopts this theory of discipline, then mitigating circumstances would exist to reduce the disciplinary action. Grievant’s duty to conduct 15 minute checks of the Resident would not be different from the duty of the other two staff to conduct 15 minute checks of the Resident. The other two staff did not conduct checks of the Resident but received no disciplinary action. Grievant was singled out for disciplinary action. Under this theory, there would be a basis to reduce the discipline to less than a Group III Written Notice.

Under the disciplinary theory of poor supervision, there would be no basis to further 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 **reduced** to a Group II Written Notice. Grievant’s 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:

⁴ Va. Code § 2.2-3005.

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.⁵

[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

⁵ Agencies must request and receive prior approval from EDR before filing a notice of appeal.