

Issue: Group II Written Notice with suspension (failure to follow established written policy); Hearing Date: 08/30/04; Decision Issued: 09/14/04; Agency: DMHMRSAS; AHO: Carl Wilson Schmidt, Esq.; Case No. 836



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 836

Hearing Date: August 30, 2004
Decision Issued: September 14, 2004

PROCEDURAL HISTORY

On May 4, 2004, Grievant was issued a Group II Written Notice of disciplinary action with a three workday suspension for "Failure to Comply with Established Written Policy."

On June 2, 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 August 5, 2004, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 30, 2004, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee
Agency Advocate
Witnesses

ISSUE

Whether Grievant should receive a Group II Written Notice of disciplinary action with suspension for failure to follow 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 Direct Service Associate III. Her position is:

responsible for implementing and monitoring the policies of [the Facility], Medicaid and ACMRDD. Supervises an assigned shift of Human Services Care lead Workers and Human Services Care Workers to ensure the quality of work and continue implementation of individualized treatment of clients.¹

Grievant earned an overall rating of “Contributor” for her 2003 evaluation.

On March 16, 2004, Ms. S was rendering direct care services to clients at the Facility. Many of these clients have profound mental retardation and require continuous care. Ms. S failed to provide needed care to her clients. She did not properly bathe, feed, and dress them. She engaged in client neglect contrary to Departmental Instruction 201. Three co-workers observed how Ms. S was treating her clients. These staff reported Ms. S to Grievant. Grievant examined the clients and then asked the three staff to write reports of what they observed of Ms. S’s treatment of her clients. Grievant received the reports. Grievant then informed her immediate supervisor for the shift, Ms. C. Ms. C reported the matter to Ms. H, but not to the Facility Director. Under Agency policy, Ms. C should have reported the matter directly to the Facility Director. No disciplinary action was taken against Ms. C.

¹ Agency Exhibit 7.

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).² 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).

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. When an instance of neglect occurs, employees have defined reporting obligations. Departmental Instruction 201 states:

Any workforce member who has any knowledge or reason to believe that that a patient or resident of a state facility may have been abused or neglected, or both, shall immediately report this information directly to the facility director or his designee. Knowledge or reason to believe abuse or neglect has occurred may be based on, but not limited to, the following:

- Direct observation;
- A report made by an individual receiving services;
- A report from another workforce member; or
- Behavior or physical indicators of abuse or neglect, including age-specific indicators.

Grievant received reports from three other workforce members that client neglect may have occurred. Instead of immediately reporting this information directly to the facility director, Grievant reported it to Ms. C. By failing to report the information directly to the facility director, Grievant acted contrary to DI 201.³ “Failure to ... comply with established written policy” is a Group II offense.⁴

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including “mitigation or reduction of the agency disciplinary action.” Mitigation must be

² The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

³ Grievant argues that Ms. S may not have engaged in neglect contrary to DI 201 and, thus, she was not obligated to report Ms. S to the facility director. Grievant’s obligation under DI 201 does not require there to be client neglect, it only requires the suspicion of neglect. Grievant’s written statement shows she suspected Ms. S engaged in behavior that may constitute neglect. Grievant wrote, “I explained to staff that if this actually happened, there was neglect on [Ms. S]’s behalf” Agency Exhibit 2.

⁴ DHRM § 1.60(V)(B)(2)(a).

“in accordance with rules established by the Department of Employment Dispute Resolution....”⁵ Under the EDR Director’s *Rules for Conducting Grievance Hearings*, the Hearing Officer may mitigate based on considerations including whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action, and (3) the disciplinary action was free of improper motive.

A basis to mitigate the disciplinary action against Grievant exists. Grievant received disciplinary action for failing to immediately report possible neglect to the facility director. Ms. C learned of the possible neglect from Grievant, yet Ms. C did not immediately report what she learned to the facility director.⁶ The Agency inconsistently disciplined two employees engaging in similar behavior. The disciplinary action against Grievant should be mitigated to a Group I Written Notice. Elimination of all disciplinary against Grievant is not appropriate. Grievant should receive some disciplinary action because of the frequent training she received regarding DI 201 and her experience with the Agency.⁷

Grievant contends that the Agency failed to timely issue disciplinary action against her. The Agency issued an incomplete Written Notice to Grievant on May 4, 2004. A corrected Written Notice was issued after Grievant’s second step meeting on July 2, 2004. The Hearing Officer finds that Grievant was given sufficient notice of the charges by Written Notice on May 4, 2004. Although the notice did not contain a date of issuance or date it would become inactive, the notice adequately informed Grievant that the Agency believed she had failed to comply with established written policy. Grievant contends the notice should have been issued within 30 days of the offense date. There is no policy, however, which sets forth this time requirement.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group II Written Notice of disciplinary action with a three day suspension is **reduced** to a Group I. Because the normal disciplinary action for a Group I offense is issuance of a Written Notice, Grievant’s suspension is **rescinded**. GPM § 5.9(a)(2). Standards of Conduct, Policy No. 1.60(D)(1)(a). The Agency is directed to provide the Grievant with **back pay** for the period of suspension less any interim earnings that the employee received during the period of suspension and credit for annual and sick leave that the

⁵ Va. Code § 2.2-3005.

⁶ The Agency also failed to discipline three probationary staff. Since these employees do not fall within the Standards of Conduct, it would not have been appropriate for the Agency to issue them written notices.

⁷ On April 14, 2000, Grievant signed a statement admitting she received a copy of DI 201 and saying “I also hereby acknowledge I have read, understand and agree to abide by this instruction.” Agency Exhibit 5.

employee did not otherwise accrue. GPM § 5.9(a)(3). Standards of Conduct, Policy No. 1.60(IX)(B)(2).

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.⁸

⁸ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

[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