

Issue: Group I Written Notice (unsatisfactory job performance); Hearing Date: 01/24/06; Decision Issued: 02/02/06; Agency: DMHMRSAS; AHO: Carl Wilson Schmidt, Esq.; Case No. 8246; Outcome: Employee granted full relief.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8246

Hearing Date: January 24, 2006
Decision Issued: February 2, 2006

PROCEDURAL HISTORY

On September 30, 2005, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory job performance. On October 19, 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 December 29, 2005, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 24, 2006, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee
Agency Representative
Witnesses

ISSUE

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

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 Direct Services Associate III at one of its facilities. She has been employed by the Agency for approximately 29 years. The purpose of her position is:

Provide training for [facility] clients in the areas of communication, functional movement, environmental awareness, and daily living skills within the context of a Development Day Program. This will be accomplished either through direct client training or through supervision of client training by assigned Human Service Care Workers during Development Day Program hours.¹

No evidence of prior active disciplinary action against Grievant was introduced during the hearing. Grievant reports to the Supervisor.

The Client resides at the facility. He is 37 years old and is ambulatory. He has a diagnosis including mental retardation and demonstrates characteristics of autism. He

¹ Grievant Exhibit 9.

is responsive to verbal instructions. The Client is able to work for a portion of the day. The Grievant's duties include providing training and supervision while the Client is working. The Client often cleans ashtrays at various locations at his worksite. Grievant is not supposed to perform the cleaning tasks, but is to help the Client perform his job.

In August and September 2005, the Supervisor observed Grievant's interaction with the Client while the Client worked. He observed behavior by Grievant that he considered to be unsatisfactory job performance.

CONCLUSIONS OF POLICY

The attachment to the Written Notice describes Grievant's unsatisfactory job performance as follows:

1. You failed to train the client to perform the task. You choose to do the job while the client sits or paces.
2. You failed to maintain a safe and acceptable proximity to the client while traveling from building to building, thus impeding communication while ambulating.
3. You failed to ensure occupational health and safety for the client and yourself by failing to utilize the gloves provided.
4. You failed to interact with clients during the activity.

The First Step Respondent met with Grievant and considered her arguments opposing the disciplinary action. He concluded that items two and three should be rescinded from the attachment to the Written Notice. Accordingly, the Hearing Officer will address only items one and four.²

This case must be resolved based on which party has the burden of proof. The Agency has presented detailed notes of the Supervisor. The notes have been corroborated, in part, by Grievant's testimony. In other words, Grievant admits to using her key to open ash trays, etc. In contrast, Grievant has presented sufficient evidence to establish her defense that she did not perform the Client's duties instead of letting him perform those duties. For example, Grievant testified that she occasionally opened the ashtrays for those ashtrays that often did not need cleaning. She did this because she had observed the Client become agitated in the past when he had to put on his

² The Agency argues that all four items are for the Hearing Officer to decide because Grievant did not end her Grievance at the first step of the grievance procedure. This argument fails because the First Step Respondent rescinded items two and three without attaching any conditions requiring Grievant to end her grievance. If an agency wishes to make a change to disciplinary action conditioned on the Grievant ending the grievance, the agency must first plainly express the requirement. A handwritten note appears at the bottom of the First Step Respondent's comments in this grievance. That note says, "Options are: to conclude the grievance (return to HR), [or] proceed to Step 2 – give Step 2 respondent form." Nothing in this note indicates the First Step Respondent's rescission of items two and three is conditional. No evidence was presented indicating Grievant was orally informed that the rescission of items two and three was conditional on her ending the grievance after the first step.

gloves and open an ashtray only to discover that the ashtray did not need cleaning. To avoid this problem, Grievant would open the ashtray first to make sure it needed cleaning and then would have the Client put on his gloves, open the ashtray, and clean it.

The Agency contends Grievant failed to fully interact with the Client while he performed his duties. Grievant denied failing to interact with the Client. She points out that the Client did not always work continuously. In other words, the Client would work for a short period of time and then become distracted. He would pace or play with objects near him such as twigs or grass. Grievant had been instructed to let the Client take a break, and once he resumed work, she was to resume training and supervision. Grievant presented evidence that she was communicating with the Client while he performed his duties and while they walked from one ashtray location to another.

Based on the evidence presented, it is equally likely that the events occurred as described by each party. In other words, the evidence presented is in stalemate. Because the Agency has the burden of proving that its understanding of the facts is more likely than is Grievant's understanding, and the Agency has not done so, the disciplinary action must be reversed.

The Agency presented evidence suggesting that the Supervisor was well-regarded by Agency managers. The Agency asserts that the Supervisor's notes should be considered by the Hearing Officer as a full and detailed account of the events that occurred. Grievant presented the testimony of a witness who heard the Supervisor yelling at Grievant. In August or September 2005, Grievant and the Supervisor were outside of a building. The witness was inside the building yet could hear the Supervisor yelling at Grievant. The witness felt that the Supervisor's behavior was so unprofessional that she reported her concerns to the Supervisor's manager. Grievant contends the Supervisor was angry with her for writing a letter to the Human Resource Officer complaining about being harassed. When this evidence is considered together, the Hearing Officer finds that the credibility of the Supervisor is an important consideration in order to resolve this appeal. The Supervisor resigned from the Agency's employment in October 2005. He did not testify at the hearing. Although the Agency may be in the position of being able to evaluate the credibility of the Supervisor and his observations, the Hearing Officer is not in that position. The Hearing Officer cannot assume³ the Supervisor is accurately portraying the events as they occurred simply because the Agency is willing to reach that conclusion. In the absence of the Supervisor's testimony, the Hearing Officer cannot uphold the Agency's disciplinary action.

DECISION

³ If the Supervisor had testified and been subject to cross-examination, the Hearing Officer would have been able to assess the Supervisor's credibility.

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action is **rescinded**.

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

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

[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].

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer