

Issue: Group III Written Notice with termination (client abuse); Hearing Date: 09/28/05; Decision Issued: 09/29/05; Agency: DMHMRSAS; AHO: Carl Wilson Schmidt, Esq.; Case No. 8169



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8169**

Hearing Date: September 28, 2005  
Decision Issued: September 29, 2005

**PROCEDURAL HISTORY**

On July 1, 2005, Grievant was issued a Group III Written Notice of disciplinary action with removal for:

*In accordance with DI 201, Reporting and Investigating Abuse and Neglect of Clients. Employee was found to have misused a client's assets. The resident's father testified that [Grievant] asked for money in exchange for special care for his child. He stated that he had given [Grievant] \$300 on one occasion but refused her recent request for money to buy clippers that she said would be stored in her own home.*

On July 18, 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 she requested a hearing. On August 23, 2005 the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 28, 2005, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant

Grievant's Representative  
Agency Party Designee  
Agency Advocate  
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 direct care worker at one of its Facilities until her removal effective July 1, 2005. No evidence of prior disciplinary action against her was presented during the hearing.

Grievant cared for several residents living in a resident cottage. The Resident is a 45 year old male requiring continuous assistance. Grievant worked in the cottage where the Resident lives. The Resident's Father is an active participant in his son's life.

The Agency employs someone to cut the hair of residents living at the Facility. No fee is charged to residents for this service. Some family members will authorize residents to leave the Facility to obtain haircuts while under staff supervision. The cost of these haircuts falls on the resident and his or her family.

The Agency received a complaint originating from the Resident's Brother who alleged that Grievant solicited money from the Father. During the investigation, the Agency's investigator spoke with the Father who said Grievant had requested money from him in order to buy an expensive pair of hair clippers for his son and that she planned to keep the clippers at her home for use with her teenager. The Father refused Grievant's request for money.

The Father did not testify at the hearing; nor did the Agency offer the written statement he gave to the Investigator.

## CONCLUSIONS OF POLICY

Departmental Instruction 514-5 provides:

It is the policy of the Department that no employee(s) will request, demand, or accept any gift for the personal use from a vendor, licensed provider, provider applying for a license, patient, patient's family, or any other individual or organization having a personal interest in the decisions or work of an employee of the Department.

Grievant requested money from a family member of a patient thereby acting contrary to DI 514-5. "Failure to ... comply with established written policy" is a Group II offense.<sup>1</sup> A Group II offense justifies an employee's suspension for up to ten work days.<sup>2</sup> Accordingly, the Agency has presented sufficient evidence to support the issuance of a Group II Written Notice with a ten workday suspension.<sup>3</sup>

Grievant contends she did not ask the Father for money to buy hair clippers. The Agency has presented credible evidence to show Grievant asked for money from the Father. The hearsay testimony of the Father was corroborated by the Team Leader working in the cottage where the Resident lived. The Team Leader testified Grievant spoke with him and said she intended to ask the Father for money to buy hair clippers. The Team Leader's testimony was credible and no motive was offered for him to falsely testify. Indeed, he testified Grievant's work performance was very good. The Team Leader's testimony shows Grievant had the intention of asking for money and the Father's statements to the Investigator show she followed through with her intent to solicit money.

The Agency contends Grievant engaged in client abuse and should be terminated from employment. Departmental Instruction ("DI") 201 defines<sup>4</sup> client abuse as:

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<sup>1</sup> DHRM § 1.60(V)(B)(2)(a).

<sup>2</sup> An employee may receive harsher punishment than a ten workday suspension if the employee has sufficient prior active disciplinary action.

<sup>3</sup> No credible evidence was presented to justify mitigation of the disciplinary action in accordance with the *Rules for Conducting Grievance Hearings*.

<sup>4</sup> See, *Va. Code § 37.1-1 and 12 VAC 35-115-30*.

Abuse means any act or failure to act by an employee or other person responsible for the care of an individual that was performed or was failed to be performed knowingly, recklessly or intentionally, and that caused or might have caused physical or psychological harm, injury or death to a person receiving care or treatment for mental illness, mental retardation or substance abuse. Examples of abuse include, but are not limited to, acts such as:

- Rape, sexual assault, or other criminal sexual behavior
- Assault or battery
- Use of language that demeans, threatens, intimidates or humiliates the person;
- Misuse or misappropriation of the person's assets, goods or property
- Use of excessive force when placing a person in physical or mechanical restraint
- Use of physical or mechanical restraints on a person that is not in compliance with federal and state laws, regulations, and policies, professionally accepted standards of practice or the person's individual services plan; and
- Use of more restrictive or intensive services or denial of services to punish the person or that is not consistent with his individualized services plan.

The Agency argues Grievant misused or misappropriated the assets, goods or property of the Resident thereby engaging in client abuse. This argument fails. Grievant sought money. That money was in the possession of and belonged exclusively to the Father. Had the Father granted Grievant's request, he would have delivered his money to Grievant. Nothing in that transaction would have involved the money or property belonging to the Resident.<sup>5</sup> Although Grievant sought money under the purported rational that she intended to benefit the Father's son, the fact remains that the person losing the money would have been the Father and not the Resident.

Although the Hearing Officer agrees with the Agency that Grievant's behavior was unseemly, the question becomes what notice did Grievant have that such behavior would result in her removal from employment. The policy prohibiting employees from soliciting patient family members does not specify a consequence for violating its terms. Thus, the Hearing Officer must look to the Standards of Conduct which establishes that violation of a written policy should be disciplined with a Group II Written Notice.

## **DECISION**

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<sup>5</sup> Residents have separate accounts at the Facility from which monies are removed to pay for various items to benefit the resident. The Agency considers these accounts to be the property of the residents.

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action is **reduced** to a Group II Written Notice with a ten workday suspension. The Agency is ordered to **reinstate** Grievant to her former position or if occupied to an objectively similar position. The Agency is ordered to provide Grievant with **back pay** along with benefits and seniority from the end of the ten workday suspension less any interim earnings including unemployment compensation.

## 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 14<sup>th</sup> St., 12<sup>th</sup> 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.<sup>6</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].

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>6</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.