

Issue: Group III Written Notice with Termination (client neglect); Hearing Date: June 11, 2002; Decision Date: June 12, 2002; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; AHO: Carl Wilson Schmidt, Esquire; Case Number: 5446



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5446

Hearing Date: June 11, 2002
Decision Issued: June 12, 2002

PROCEDURAL HISTORY

On March 8, 2002, Grievant was issued a Group III Written Notice of disciplinary action with removal for:

Violation D.I. 201, Reporting and Investigation Abuse and Neglect of Clients, as defined in Section 201-3 for substantiated allegation of neglect. The investigation substantiated the allegation that you were neglectful when you failed to immediately notify the charge nurse and your post relief of one client's detailed account of another client's threat to harm self. The client succeeded in carrying out the threat sustaining significant injuries.

On March 28, 2002, Grievant timely filed a grievance to challenge the disciplinary action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On May 13, 2002, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 11, 2002, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant

Agency Party Designee
Legal Assistant Advocate
Employee M
Charge Nurse
Investigator
Facility Director

ISSUE

Whether Grievant should receive a Group III Written Notice of disciplinary action with removal.

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 Mental Health Mental Retardation and Substance Abuse Services employed Grievant as a Forensic Mental Health Technician until his removal on March 8, 2002. Grievant had a favorable work performance record. He received a Group I Written Notice on March 3, 2000 for unsatisfactory attendance. He received another Group I Written Notice on July 29, 2000 for unsatisfactory attendance.

The Agency's Facility treats individuals with mental illness including patients who have been charged with crimes but have been determined to be incompetent to stand trial or found not guilty by reason of insanity. The Facility staff refer to these patients as their clients.

Client F has a history of attempting to injure himself. On a prior occasion, he successfully removed a light bulb from a light fixture and cut himself. He is subject to an Aggression Management Plan in order to improve his behavior. For example, when Client F curses or yells or is otherwise disruptive, a staff member can activate his plan by asking him if he needs a time out. A time out is a period of approximately ten minutes during which Client F can yell and scream in an empty room until he calms down. If he says he does not want a time out, the staff member determines if a

response team should be called to assist in having Client F proceed with a time out. Further actions may be taken under the Aggression Management Plan depending on Client F's improvement in behavior.

On December 28, 2001 in the early morning, Grievant was working as a hall monitor. His post was at one end of the hall. Along the hall were client rooms. At the opposite end of the hall was a dayroom. At approximately 1:42 a.m., Client S sat next to Grievant and began speaking with him. At approximately 1:53 a.m., Employee M walked from the dayroom down the hall to Grievant and told Grievant that she was concerned about Client F because Client F had been in the bathroom for an excessive number of minutes. Employee M asked Grievant to check on Client F in the bathroom. Client S was sitting next to Grievant when Employee M expressed her concerns. Client S said words to the effect that Client F was going to cut himself. Grievant described Client S's comments as Client F threatened to "snatch a light from the ceiling and cut himself, because that would get him more medicine." Grievant immediately got up and walked to the bathroom to check on Client F.

At approximately 2:21 a.m., Client F approaches Grievant and asked Grievant when he was off of his shift. Grievant responded and then Client F said, "Because whatever I do, I don't want you to think it's against you." Client F added, "I asked that 'B-t-h' for some medicine and she won't even give me any." Upon hearing this, Grievant stood up and walked down the hall to the nursing station where the Charge Nurse was working. He informed the Charge Nurse that Client F seemed agitated and had made a comment to Client S warning that he was going to act out. Within a minute or two of this conversation, other staff found Client F in the bathroom with a broken light bulb stabbing himself in the arms. A response team was called and the crisis was addressed.

CONCLUSIONS OF LAW

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 client neglect as:

Neglect means failure by an individual, program or facility responsible for providing services to provide 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.

DI 201 states, "It is expected that a facility director will terminate an employee(s) found to have abused or neglected a client."

Grievant was responsible for providing care to Client F. Client F was an individual receiving care or treatment for mental illness, mental retardation or substance abuse. In order to properly care for Client F, Grievant should have timely reported any

information he had about whether Client F intended to hurt himself. If Grievant had immediately reported the threat to his supervisor, the Charge Nurse, the Charge Nurse could have implemented Client F's Aggression Management Plan and possibly stopped Client F from injuring himself. Waiting for approximately 30 minutes before reporting the concern to the Charge Nurse is an excessive period of time, thereby justifying issuance of a Group III Written Notice for client neglect.

Grievant argues that Client S did not tell him at approximately 1:53 a.m. that Client F was going to injure himself. Grievant contends that Client S told Employee M separately of the threat and that Grievant did not learn of the threat until four or five minutes before Client F injured himself. Thus, he timely reported the threat to the Charge Nurse. Grievant's argument fails for several reasons. First, Employee M testified credibly that she learned of the threat from Client S at the same time Grievant learned of the threat. Second, the tapes do not show Employee M speaking with Client S during the time of 1:30 a.m. to 1:53 a.m. Employee M's first concern about Client F was at 1:51 a.m. and her concern was about why Client F was taking so long in the bathroom and not about whether Client F intended to harm himself. Third, the tapes show Employee M speaking with Grievant while Client S is seated next to Grievant. This is the most likely time when Client S informed them of the threat.

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

As Sections 7.1 through 7.3 of the Grievance Procedure Manual set forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review – This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.
2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resource Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy.

3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **10 calendar** days of the **date of the original hearing decision**. (Note: the 10-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 10 days; the day following the issuance of the decision is the first of the 10 days). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 10 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

Carl Wilson Schmidt, Esq.
Hearing Officer