

Issues: Group III Written Notice with termination (client abuse/neglect); Hearing Date: 08/31/07; Decision Issued: 10/03/07; Agency: DMHMRSAS; AHO: Carl Wilson Schmidt, Esq.; Case No. 8676; Outcome: Partial Relief (Written Notice reduced to Group I, Employee reinstated); Attorney Fee Addendum issued 10/19/07.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8676

Hearing Date: August 31, 2007
Decision Issued: October 3, 2007

PROCEDURAL HISTORY

On March 28, 2007, Grievant was issued a Group III Written Notice of disciplinary action with removal for neglecting a client. On April 6, 2007, 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 2, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 31, 2007, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Representative
Witnesses

ISSUES

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 employed Grievant as a Direct Service Associate II at one of its facilities. She had been employed for approximately two years prior to her removal effective March 28, 2007. The purpose of her position was:

To assist in providing clients with basic personal care, therapeutic treatments and other direct services in accordance with individual programs and facility and department policies and standards.¹

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

On January 11, 2007, Grievant was working as the Acting Charge Aide in one of the Agency's living units. She was responsible for coordinating the unit's work duties and approving breaks by employees working in the unit. Twelve clients resided in the living unit. Several client rooms opened into a day hall.

Ms. Mi was responsible for Group 1 which consisted of four clients including Client I. At approximately 4:05 p.m., Client I indicated she wanted to go into her room and watch television. Ms. Mi walked Client I into her room and put her in her bed and played a videotape on the television. Ms. Mi left the room. Ms. Mi received a phone

¹ Agency Exhibit 5.

call from her daughter and went to the Aide office to take the call. The Aide's Office was in the dayroom.

Grievant was responsible for Group 2 which consisted of four clients.

Ms. Mc was responsible for Group 3 which consisted of four clients including Client V.

A team of Agency professionals had evaluated Client V. They established a Behavior Support Plan identifying "preventive/proactive supports" for Client V. One of these required:

Staff will monitor [Client V's] environment and make changes as necessary if someone or something is bothering her and/or she is bothering someone/something. [Client V] will be monitored very closely in the bathroom and other small areas such as program room, dining room, etc. She should not be left alone with other clients at any time. She has been known to target other individuals for aggression when staff are not around or when staff are assisting others.²

Grievant and other Agency staff providing services to Client V received training regarding the Agency's Behavior Support Plan for Client V.

Grievant was inside the Aide's office. The Aide's office had a large window enabling someone inside the office to look out into the dayroom and to the entrances of Client I's room and Client V's room. Grievant was leaning against a counter in the office. She was faced towards the wall with her back towards the dayroom. Grievant could not see the door entries to Client I's and to Client V's rooms.

At approximately 4:05 p.m., Ms. Mc said she was going on break and told Grievant this. Grievant said "okay" and Ms. Mc left the dayroom. Since Ms. Mc went on break, Grievant became responsible for her group of four clients and Ms. Mc's group of four client, including Client V.

While Grievant had her back to the dayroom, Client V walked towards Client I's room, opened the door and entered Client I's room. Client V was alone with Client I. Client V attacked Client I. At approximately 4:15 p.m., Client I came out of her room and had blood on her face and ears. Client V remained in Client I's room sitting on one of the two beds in the bedroom. There was blood on the floor between the beds, on the rungs, and also on one of Client I's tennis shoes. Client V had bitten off parts of Client I's ears. Client V had also pulled off a small patch of Client I's hair. The Agency began an investigation.

CONCLUSIONS OF POLICY

² Agency Exhibit 3.

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).

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. Client neglect can be a Group III offense justifying an employee’s removal.

“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.”⁴

Whether Grievant neglected Client V depends on whether her failure to observe Client V enter Client I’s room rises to the level of neglect. The degree of the injury to Client I does not determine whether neglect occurred. For example, neglect could have occurred even if the injuries to Client I were slight.

The Agency’s case against Grievant depends on the degree of her responsibility to Client V. The Agency has established different degrees of staff responsibility with respect to the care of clients. In a one-to-one relationship, an employee must constantly monitor a client and be within arm’s reach of the client. In a shadowing relationship, an employee must keep the client within an unobstructed view at all times. Grievant was in neither a one-to-one, nor a shadowing relationship with Client V. Grievant’s responsibility towards Client V was less than that of a staff member in a one-to-one or shadowing relationship.

Grievant’s responsibility towards Client V was to monitor Client V but her responsibility was shared with other clients. Grievant failed to monitor Client V as she entered Client I’s room. If Grievant had been providing services to another client, her failure to observe Client V would not have been misbehavior. In this case, Grievant was not observing any client. At a minimum, her work performance was inadequate because she was supposed to be observing or providing services to at least one of the eight clients for which she was responsible.

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

⁴ Agency Exhibit 6. Departmental Instruction 201-3. The Facility has a similar policy and definition of neglect.

