

Issue: Group III Written Notice with suspension (client neglect); Hearing Date: 02/23/05; Decision Issued: 03/07/05; Agency: DMHMRSAS; AHO: David J. Latham, Esq.; Case No. 7990



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 7990

Hearing Date: February 23, 2005
Decision Issued: March 7, 2005

PROCEDURAL HISTORY

On December 16, 2004, Grievant was issued a Group III Written Notice of disciplinary action with 30 workday suspension for:

Violation of D.I. 201, Reporting and Investigating Abuse and Neglect of Clients, as defined in Section 201-3 for a Substantiated Allegation of Neglect. An investigation has confirmed that on 11-29-2004 at approximately 4:00 a.m. you were observed lying on the couch in Building 4 living room asleep. A resident was awake at this time and seated in a chair next to the couch.¹

On December 21, 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 he requested a hearing. On January 27, 2005, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 23, 2005, a hearing was held at the Agency's regional office.

¹ Agency Exhibit 9.

APPEARANCES

Grievant
Grievant's Representative
Agency Representative
Witnesses

ISSUE

Whether Grievant should receive a Group III Written Notice of disciplinary action with 30 workday suspension 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 employs Grievant as a Developmental Aide at one of its Facilities. He was hired by the Agency on May 26, 1981 and has no active disciplinary action. The purpose of his position is:

Works directly with mentally retarded individuals, supplying them with all their basic needs, including medical, personal hygiene, training needs, etc. Implements program plans, assuring Active Treatment is provided (works as member of ID Team). Ensures a safe, homelike environment is provided; completes required documentation. HIPAA Level two Access – Complete access to PHI only for clients served/assigned. Utilization of information will be in accordance with HIPAA regulations regarding use limitations, disclosure and requests of PHI.²

On November 28, 2004, Grievant began his shift at 11 p.m. He was assisting two other employees providing care to clients residing at the Facility and requiring

² Agency Exhibit 3.

extensive mental health care. He worked diligently to clean many parts of the building. At approximately 4 a.m. the following morning, the Security Officer entered the living area of the building where Grievant was working and observed Grievant sleeping on a couch. Grievant was laying on the couch with his head at one end and his feet at the other end. His eyes were closed and he was snoring. The Security Officer walked to another part of the building and asked another employee to come and observe Grievant. Both employees walked to the living area and observed Grievant sleeping. The Security Officer waived his arms in Grievant's line of site to verify that Grievant was asleep and not able to see the Security Officer's arms. Grievant did not respond. Grievant remained asleep for at least 20 minutes.

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") 201-3 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.

Grievant became sleepy, placed his head and feet on the couch and began sleeping. He slept for 20 minutes. During that time, he did not provide care to clients residing at the Facility. His actions constitute neglect under DI 201.

Under DI 201, the expected disciplinary action for an employee who has neglected clients is a Group III Written Notice with removal. The Agency mitigated the disciplinary action to a Group III Written Notice with a 30 workday suspension. The Agency's mitigation was appropriate given the number of years Grievant had worked at the Facility and the absence of active disciplinary action.

Grievant argues there are discrepancies between the statements made by the Security Officer and the other employee observing him sleeping. To the extent there are discrepancies, those discrepancies are immaterial. Both witnesses clearly observed Grievant sleeping for several minutes. Neither had any doubt about what they observed. In addition, Grievant admitting during his testimony that he was asleep for a short period of time.

Grievant contends that the Security Officer reported him as retaliation for Grievant's having complained about the Security Officer's behavior in the past. This argument fails because although the Agency informed the Security Officer of the complaint about his behavior, the Agency did not inform him of the source of the

complaint. The Security Officer was not aware of Grievant's complaint against him. In addition, more than one employee observed Grievant sleeping.

Grievant contends medication he was taking caused him to fall asleep. Grievant had been taking the medication for over two years without prior incidence of falling asleep. It is not likely Grievant's medication caused him to fall asleep. It is more likely that Grievant was tired from his cleaning duties and fell asleep after placing his feet and head on the couch.

Grievant argues the Agency has inconsistently disciplined its employees. Grievant presented evidence of a Direct Care Aide who was supervising a client requiring one-on-one attention. The Direct Care Aide fell asleep and received a Group II Written Notice without suspension. Grievant's argument is untenable because the facts of each case are not the same. The Direct Care Aide suffered an on-the-job injury and received workers' compensation benefits. She returned to work but with lifting restrictions. She was taking pain medication with adverse side effects. She informed the Agency human resource staff that she was taking the medication. She experienced pain relating to her injury while working and took her pain medication at work. This caused her to fall asleep. Grievant had not returned to work with restrictions after suffering a workers compensation injury. His medication did not cause his drowsiness. There was nothing unusual about Grievant's routine in November 2004 whereas many things were unusual about the Direct Care Aide's routine on the day she fell asleep. Grievant and the Direct Care Aide are not so similarly situated for the Hearing Officer to conclude the Agency has inconsistently disciplined its employees.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with 30 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.³

[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

³ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.