

Issue: Group III Written Notice with termination (client neglect); Hearing Date:
09/15/03; Decision Issued: 09/22/03; Agency: DMHMRSAS; AHO: Carl Wilson
Schmidt; Case No. 5796



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5796

Hearing Date: September 15, 2003
Decision Issued: September 22, 2003

PROCEDURAL HISTORY

On June 17, 2003, Grievant was issued a Group III Written Notice of disciplinary action with removal for:

Violation of D.I. 201, Reporting & Investigating Abuse & Neglect of Clients – Sufficient evidence exists to find staff culpable of neglect based on statements from Program Director and another HSCW; client was in Building 122 from approximately 3:20 p.m. until 3:33 p.m. This time is not an agreement with the time of 3:30 p.m. which [Grievant] states she spoke to client.

On July 14, 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 she requested a hearing. On August 19, 2003, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 15, 2003, a hearing was held at the Agency's regional office. This decision could not be issued sooner due to State office closings.

APPEARANCES

Grievant
Grievant' Representative
Agency Party Designee
Agency Advocate
Eight 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 until her removal on June 17, 2003. The purpose of Grievant's position was:

Provides 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.

On May 20, 2003, the Agency had two employees working on Side 1 and two employees working on Side 2 of Building 125. Grievant typically worked on Side 1 but because of staffing shortages, she worked as a floater. This means she walked back and forth between Sides 1 and 2 to assist other employees depending on their needs.

The Client is an individual with mental retardation. He has an overall age equivalency of two years, seven months. He resides at the Agency's Facility on Side 2 of Building 125. At approximately 3:15 p.m. on May 20, 2003, the Client walk out of the living facility and into a nearby street. An employee driving into the Facility Campus observed the Client and escorted him to Building 122. At 3:20 p.m., the Client was in

Building 122. Staff, including Grievant, working on Sides 1 and 2 in Building 125 did not realize the Client was absent. At 3:32 p.m., Grievant learned that the Client had eloped and was in the process of being returned to Building 125. Grievant clocked out and left the Facility.

CONCLUSIONS OF POLICY

The Agency has established that someone engaged in client neglect by permitting the unsupervised Client to walk out of Building 125 and near a roadway. The question in this case, however, is which individual was responsible for supervising the Client.

The Agency's conclusion that Grievant was responsible for supervising the Client rests on two facts. First, the Shift Change Report showed that Grievant was assigned to the Client. Second, Grievant falsely stated that she had seen the Client at a time when she could not have seen the Client.

Grievant was not responsible for supervising the Client on May 20, 2003. Grievant testified that she was not assigned to the Client on May 20, 2003. Grievant's testimony was credible. Grievant's supervisor also testified that Grievant was not assigned to the Client on May 20, 2003. Grievant's supervisor was the person responsible for assigning staff to clients. If Grievant had not been a floater, her normal assignment would have been to work with clients on Side 1; the Client resided on Side 2. Another employee would have assumed responsibility for working with the Client. Grievant has consistently denied being assigned to the Client. No witnesses testified Grievant was working in any capacity other than as a floater. Because Grievant was a floater, she was the person least likely to be directly assigned to the Client.

The Shift Change Report is insufficient in itself to establish that Grievant was assigned responsibility for the Client. The Hearing Officer reviewed the original Shift Change Report. This document shows staff being assigned to 21 clients who live on either Side 1 or 2 of Building 125. If an employee is assigned to a particular client, that employee's initials appear next to that client's name. For 18 clients, staff initials appear next to the clients' names. These initials were written once and not altered. Grievant's initials appear next to the names of the three remaining clients. For each of these three clients, Grievant's initials were written on top of the initials of another employee. With respect to the Client, the initials EH were first written next to his name and then Grievant's initials were written on top of EH. Grievant testified that she did not write her initials next to the Client's name. Grievant's supervisor testified she was familiar with Grievant's handwriting and that the initials appearing next to the Client's name were not written in Grievant's handwriting. No witnesses testified that the initials were written in Grievant's handwriting. It appears that someone wrote Grievant's initials on top of the initials of another employee at some unknown time. At the bottom of the Shift Change Report are written the last names of four of the five staff working on Grievant's shift. One of the names is spelled like Grievant's last name except that it begins with a letter

different from Grievant's name. It is unlikely Grievant would misspell her own last name. No witnesses testified that Grievant used a nickname matching the name at the bottom of the report.

When Grievant first learned from other staff of the claim that Client was not in Building 125, she expressed disbelief and said that the claim could not be true because she had seen him one and a half minutes before she clocked out. She clocked out at 3:32 p.m. Her statement was incorrect because the Client was in the process of being returned to Building 125 when she Grievant claimed she observed him as being safe and secure in Building 125. From Grievant's incorrect statement, the Agency concludes Grievant was the individual responsible for supervising the Client.

Grievant's statement referencing time was made as part of her expression of disbelief that the Client could have been missing. Her statement was made based on approximated times. Although her statement was in error, nothing other than that she was in error can be discerned by her statement. Her statement did not justify the conclusion that she was the person assigned to supervise the Client and therefore responsible for client neglect.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action is **rescinded**. The Agency is Ordered to pay Grievant **full back pay** less any interim earnings from June 17, 2003 forward. The Agency is Ordered to **reinstate** Grievant to her former position or, if occupied, to an objectively similar position. The Agency is Ordered to remove the Written Notice from Grievant's personnel file.

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.¹

[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

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