

Issue: Group II Written Notice with suspension (failure to comply with established written policy); Hearing Date: 11/02/04; Decision Issued: 12/13/04; Agency: DMHMRSAS; AHO: Carl Wilson Schmidt, Esq.; Case No. 7897



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 7897

Hearing Date: November 2, 2004
Decision Issued: December 13, 2004

PROCEDURAL HISTORY

On August 30, 2004, Grievant was issued a Group II Written Notice of disciplinary action with three workday suspension for "Failure to Comply with Established Written Policy."¹ On August 31, 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 October 12, 2004, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 2, 2004, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Advocate
Witnesses

¹ The Agency mitigated the disciplinary action from a Group III Written Notice to a Group II Written Notice with a three workday suspension based on Grievant's good work performance and tenure of employment.

ISSUE

Whether Grievant should receive a Group II Written Notice of disciplinary action with suspension for failure to comply with established written policy.

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 employs Grievant as a Human Services Care Worker at one of the Agency's facilities providing services for mental retardation. The purpose of her position is to:

Provide direct care for assigned clients of [the 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.²

Grievant works the evening shift at the Facility. No evidence of prior disciplinary action against Grievant was introduced at the hearing.

The Client resides at the Facility and receives services from employees.

On July 14, 2004, at approximately 3:40 p.m., an employee parked her vehicle behind a residential cottage. As she walked to the cottage, she noticed the Client sitting on the grass, chewing on her glove, unattended. The employee went into the Client's cottage and asked Ms. J, an employee, if she was aware that the Client was outside unattended. Grievant was in the room and pointed at Ms. J to suggest it was Ms. J who was responsible for the Client. Ms. J did not see the Client leave but surmised that the Client left while she had her back turned away from the door.³ Each cottage door had

² Agency Exhibit 4.

³ Ms. J also received disciplinary action.

an alarm that sounded when the door was open. The alarm system was working on July 14, 2004.

All clients were accounted for when Grievant began her shift. Grievant knew that the Client was present in the cottage because Grievant had had to re-direct the Client from the bedroom area earlier in Grievant's shift.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force." DHRM § 1.60(V)(B).⁴ Group II offenses "include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal." DHRM § 1.60(V)(B)(2). Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal." DHRM § 1.60(V)(B)(3).

"Failure to ... otherwise comply with established written policy" is a Group II offense.⁵ Departmental Instruction ("DI") 201-3 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.

Permitting a Client requiring constant supervision to be unattended outside of a resident cottage is contrary to Departmental Instruction 201. Grievant failed to properly observe the Client thereby enabling the Client to leave the cottage. Many things could have happened to the Client while she was outside the cottage without any staff observing her. Grievant's actions are contrary to established written policy thereby justifying issuance of a Group II Written Notice. A suspension of up to ten workdays is appropriate when a Group II Written Notice is issued. Accordingly, Grievant's three workday suspension is upheld.

Grievant contends she was not assigned to the Client and, thus, should not be disciplined. The evidence showed that Ms. J had primary responsibility for the Client with respect to certain tasks but that Grievant also had responsibility for the Client's

⁴ The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

⁵ DHRM § 1.60(V)(B)(2)(a).

safety. Grievant and Ms. J were to act as a team concerning client safety. They had shared responsibility for clients in the cottage.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with three workday suspension is **upheld**.

APPEAL RIGHTS

You may file an administrative review request within **15 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 15 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 15-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.⁶

[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

⁶ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.