

Issue: Group III Written Notice (client neglect); Hearing Date: 07/25/16; Decision Issued: 08/03/16; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10835; 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: 10835

Hearing Date: July 25, 2016
Decision Issued: August 3, 2016

PROCEDURAL HISTORY

On March 8, 2016, Grievant was issued a Group III Written Notice of disciplinary action for client neglect.

On March 28, 2016, 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 June 21, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 25, 2016, 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. 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 DSA II at one of its facilities. No evidence of prior active disciplinary action was introduced during the hearing.

The Resident required a one-to-one relationship at all times during his waking hours regardless of where he was located. In a one-to-one relationship, an employee must remain within arm's length of the Resident at all times.

On Monday February 15, 2016, the weather was cold and snowing. The Facility staff concluded that the Resident should be taken to the Emergency Department of the local Hospital. The Resident was transported by ambulance to the local Hospital Emergency Department. The Resident arrived a few minutes before 10 p.m. He was placed in one of several bays. The bay had a curtain for privacy.

On February 15, 2016, Grievant was working the second shift and expected to continue working into the third shift.¹ The Facility Scheduler selected Grievant to go to the Hospital to be in a one-to-one with the Resident. Grievant did not want to go to the Hospital because of the inclement weather. She was concerned for her safety. The Facility assigned a Facility police officer to drive Grievant to the Hospital. Grievant

¹ The second shift ended at 11:30 p.m. The third shift began at 11 p.m. allowing a half hour for staff from the second shift to brief staff on the third shift.

refused to go to the Hospital. The Manager told Grievant she could either go to the Hospital or go home. Grievant decided to go to the Hospital.

Grievant arrived at the Hospital at approximately 10 p.m. She assumed responsibility for the Resident. Hospital staff concluded it was necessary for the Resident to have x-rays taken. An employee from the x-ray unit came to the bay. Grievant asked the X-Ray Employee if she needed to go with the X-Ray Employee. The X-Ray Employee said “no”. The X-Ray Employee told Grievant of a location where she could make her cell phone calls privately. The X-Ray Employee rolled the Resident from the bay and around a corner several hundred feet away to have x-rays completed.

When the Resident left the bay, Grievant left the area where the bay was located and walked out into the lobby. Grievant did not obtain permission from the Hospital Nurse to leave the bay area.²

After approximately ten minutes, the Resident was rolled back to the bay. Grievant was not present when the Resident returned. The Resident was unsupervised. A Hospital Nurse called the Facility to complain about Grievant’s loud voice, cursing, use of cell phone and failure to monitor the Resident. Approximately ten to fifteen minutes after the Resident returned to the bay, Grievant returned to the bay and resumed supervising the Resident.

Facility staff contacted another employee and asked that employee to go to the Hospital to relieve Grievant. That employee arrived at the Hospital and Grievant left the Facility.

For approximately two to three hours, Grievant was at the Hospital with the Resident. During that time, on three or four occasions the Nurse observed Grievant speaking on her personal cell phone while Grievant was supposed to be attentive to the Resident. Grievant made calls to her Supervisor.

The Agency’s policy was that employees could not use their personal cell phones while working with residents. An employee in a one-to-one relationship would not be able to focus on the resident while talking on a cell phone.

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:

² Grievant was advised that, “Arrange with the Nurse (no CNA or secretary) assigned to your individual a time when you can take a break/lunch. They must provide coverage of their choice while you are gone.” See, Agency Exhibit 6.

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 was assigned responsibility to be in a one-to-one relationship with the Resident. She was to remain within arm's length of him. When the X-Ray Employee took the Resident and then returned him to the bay, Grievant was not within arm's length of the Resident. The Resident was not under anyone's supervision for approximately ten to fifteen minutes after he was returned to the bay. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for client neglect.

Grievant argued that she was relieved by Hospital staff. The evidence showed that the X-Ray Technician was not an employee authorized to relieve Grievant of her duties.

Grievant argued that the Resident was not left alone for approximately ten to fifteen minutes when he was returned to the bay. The Agency presented credible testimony of a witness who stated that the Resident remained in the bay for approximately ten to fifteen minutes until Grievant returned. Grievant did not testify in this case. She did not present sworn testimony to rebut the testimony of the Agency's witness. Insufficient evidence exists for the Hearing Officer to conclude that Grievant returned to the bay at the same time the Resident returned to the bay.

Grievant argued that it was inappropriate for the Agency to send her to the Hospital rather than two other employees who were better suited to go. The evidence showed that the Agency's decision to send her to the Hospital was logical and appropriate.

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"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

³ Va. Code § 2.2-3005.

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 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.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.