

Issue: Group III Written Notice with termination (client abuse and neglect); Hearing Date: 03/12/04; Decision Issued: 03/15/04; Agency: DMHMRSAS; AHO: Carl Wilson Schmidt, Esq.; Case No. 606



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 606

Hearing Date: March 12, 2004
Decision Issued: March 15, 2004

PROCEDURAL HISTORY

On December 19, 2003, Grievant was issued a Group III Written Notice of disciplinary action with removal for client abuse and neglect. On January 13, 2004, 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 February 17, 2004, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 12, 2004, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Representative
Witnesses

ISSUE

Whether Grievant should receive a Group III Written Notice of disciplinary action with removal for client abuse and neglect.

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 at one of its facilities until her removal on December 19, 2003. On August 22, 2003, Grievant received a Group II Written Notice.¹

On November 3, 2003, Grievant poured a poisonous local medication called Hibiclens² into a cup, and then left the medication on a dresser in the bathroom unattended. Grievant yelled to a co-worker that the medication had been poured. The co-worker did not hear Grievant and did not know the medication had been poured. Pouring medication and leaving it in an open area for another employee to access, is not authorized by Facility policy.³ A Client entered the bathroom and observed the cup. He took a drink from the cup, made a “hacking” noise, and made a face suggesting he disliked the taste of what he drank.

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 defines⁴ client abuse as:

Abuse means any act or failure to act by an employee or other person responsible for the care of an individual that was performed or was failed

¹ Agency Exhibit 10.

² Hibiclens is an antiseptic antimicrobial skin cleanser. It can be used as a surgical scrub, as a health-care personnel hand wash, for patient preoperative showering and bathing, as a patient preoperative skin preparation and as a skin wound cleanser and general skin cleanser.

³ Facility policy requires that medications should be kept in a locked cabinet at all times except when an employee is pouring a medication. See Agency Exhibit 4.

⁴ See, *Va. Code* § 37.1-1 and 12 VAC 35-115-30.

to be performed knowingly, recklessly or intentionally, and that caused or might have caused physical or psychological harm, injury or death to a person receiving care or treatment for mental illness, mental retardation or substance abuse.

For the Agency to meet its burden of proof in this case, it must show that (1) Grievant engaged in an act that she performed knowingly, recklessly, or intentionally and (2) Grievant's act caused or might have caused physical or psychological harm to the Client. It is not necessary for the Agency to show that Grievant intended to abuse a client – the Agency must only show that Grievant intended to take the action that caused the abuse. It is also not necessary for the Agency to prove a client has been injured by the employee's intentional act. All the Agency must show is that the Grievant might have caused physical or psychological harm to the client.

Grievant intentionally placed a cup of Hibiclens in a location that could be accessed by clients and then abandoned control of the Hibiclens. Grievant's actions were reckless because she knew or should have known that the clients she served would not be able to exercise judgment to refrain from consuming a substance unknown to them. Because the Hibiclens was left unattended, the Client consumed it thereby ingesting a poison. Ingesting a poison may cause physical or psychological harm to the Client. Accordingly, the Agency has presented sufficient facts to support its issuance of a Group III Written Notice with removal.

Grievant contends that her actions were consistent with the Facility practice of pouring medications and leaving them for a co-worker to obtain and administer the medication. The evidence presented, however, showed that leaving medications unattended was not the Facility's practice and that leaving medications unattended is contrary to policy.

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 file an administrative review request within **10 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.

2. 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

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to 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:

Director
Department of Employment Dispute Resolution
830 East Main St. STE 400
Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 10 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 10-calendar day period has expired, or when administrative requests for 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].

Carl Wilson Schmidt, Esq.
Hearing Officer

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