

Issue: Group III Written Notice with Termination (client abuse); Hearing Date: June 7, 2002; Decision Date: June 18, 2002; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; AHO: Carl Wilson Schmidt, Esquire; Case Number: 5450



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5450

Hearing Date: June 7, 2002
Decision Issued: June 18, 2002

PROCEDURAL HISTORY

On April 16, 2002, Grievant was issued a Group III Written Notice of disciplinary action with removal for:

Client Abuse: Based on findings of Investigation #707-2002-0016 as confirmed by the Department of Mental Health, Mental retardation and Substance Abuse Services (DMHMRSAS) Central Office.

On April 26, 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 she requested a hearing. On May 21, 2002, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 7, 2002, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Representative
Registered Nurse

Critical Care Nurse
Respiratory Care Practitioner
Administrative Investigator
Facility Director
Registered Nurse Manager I
Psychologist

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 direct care worker for approximately 26 years until her removal on April 16, 2002. She was a good employee who enjoyed her work. She provided direct care services to patients at the Agency's Facility. These patients are referred to as clients. Many of the clients are individuals with significant retardation who require constant supervision and attention.

The Client was admitted into the local hospital. She was placed in soft wrist restraints. Three tubes were attached to her to provide for feeding, oxygen, and other needs. Monitors measured the Client's condition. The restraints were intended to prevent the Client from removing the tubes. She received constant care from hospital nursing and other staff.

Grievant worked the midnight shift beginning on March 21, 2002 and ending on March 22, 2002. She volunteered to attend to the Client who was hospitalized because she had a good relationship with the Client and enjoyed caring for her. Grievant sat in a chair inside the Client's hospital room. Her role was to provide a familiar face to the

Client and to carryout any instructions from the hospital staff. Hospital staff were the Client's primary caregivers while the Client was in the hospital.

At approximately 3 a.m. on March 22, 2002, the hospital Respiratory Care Practitioner entered the Client's room and noticed that the Client had slid downward in the bed and pulled two of the three tube out from her body.¹ Grievant had fallen asleep and did not notice the Client's movements. The Respiratory Care Practitioner quickly contacted the Critical Care Nurse who notified the Registered Nurse and they went into the Client's room. They turned on the bright overhead light in the Client's room, but Grievant remained asleep. After attending to the Client, Grievant remained asleep so the Registered Nurse said words to the effect of "Ma'am, you're going to have to wake up!" Grievant jumped out of the chair and was ready to assist.

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.

If Grievant had been observing the Client, Grievant would have seen the Client attempt to remove her treatment tubes and could have warned hospital staff so that they could have prevented the removal. By falling asleep, Grievant was unable to do this. Her behavior constitutes client neglect.

Corrective action may be reduced based on mitigating circumstances. Mitigating circumstances include: (1) conditions related to an offense that justify a reduction of corrective action in the interest of fairness and objectivity, and (2) consideration of an employee's long service with a history of otherwise satisfactory work performance. P&PM § 1.60(VII)(C)(1).

There are several reasons to mitigate Grievant's removal. First, Grievant's role working at the hospital was substantially different from her role while working at the Agency's Facility. While working at the Facility, Grievant was actively engaged in providing direct care to clients. While working at the hospital, her role was to provide a familiar face for the Client and to take any actions as requested by the hospital staff.

¹ The Respiratory Care Practitioner informed the Agency's Investigator that the "patient was not properly restrained."

Her role at the hospital was passive.² Hospital staff described her (and others from the Facility serving similar roles) as a “sitter.” Second, the Facility’s practice is to discipline first instances of sleeping with a Group III Written Notice and ten days suspension. Third, Grievant has approximately 26 years of good work performance without any prior disciplinary action.

Although the Hearing Officer upholds the Agency’s issuance of a Group III Written Notice, the Hearing Officer will reinstate Grievant. Because of the seriousness of Grievant’s actions, the Hearing Officer will not award back pay.

Grievant contends that she should not be found to have engaged in client neglect because the Investigator concluded the allegation against her was unfounded and the Central Office overturned that conclusion without conducting any additional investigation. This argument is untenable. The Investigator concluded that the allegation was unfounded not based on Grievant’s behavior but based on the Facility’s practice of treating first instances of sleeping as a Group III offense with ten day suspension. Whether an employee engages in client abuse depends solely on the employee’s behavior. How to discipline an employee is addressed only after first concluding that the employee engaged in client neglect. The Central Office’s conclusions were appropriate under the facts of this case.

Grievant contends she was not asleep but was lightly dozing. The evidence, however, showed that Grievant was sound asleep.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group III Written Notice of disciplinary action is **upheld** except that the Agency’s removal of Grievant is **reversed**. The Agency is directed to **reinstate** the Grievant to her former position or, if occupied, to an objectively similar position. GPM § 5.9(a). No back pay is awarded.

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.

² The Agency offered a hospital policy defining the role of Agency staff at the hospital. The policy was never provide to Grievant and it does not appear that Agency staff were familiar with the policy since it was discovered only after the Agency had completed its initial investigation. The Hearing Officer gives little weight to this policy. See, Agency Exhibit 2.

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

