

Issue: Group III Written Notice with termination (client neglect); Hearing Date:
02/23/05; Decision Issued: 03/07/05; Agency: DMHMRSAS; AHO: Carl Wilson
Schmidt, Esq.; Case No. 7996



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 7996

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

PROCEDURAL HISTORY

On October 26, 2004, Grievant was issued a Group III Written Notice of disciplinary action with removal 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 confirmed that on your work shift on October 6, 2004, on Living Unit 3F, you neglected to provide proper care to residents by being away from your worksite for at least 20 minutes without permission. This action is also a violation of SWVTC Instruction 106, Standards of Conduct.

On November 24, 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 February 3, 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.

APPEARANCES

Grievant
Grievant's Counsel
Agency Representative
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 Developmental Aide at one of its Facilities until his removal on October 26, 2004. He was hired by the Agency on August 16, 1981 and has no active disciplinary action. The purpose of his position was:

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.¹

Grievant's worked from 11 p.m. until 7 a.m. One of Grievant's duties included conducting bed checks every 30 minutes and headcounts every 15 minutes.²

¹ Agency Exhibit 3.

² Agency Exhibit 5.

Eighteen clients reside on a living unit. Nine clients residing on one side of the unit are Grievant's responsibility, and nine clients residing on the other side are the Direct Care Worker's responsibility. Most of the clients are non-verbal and non-ambulatory men ranging in ages from 23 to 67. Half of them are frequent fallers and must be moved from one area to another. Several cannot call for help if they fall. They have numerous medical problems including reflux disease which can cause them to regurgitate and prevent them from breathing. Several clients have epilepsy and experience seizures that can't be controlled by medication.

Grievant cares for clients residing at the Facility during his shift. Grievant is permitted by the Agency to take short breaks to obtain snacks from a nearby snack machine, take restroom breaks, and attend to other personal matters. Breaks are permitted so long as Grievant has the Direct Care Worker oversee his living area while Grievant is on break. Grievant usually yelled towards the other side of the unit to indicate he would be taking a break. Grievant would wait until the Direct Care Worker responded "ok" and then Grievant would take his break. Grievant and the Direct Care Worker had been following this routine for at least the past ten years.

On October 6, 2004 at 11:35 a.m., two Case Managers arrived at the living unit. They walked to Grievant's area and could not find him and became concerned for the safety of the unit's residents. They asked the Direct Care Worker if he knew of Grievant's location and he responded that he did not know Grievant was away from the living unit. Approximately 20 minutes later, Grievant returned to the unit. Grievant had taken a break. He yelled to the Direct Care Worker before leaving but did not wait to confirm that the Direct Care Worker had heard him and would be assuming care for Grievant's clients.

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 left his worksite for 20 minutes without having the Direct Care Worker assume his duties.³ As a result, Grievant's clients had no one to care for them. If one

³ The Direct Care Worker testified that Grievant usually notified him when Grievant would be taking a break but on October 6, 2004, the Direct Care Worker did not hear Grievant indicate he would be taking a break.

of the clients needed immediate or emergency care, no one would have been able to assist them. Grievant's absence from the unit meant he did not provide services necessary for the health, safety and welfare of the clients. Grievant's actions amounted to neglect under DI201.⁴

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 "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. The *Rules* further require the Hearing Officer to "consider management's right to exercise its good faith business judgement in employee matters. The agency's right to manage its operations should be given due consideration when the contested management action is consistent with law and policy."

Grievant's disciplinary action should be mitigated to a Group III Written Notice with a 30 workday suspension. On November 29, 2004, a Direct Care Worker fell asleep for 20 minutes while caring for clients at the Facility. The Agency investigated the matter and concluded the employee engaged in neglect. Upon the request of the Facility Director, the Agency mitigated the employee's disciplinary action from a Group III Written Notice with removal to a Group III Written Notice with a 30 workday suspension. Grievant and the Direct Care Worker began working for the Agency in 1981. Neither employee had any active disciplinary action. The employees had similar work performance. Both employees failed to perform their duties for 20 minutes. There is no material difference between the Direct Care Worker and Grievant, yet they were disciplined differently. Accordingly, the Hearing Officer finds that the Agency has inconsistently disciplined⁶ its employees thereby justifying mitigation of the disciplinary action against Grievant. Under the facts of this case, the appropriate disciplinary action for Grievant is a Group III Written Notice with a 30 workday suspension.

⁴ The length of Grievant's absence does not form a basis for neglect. The Agency has not established any policy determining the length of breaks an employee in Grievant's position may take other than to inform employees that they may take "short breaks."

⁵ *Va. Code § 2.2-3005.*

⁶ The Agency contends Grievant was counseled previously about being away from his work area without permission thereby making his actions different from the Direct Care Worker. In this case, Grievant did not know he was away from his work area without permission. He believed the Direct Care Worker on the other side of the floor was assuming his duties. Grievant's error was not to leave the work area without permission, but rather was to fail to confirm that the Direct Care Worker had assumed Grievant's responsibilities.

Grievant contends his behavior amounts to abuse of State time which is a Group I offense. This argument fails because Grievant's abuse of State time occurred in the context of providing client care thereby making his abuse of State time client neglect.

Grievant argues that once the Agency discovered neglect it did not timely report it and did not report the neglect to all persons required to be informed of neglect. Any failure by the Agency to properly report neglect is independent of and does not affect Grievant's liability for his neglect.

For grievances filed after July 1, 2004, an employee who is represented by an attorney and substantially prevails on the merits of a grievance challenging his discharge is entitled to recover reasonable attorney's fees, unless special circumstances would make an award unjust.⁷ Based on the unique circumstance of this case, special circumstances exist that would make an award of attorney's fees unjust. These circumstances include (1) Grievant was at fault for failing to properly attend to his clients and (2) the Agency acted in good faith when attempting to decide the appropriate discipline for Grievant.⁸

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 **reduced** to a Group III Written Notice with a 30 workday suspension. The Agency is ordered to reinstate Grievant to his former position, or, if occupied, to an objectively similar position. The Agency is ordered to provide the Grievant with **back pay** for the period exceeding a 30 workday suspension less any interim earnings that the employee received during the period of suspension and credit for annual and sick leave that the 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 **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.

⁷ *Rules for Conducting Grievance Hearings, § VI(D).*

⁸ When determining whether to mitigate Grievant's discipline, the Agency incorrectly considered inactive Group Written Notices. Although an Agency is free to consider an employee's prior work performance, an Agency may not consider the inactive Written Notices that may have been generated by prior poor work performance. To do so would amount to converting a Written Notice with a defined life into one with unlimited life.

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.⁹

[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

⁹ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

