

Issue: Group III Written Notice with Termination (client neglect); Hearing Date:  
09/10/03; Decision Issued: 09/11/03; Agency: DMHMRSAS; AHO: Carl Wilson  
Schmidt, Esq.; Case No. 5792



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 5792**

Hearing Date: September 10, 2003  
Decision Issued: September 11, 2003

**PROCEDURAL HISTORY**

On June 20, 2003, Grievant was issued a Group III Written Notice of disciplinary action with removal for:

*Violation D.I. 201, Reporting and investigating Abuse and Neglect of Clients, as defined in Section 201-3 for substantiate allegations of neglect: The investigation substantiated the allegation that you were less than alert while performing a 1:1 assignment at [Facility].*

On July 7, 2003, 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 he requested a hearing. On August 14, 2003, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 10, 2003, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Agency Party Designee  
Agency Advocate

## **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 Forensic Mental Health Technician (FMHT) for approximately three years until his removal on June 20, 2003. He received a Group I Written Notice on October 3, 2002 for unsatisfactory attendance.

The purpose of Grievant's position was:

To provide competent nursing care to an adult population ranging from ages 18 to 64 in a Forensic setting to maintain a safe, clean and therapeutic environment and to participate and encourage patients to participate in their prescribed treatment programs.

In the early morning of May 12, 2003, Grievant and another employee were supervising a patient in a 2:1 relationship. This relationship means that the patient requires the presence of two employees at all times. While the patient was sleeping in the hospital bed, Grievant and the other employee also fell asleep. A Registered Nurse entered the hospital room and observed Grievant and the other employee asleep. She walked around the room, went to the bathroom inside the room, and turned on the bathroom light. Neither Grievant nor the other employee awoke. The Registered Nurse contacted the Nursing Supervisor and informed her that the two employees were asleep. The Nursing Supervisor went to the room and observed Grievant and the other employee asleep. The Nursing Supervisor shook the other employee to wake her up. Grievant woke up when the Nursing Supervisor turned on the light to the room.

When later questioned, Grievant denied he was asleep. He did not recall the Registered Nurse entering the room and turning on the bathroom light.

## 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."

Grievant was responsible for providing services to a patient regarding the patient's safety and welfare. While Grievant was asleep he was unable to provide those services. His failure to provide those services was client neglect. Accordingly, the Agency has presented sufficient facts to support its issuance of a Group III Written Notice with removal.

Grievant denies he was asleep. He contends that he was already awake when the Nursing Supervisor turned on the light. The evidence, however, is sufficient to establish that Grievant was asleep. Grievant has not established any reason for which the Registered Nurse or the Nursing Supervisor would falsely claim to have observed him or the other employee sleeping.

Grievant contends that the statements of the Registered Nurse and the Nursing Supervisor should not be trusted because of inconsistencies in the times they reported. The Hearing Officer finds that any inconsistencies in the times reported by the Registered Nurse and the Nursing Supervisor are immaterial. The times reported by these witnesses were approximations. It is not unusual for witnesses to report different times when they are relying upon approximated times.

Grievant contends the Agency discriminated against him. No evidence was presented supporting this claim. The Hearing Officer finds that the Agency did not discriminate against Grievant.

## 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.
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.

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>1</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].

---

Carl Wilson Schmidt, Esq.  
Hearing Officer

---

<sup>1</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