The Agency argues that Grievant's failure to observe Client V rises to the level of neglect because Grievant knew of the risk that Client V could harm other clients if left alone. Grievant received training on Client V's Behavior Support Plan. This Plan requires Client V to be "monitored very closely in the bathroom and other small areas such as program room, dining room, etc." The Plan does not specifically list the dayroom or Client V's bedroom as an area in which Client V should be monitored closely. This Plan also required:

She should not be left alone with other clients at any time. She has been known to target other individuals for aggression when staff are not around or when staff are assisting others.⁵

Client V entered Client I's room and was alone with Client I. The language of the Plan suggests Grievant should have exercised a heightened scrutiny with regard to Client V. If this were the only evidence before the Hearing Officer, the Agency's case would be significant. Although the Agency's Plan specifies that Client V should not be left alone with other clients at any time, the Agency routinely and consistently disregarded that standard. Client V slept in a bedroom with two other clients as her roommates. The door to the bedroom did not have a window in it and it could be closed at any time by one of the three clients in the bedroom. In short, the Agency routinely disregarded its own Plan. If the Agency is not following the Plan for Client V, there is no reason to believe it can hold Grievant to the letter of the Plan. Indeed, by permitting Client V to sleep in a room with two other clients, the Agency was sending its staff a message that Client V could be left alone with certain clients on a routine basis (a message contrary to the Plan).

The evidence is insufficient to raise Grievant's inadequate job performance, a Group I offense, to the level of client neglect, a Group III offense. The Agency presented Grievant with mixed signals regarding what level of scrutiny she should apply to Client V.⁶

Grievant argues Ms. Mc was the person responsible for Group 3 and, thus, for Client V. Since Ms. Mc did not properly sign the log showing she was leaving on break and assigning the clients to Grievant, Grievant was not responsible, according to Grievant. This argument fails. Grievant observed Ms. Mc leave and told Ms. Mc "okay" when Ms. Mc left the room. Grievant knew or should have known she was responsible for Client V regardless of whether Ms. Mc recorded the break in the logbook.

⁵ Agency Exhibit 3.

⁶ The Agency argues its team of professionals determined that Client V could remain alone with two other roommates. The problem with this argument is that the Agency's position remains in conflict with the Plan for Client V. The Plan says Client V should not be left alone with another client at any time. The Agency also argued that it conducted 15 minute bed-checks and, thus, would be in a position to properly monitor Client V while she slept. This argument fails because Client V required fewer than 15 minutes to enter Client I's room and attack her. Likewise, Client V could attack her roommates between bed-checks.

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....”⁷ Under the *Rules for Conducting Grievance Hearings*, “[a] hearing officer must give deference to the agency’s consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency’s discipline only if, under the record evidence, the agency’s discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency’s discipline, the hearing officer shall state in the hearing decision the basis for mitigation.” A non-exclusive list of examples includes 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 among similarly situated employees, and (3) the disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

The Virginia General Assembly enacted *Va. Code § 2.2-3005.1(A)* providing, “In grievances challenging discharge, if the hearing officer finds that the employee has substantially prevailed on the merits of the grievance, the employee shall be entitled to recover reasonable attorneys’ fees, unless special circumstances would make an award unjust.” Grievant has substantially prevailed on the merits of the grievance because she is to be re-instated. There are no special circumstances making an award of attorney’s fees unjust. Accordingly, Grievant’s attorney is advised to submit an attorneys’ fee petition to the Hearing Officer within 15 days of this Decision. The petition should be in accordance with the EDR Director’s *Rules for Conducting Grievance Hearings*.

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 I Written Notice for inadequate job performance. The Agency is ordered to reinstate Grievant to Grievant’s former position, or if occupied, to an objectively similar position. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal and credit for leave and seniority that the employee did not otherwise accrue.

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 *Va. Code § 2.2-3005.*

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 all of your appeals to the other party and to the EDR Director. 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.⁸

[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

⁸ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

ADDENDUM TO DECISION OF HEARING OFFICER

In re:

Case No: 8676-A

Addendum Issued: October 19, 2007

DISCUSSION

The grievance statute provides that for those issues qualified for a hearing, the Hearing Officer may order relief including reasonable attorneys' fees in grievances challenging discharge if the Hearing Officer finds that the employee "substantially prevailed" on the merits of the grievance, unless special circumstances would make an award unjust.⁹ For an employee to "substantially prevail" in a discharge grievance, the Hearing Officer's decision must contain an order that the agency reinstate the employee to his or her former (or an objectively similar) position.¹⁰ In this grievance, the Hearing Officer ordered reinstatement and, thus, the Grievant substantially prevailed.

The petition also includes paralegal fees. The statute provides for the award of attorneys' fees, not paralegal fees. If the Legislature had intended to include these fees, it would have included that term in the statute. Accordingly, the Hearing Officer has no authority to award paralegal fees.

This grievance was initiated after August 1, 2006 and, thus, the hourly rate is \$127 per hour as established by the EDR Director for the region in which the grievance arose.

⁹ Va. Code § 2.2-3005.1.A.

¹⁰ § 7.2(e) Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004. § VI(D) *EDR Rules for Conducting Grievance Hearings*, effective August 30, 2004.
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AWARD

The Grievant is awarded attorneys' fees for 17.51 hours at the rate of \$127 per hour for a total of \$2,223.77. The petition for paralegal fees is denied.

APPEAL RIGHTS

If neither party petitions the EDR Director for a ruling on the propriety of the fees addendum within 10 calendar days of its issuance, the hearing decision and its fees addendum may be appealed to the Circuit Court as a final hearing decision. Once the EDR Director issues a ruling on the propriety of the fees addendum, and if ordered by EDR, the hearing officer has issued a revised fees addendum, the original hearing decision becomes "final" as described in §VII(B) of the *Rules* and may be appealed to the Circuit Court in accordance with §VII(C) of the *Rules* and §7.3(a) of the *Grievance Procedure Manual*. The fees addendum shall be considered part of the final decision. Final hearing decisions are not enforceable until the conclusion of any judicial appeals.

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer