

Issue: Group III Written Notice with termination (client neglect); Hearing Date:  
07/06/04; Decision Issued: 07/08/04; Agency: DMHMRSAS; AHO: Carl Wilson  
Schmidt, Esq.; Case No. 745



***COMMONWEALTH of VIRGINIA***  
***Department of Employment Dispute Resolution***

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 745**

Hearing Date: July 6, 2004  
Decision Issued: July 8, 2004

**PROCEDURAL HISTORY**

On April 29, 2004, Grievant was issued a Group III Written Notice of disciplinary action with removal for:

*Termination for violation of Departmental Instruction 201, Reporting and Investigating Abuse and Neglect of Individuals Residing in Departmental Facilities.*

On May 10, 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 May 27, 2004, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The hearing was originally scheduled for June 28, 2004 but because of the illness of a family member Grievant sought a continuance. The Hearing Officer found just cause and granted Grievant's request. On July 6, 2004, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Agency Party Designee

Agency Advocate  
Witnesses

## **ISSUE**

Whether Grievant should receive a Group III Written Notice of disciplinary action with removal for client 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 as a Human Services Care Worker (HSCW) for approximately three and a half years until her removal on April 29, 2004. The purpose of her position was to:

Provide direct care for assigned clients of [Facility] by assisting with all phases of general hygiene and daily living. Places emphasis on maintaining the self-esteem and personal dignity while increasing the self-reliance of clients.<sup>1</sup>

On February 13, 2004, Grievant received a Group I Written Notice for unsatisfactory attendance. She received another Group I Written Notice for unsatisfactory attendance on March 2, 2004.<sup>2</sup>

Grievant began her shift at 3:12 p.m. on March 16, 2004. At approximately 4:30 p.m., she asked her supervisor if she could leave early. At approximately 8:30 p.m., Grievant again asked her supervisor if she could leave early. The Supervisor said

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<sup>1</sup> Agency Exhibit 10. Employee Work Profile.

<sup>2</sup> Agency Exhibit 9.

Grievant could leave after all of the staff had completed their work which would be sometime around 9 p.m.

Grievant was assigned four clients. She performed feeding for a fifth client, Client Da. These clients are non-verbal and/or non-ambulatory. All of the clients have an age equivalency of eleven months or lower. They rely entirely on staff for their personal care such as bathing, personal hygiene, and feeding.

Grievant walked away from her work area at least two times during the evening of March 16, 2004 without telling other staff. She left her four clients unattended during that time.

Client Do and Client Da require adaptive equipment to be fed. Grievant fed Client Do and Client Da but did not use their adaptive equipment or clothing protectors to do so.<sup>3</sup>

Grievant did not bathe Client R, Client W, Client P, and Client Do. Shortly after Grievant left the Facility, Supervisor B checked all four clients and concluded that Grievant had not bathed the clients. She instructed her staff to bathe the clients.

Grievant did not change the clothing of Client R, Client W<sup>4</sup>, and Client Do prior to their going to bed. Grievant undressed and changed Client P in the dayroom. Clients are supposed to be changed in areas offering privacy such as bathrooms or with a curtain around the client. The dayroom does not offer this type of privacy.

### **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 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."

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<sup>3</sup> One employee observed Grievant feeding Clients Da and Do. She stated that Grievant "took the plate off the tray and fed him standing up." Agency Exhibit 3.

<sup>4</sup> Client W was found in bed in a T-shirt and Depends but no pajamas.

Grievant neglected Client Do and Da because she did not properly feed them by using adaptive equipment. Grievant neglected Client R, Client W, Client P, and Client Do because she did not bathe them before they were to go to bed. Grievant neglected Client R, Client W, and Client Do because she failed to provide them with clean clothing prior to their going to bed. Grievant failed to respect the privacy of Client P by changing him in the dayroom. Based on the evidence presented, the Agency has established the basis for issuance of a Group III Written Notice with removal. Grievant has not presented sufficient evidence of any mitigating circumstances.

Grievant contends she bathed the four clients and properly changed them.<sup>5</sup> This assertion is unsupported by the evidence. Three other staff members observed the clients unbathed and then bathed them. The clothing of at least three clients had to be changed by other staff after Grievant left the Facility. The Agency maintains a Daily Care Sheet for the HSCW to write her initials indicating she had bathed a client. Grievant did not write her initials on the Daily Care Sheet for Client W and Client P.<sup>6</sup>

## 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 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

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<sup>5</sup> Grievant also contends she properly fed Client Da and Do, but other staff observed her not properly feeding the clients.

<sup>6</sup> Agency Exhibits 4 and 5.

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.<sup>7</sup>

[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].

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>7</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.