

Issue: Group III Written Notice with termination (client neglect); Hearing Date: 03/31/08; Decision Issued: 04/09/08; Agency: DMHMRSAS; AHO: Carl Wilson Schmidt, Esq.; Case No. 8813; Outcome: No Relief – Agency Upheld in Full; **Judicial Review – Appealed to Circuit Court (05/07/08); Outcome: AHO’s decision affirmed (06/30/08)**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8813

Hearing Date: March 31, 2008
Decision Issued: April 9, 2008

PROCEDURAL HISTORY

On November 13, 2007, Grievant was issued a Group III Written Notice of disciplinary action with removal for client abuse and neglect. On November 27, 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 March 5, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 31, 2008, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency 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 until her removal effective November 13, 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 departmental policies and standards."¹ Grievant received an overall rating of "Contributor" on her 2006 evaluation.² No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

The bathroom in the housing unit where Grievant worked is L-shaped. At the bathroom entrance (at the bottom of the "L"), a sink and mirror appear on the right side of a wall. On the left side are several wall cabinets. On the long side of the "L", there are curtains covering windows on the left side and four toilets on the right side. The toilets have panel walls separating them. In front of each toilet is a curtain for privacy. When a curtain is partially or completely closed, it usually indicates someone is in the stall.

On July 15, 2007, Grievant was assigned to work in a one-to-one relationship with Client R. As part of a one-to-one relationship, Grievant was expected to be within

¹ Grievant Exhibit 1.

² Grievant Exhibit 1.

arm's length of Client R at all times. Grievant had attended an in-service training session where she learned that Client R had a tendency to bite other clients, especially Client J.

Client J entered the bathroom and went to the fourth stall farthest away from the bathroom entrance. She closed the curtain to the toilet. Grievant did not know Client J had entered the bathroom.

At approximately 9:15 p.m., on July 15, 2007, Client R entered the bathroom. Grievant followed Client R. Client R went to the first toilet and lowered her underwear to sit on the toilet. Grievant turned to her right and stepped away from Client R approximately five feet. Grievant took a key and opened the cabinets against the wall. Grievant was attempting to find a brief for Client R to wear. While Grievant was looking away from Client R, Client R stood up and turned to her right. Client R walked slowly because she takes very short steps. Client R walked down to the fourth stall where Client J was located. Client R bit Client J on the arm leaving red marks. Grievant turned and looked down the hall. She observed Client R holding Client J's right arm and looking back at Grievant. Grievant walked to the two clients, took Client R by the arm and moved her out of the way so Grievant could check Client J. Client R sat on the third toilet and finished toileting while Grievant attended to Client J. Grievant observed the red marks on Client J's forearm and decided to walk her to the sink to clean her wounds. Grievant took a dry washcloth, put some of Client J's moisturizer on her forearm and began to rub the site.

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."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." Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal."

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. "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

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

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

Grievant was responsible for both preventing harm to Client R and preventing harm to other clients (such as Client J) and staff who may come into contact with Client R. Grievant knew that Client R had a tendency to bite other clients, especially Client J. Grievant failed to determine whether other clients were in the bathroom before she refocused her attention away from Client R. Grievant looked down the hallway and observed the curtain partially closed in front of the fourth stall, but she failed to determine whether another client was in the bathroom. Grievant failed to notice Client R walking slowly down the hall toward the fourth stall.⁵ Grievant should not have averted her attention from Client R for a length of time that would enable Client R to stand up and walk slowly down the hall to the fourth stall. Because of Grievant's inaction, she failed to provide proper care and services necessary to the health safety and welfare of Client R⁶ and Client J⁷. The Agency has presented sufficient evidence to show that Grievant engaged in client neglect thereby justifying the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, the Agency's policy and DHRM Policy 1.60 authorized removal from employment.⁸

Grievant contends the disciplinary action should be mitigated. *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...."⁹ 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.

⁵ Client R appears to have noticed that someone was in the fourth stall. It is unclear why Grievant did not make a similar observation.

⁶ Grievant focused her attention away from Client R for too long a period of time.

⁷ Grievant failed to prevent Client R from biting Client J.

⁸ The Agency also argued Grievant engage in client abuse by cursing in front of the clients. Grievant denied the allegation. The Hearing Officer gives greater weight to her testimony than to the written hearsay evidence presented by the Agency alleging Grievant cursed.

⁹ *Va. Code § 2.2-3005.*

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 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.¹⁰

[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

¹⁰ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

VIRGINIA:

IN THE CIRCUIT COURT OF AMHERST COUNTY

REBEKAH WARD,

Grievant/Employee,

v.

Case No: CL08007067-00

CENTRAL VIRGINIA TRAINING CENTER,

Agency/Employer.

FINAL ORDER

This matter came before the Court on June 30, 2008, at 12:00 p.m., pursuant to Va. Code § 2.2-3004(E) as an appeal from the Hearing Officer's decision dated April 9, 2008.

The Court has reviewed the record, considered the arguments of the parties, and Va. Code § 2.2-3006. Accordingly, the Court finds that the Hearing Officer's decision is not contrary to law. Thus, it is hereby ADJUDGED, ORDERED and DECREED that:

The instant appeal is denied and the Hearing Officer's decision is AFFIRMED; and this matter is DISMISSED WITH PREJUDICE and is hereby stricken from the Court's docket.

The Clerk is hereby directed to send a certified copy of this Final Order to counsel for Central Virginia Training Center and to Grievant upon entry of the order. Grievant's exceptions are duly noted.

The Court further waives enforcement of counsel pursuant to Rule 1:13 of the Rules of the Supreme Court of Virginia.

A copy,
Tested: Roy L. Itaya, Jr., Clerk
HON. G. BRADY, III
Clerk of the Circuit Court, Amherst County, Va.

ENTERED 06/30/08

Judge