



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 12076

Hearing Date: March 18, 2024

Decision Issued: March 25, 2024

PROCEDURAL HISTORY

On December 21, 2023, Grievant was issued a Group III Written Notice of disciplinary action with removal for client neglect.

On January 17, 2024, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On February 5, 2024, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 18, 2024, a hearing was held by video conference.

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. 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 Psychiatric Technician III at one of its locations. She had been employed by the Agency for approximately three years. Grievant received an overall rating of Contributor on her 2023 annual performance evaluation. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant received training regarding high risk patients and Therapeutic Options of Virginia. She understood her obligations when assigned to a one-to-one relationship with a patient.

The Patient had a history of swallowing things. Grievant was aware of that history.

Grievant was working in the Building Dayroom on October 22, 2023. She was assigned to a one-to-one relationship with the Patient from 5:30 p.m. to 6:29 p.m. She was required to always keep the Patient in her line-of-sight except when the Patient was dressing, showering, or toileting. By keeping the Patient in her line-of-sight, Grievant could respond immediately if the Patient took action to harm herself or others.

The Patient was in the Dayroom. Grievant was seated at the staff table. At approximately 6:23 p.m., Grievant stood up at the staff table and walked down a hallway

away from the Dayroom. She had her back to the Patient as she walked and remained away from the Patient such that she was unable to see the Patient. A few minutes later, Grievant returned to the Dayroom carrying linens. Grievant sat down at the staff table. The Patient began walking around the Dayroom and walked behind Grievant. Grievant did not turn around to watch the Patient. The Patient removed a marker pen from a cart located behind Grievant.

Grievant escorted the Patient back to her room. The Patient swallowed the pen. Grievant was within the line-of-sight when the Patient swallowed the pen but Grievant did not see the Patient's action. The Patient did not have a gag reflex or make a sound indicating she had swallowed an object. Grievant learned the Patient had swallowed the pen when the Patient asked Grievant to turn on the lights because she had swallowed a pen. Grievant reported the Patient's statement to a nurse who called the Doctor.

The Agency conducted an investigation. The Agency believed the failure to maintain line-of-sight in a one-to-one relationship was neglect because the Patient could have harm herself or others.

The Agency considered mitigating the disciplinary action but decided not to do so because Grievant had received a Notice of Improvement Needed/Substandard Performance on April 18, 2022.

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."¹ 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."

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 disciplined severely. Departmental Instruction ("DI") 201 defines Neglect as:

This means the failure by a program, or facility operated 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 an individual receiving care or treatment for mental illness, development disability, or substance abuse.

¹ The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

On October 22, 2023, Grievant was in a one-to-one relationship with the Patient. She was required always to keep the Patient in her line-of-sight to ensure the welfare of an individual receiving treatment for mental illness. Grievant failed to do so. Grievant gave the Patient an opportunity to harm herself or others. Indeed, the Patient was able to take a pen from a cart which she later swallowed and harmed herself. If Grievant had watched the Patient at all times, Grievant would have seen the Patient take the pen and could have immediately removed it from the Patient. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for patient neglect. 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 was not neglectful from 5:30 p.m. to 6:29 p.m. on October 22, 2023. The Agency has presented sufficient evidence to support its issuance of a Group III Written Notice.

Grievant argued that the Patient did not swallow the pen in her line-of-sight. She said the Patient, "turned off the light, laid down in the bed with [her] back turned to me and swallowed the pen." The Hearing Officer can assume for the sake of argument that Grievant was not responsible for the Patient swallowing the pen because the Patient hid her behavior from Grievant. There remains sufficient evidence to support the issuance of disciplinary action because Grievant was in a position to prevent the Patient from obtaining the pen.²

Grievant presented evidence regarding her prior work performance and work ethic. She was liked by other employees and had positive interaction with many patients. Grievant received an overall rating of "Contributor" on her 2023 annual performance evaluation. This favorable work performance, however, does not outweigh Grievant's patient neglect.

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

² Grievant wrote in her due process response, "[t]he incident that occurred could have been avoided by not letting the patient out of my sight. I have learned greatly from this event."

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 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 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]

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

[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