

Issue: Group III Written Notice with termination (client neglect); Hearing Date:
09/14/05; Decision Issued: 10/03/05; Agency: DMHMRSAS; AHO: Carl Wilson
Schmidt, Esq.; Case No. 8165



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8165

Hearing Date: September 14, 2005
Decision Issued: October 3, 2005

PROCEDURAL HISTORY

On June 21, 2005, Grievant was issued a Group III Written Notice of disciplinary action with removal for:

Violation of Departmental Instruction #201, Reporting and Investigating Abuse and Neglect, as evidenced by a finding during an investigation that you left clients unattended on a locked unit when leaving to go on a field trip. In addition, you failed to report the neglect, and withheld information during the initial investigation.

On June 24, 2005, 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 16, 2005, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 14, 2005, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Representative

Witnesses

ISSUE

Whether Grievant's actions warrant disciplinary action under the Standards of Conduct? If so, what is the appropriate level of disciplinary action?

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 Service Care Worker until his removal effective June 21, 2005. No evidence of prior disciplinary action against Grievant was introduced during the hearing.

One of the Agency's housing units is divided into two sides – side A and side B. The two sides are joined by a rectangular area called a team station. A person standing in one side cannot hear words spoken by another person located on the other side.

On May 27, 2005, Grievant and Employee AJ were working on side A. Employee B and Employee S were working on side B. Employee K was supervising the shift that night; he was the "in-charge." Employee S went on break and was away from side B. Employee K was substituting for Employee S during the break.

Several clients on side A were scheduled to take a field trip away from the Facility. Grievant arranged for the clients to be ready to be moved to the Agency's vehicle. Client M was not on side A because he was visiting with his Mother at another part of the Facility. Grievant instructed Employee AJ to find the client and his Mother and ask if the client wished to travel with the group on the field trip. Employee AJ left side A and went to find the Mother and Client M. He asked if Client M wished to travel with the group on the field trip. Employee AJ was informed that Client M would stay with his Mother and not travel on the field trip.

Employee AJ walked directly to side B¹ and told Employee K that Client M was with his Mother and would not be joining the field trip. Since Employee K was in charge, he needed to know information about each client. Employee AJ did not tell Employee K that Grievant was leaving for the field trip at that time and that Grievant needed Employee K to cover for Grievant while Grievant was on the field trip. Employee AJ did not think to tell Employee K that someone needed to cover side A. Employee AJ did not see Employee S when Employee AJ was on side B and assumed that Grievant had already notified Employee K that coverage was needed and that Employee S was absent from side B because Employee S was covering on side A. Employee AJ left side B and walked to Grievant and the group of clients who were away from side A and boarding a vehicle to depart on the field trip.

Grievant and Employee AJ left with the clients on the field trip. They left behind on side A several clients, one of whom was very aggressive and tended to bully another client who was not capable of defending himself.

Client M and his Mother returned to side A and knocked on the door to gain entry. After a short delay, someone² opened the door and let them into the living area. The Mother called out for staff to let staff know Client M had returned. No one answered. She went to the bathroom and again called out for staff and again did not receive an answer. No staff were present on side A. She became concern because she knew the clients should not remain unattended. She sat down in the living area and waited. After about ten minutes passed, Employee K walked to side A and noticed that no staff were present. He became concerned because at the time Grievant and Employee AJ left with clients for the field trip, no one had told him they were departing. He was not aware that side A was left without any staff present.

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).³ 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).

¹ Employee AJ did not walk to side A after Grievant had walked away from side A. Employee AJ did not observe that no staff were present on side A.

² This person’s identity was not determined.

³ The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

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.

Clients residing on side A required continuous care and attention for their health, safety and welfare. Grievant was the last employee on side A to leave. He should have spoken with Employee K and told Employee K that the group was leaving on a field trip and that coverage was necessary for the remaining clients. Grievant did not tell Employee AJ to inform Employee K that the group was leaving for a field trip. Employee K knew that Grievant intended to take clients on a field trip, but he did not know the time Grievant would leave for the field trip and he was not informed at the time Grievant actually departed on the field trip. Grievant should not have left side A until another employee was physically present on side A to cover in Grievant's absence. When Grievant left side A, the remaining clients were no longer receiving care. The Agency has presented sufficient to support its issuance of a Group III Written Notice. Removal from employment is authorized by DI 201 when an employee engages in client neglect. Accordingly, Grievant's removal is upheld.

Several other employees also violated DI 201, in particular, because they were aware of the client neglect but did not report that neglect to the Facility Director. None of these employees, however, were removed from employment. This raises the question of whether the Agency is inconsistently disciplining its employees by removing Grievant from employment while retaining other employees who also violated DI 201. The inconsistent application of disciplinary action is a basis to mitigate disciplinary action under the *EDR Rules for Conducting Grievance Hearings*.

Although there are mitigating circumstances otherwise justifying a reduction in the disciplinary action taken against Grievant, the Agency has presented aggravating circumstances justifying Grievant's removal. First, Grievant was untruthful during the step process. When the charges first came to light, Grievant reported to an Agency manager that the employees involved in the incident gathered to fabricate an explanation. They intended to say that Employee S was in the bathroom and thus on side A and that the Mother did not know Employee S was present. When Employee S refused to go along with the story, the plan dissolved. During Grievant's meeting with the second step respondent, however, Grievant stated, as fact, to the second step respondent that Employee S was in the bathroom of side A and the Mother was not aware of this fact. The second step respondent repeatedly questioned Grievant in order to permit him to correct his statement because the second step respondent already knew of Grievant's initial statement to another manager. Grievant refused to recant his untruthful statement. Second, Grievant had been counseled several times for how he

communicated with other co-workers. His work performance was not as valued by the Agency as was the work performance of the other employees who were not removed from employment. Accordingly, the aggravating circumstances negate the mitigating circumstances and the Agency's removal is supported by the evidence.

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 **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.⁴

[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

⁴ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.