

Issues: Group III Written Notice (client neglect) and Termination; Hearing Date: 08/06/08; Decision Issued: 02/03/09; Agency: DMHMRSAS; AHO: Carl Wilson Schmidt, Esq.; Case No. 8897; Outcome: No Relief – Agency Upheld in Full.



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8897**

Hearing Date: August 6, 2008  
Decision Issued: February 3, 2009

**PROCEDURAL HISTORY**

On April 9, 2008, Grievant was issued a Group III Written Notice of disciplinary action with removal for client neglect.

On April 11, 2008, 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 June 23, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 6, 2008, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Grievant's Representative  
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 Registered Nurse II at one of its Facilities. She began working for the Agency on September 24, 2004 until her removal effective April 9, 2008. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

The Client is a 54 year old woman admitted to the Facility on December 7, 2007. The Client had a history of being discharged from the Facility but readmitted because she was unable to care for herself. She demonstrated aggressive and disruptive behaviors while at the Facility. Her Axis I diagnosis is Schizoaffective Disorder, Bipolar Type. Her Axis II diagnosis is Personal Disorder NOS.

At approximately 6:15 a.m. on February 2, 2008, the Client decided to lay down on the bathroom floor. She remained on the floor until approximately 2:15 a.m. the following morning. The Client had a history of lying down on the floor. When staff attempted to get her off of the floor, the Client resisted and sometimes injured staff. As a result, the Agency staff permitted the Client to remain on the floor to see if she would get up on her own. Grievant was aware of this practice and knew that the Client was a "frequent admission" into the Facility.<sup>1</sup>

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<sup>1</sup> The Client was one of approximately 17 patients to whom Grievant was providing services on February 2, 2008.

Grievant was the nurse-in-charge on the Day Shift on February 2, 2008. She began working at approximately 7 a.m. and ended her shift at approximately 3:30 p.m. that day. She was responsible for making sure that clients received their medications. If a client refused to take medication, Grievant was responsible for recording that refusal in the Agency's patient records. Facility Policy NR 280-14, *Medication Administration* states, "If a resident refuses to take a prescribed medication, the nurse will document in the resident record and on the MAR according to the MAR Procedure." Grievant did not provide medication to the Client because the Client was lying on the floor in the bathroom. Grievant did not document the Client's refusal to take medication on February 2, 2008.

The Medication Administration Record (MAR) for the Client showed that the Client did not receive any medications during the Day Shift. When Grievant was interviewed on March 5, 2008 by Investigator M and Investigator B, Grievant stated, "If the MAR says she (the Client) didn't get the medications, then she didn't get the medications." Grievant told the investigators that she does not offer medications to patients who are in their bedrooms. She said, "This is my policy. If the patient is not able to come and get the medications, then they don't get them."

Interdisciplinary Notes (ID) are used by the Agency to record activities relating to patient treatment. Grievant did not record in the Interdisciplinary Notes that the Client refused to take medications during the Day Shift.

Report sheets are documents used by employees on one shift to inform employees on a subsequent shift of what transpired on a particular shift regarding a patient. On February 2, 2008, Grievant wrote on the "Report Sheet" for the Client that the Client was, "on the [floor] in the bathroom all day. No meds or meal."

## **CONCLUSIONS OF POLICY**

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."

Grievant failed to offer medication to the Client on February 2, 2008. Grievant's policy of not giving medication unless the patient came to Grievant was not consistent with the Agency's policies and practices. By failing to provide the Client with required medication, Grievant failed to provide treatment necessary for the health, safety and welfare of the Client.

There are two reasons to believe that Grievant did not offer medication to the Client on February 2, 2008. First, Grievant did not document that the Client refused medication on February 2, 2008 even though she had done so previously.<sup>2</sup> For example, on January 28, 2008, Grievant wrote in the Report Sheet that the Client, “Refused meds.” In contrast, Grievant wrote in the February 2, 2008 Report Sheet, “No meds or meal.” She did not write that the Client refused medication on February 2, 2008. Other records relating to the Client do not reflect that medication was refused by the Client. Second, Grievant told the investigators that her practice was not to give medication to patients unless those patients came to her to receive the medication. The Client spent the entire day on the floor of the bathroom and did not go to Grievant to obtain medication. Thus, Grievant did not offer the medication to the Client. Grievant contends the investigators were untruthful about her statements. This argument fails. There is no credible evidence to show that two investigators were untruthful about Grievant’s statement to them.

Grievant contends she offered medication to the Client and the Client refused that medication. Her assertion lacks credibility because Grievant’s knowledge of what happened on February 2, 2008 appears to vary over time. For example, when investigators spoke with Grievant on March 5, 2008 regarding the February 2, 2008 incident, Grievant drafted a statement saying:

I do not recall [the Client] lying on the floor in the bathroom for my dayshift on February 2, 2008. I was not made aware by any staff.

It is clear that Grievant has no actual recollection of the events on February 2, 2008. At most, Grievant may believe she offered the Client medication and that medication was refused, but she has no actual recollection of what happened that day.

*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....”<sup>3</sup> 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

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<sup>2</sup> Grievant documented that the Client did not receive medication on February 2, 2008. She did not, however, document that medication was given to the Client and refused by the Client.

<sup>3</sup> *Va. Code § 2.2-3005.*

consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive.

Grievant contends the disciplinary action should be mitigated because other staff were not disciplined or were not disciplined at the same level she received. The details regarding what level of discipline other employees received and why they were given that level of discipline were not presented as evidence. The Facility Director testified that other employees were disciplined regarding the incident but that none other than Grievant were removed from employment. This evidence alone is insufficient for the Hearing Officer to conclude that the Agency singled out Grievant for harsher discipline for some improper motive. There may have been mitigating circumstances or other reasons why those employees received lesser discipline than did the Grievant. The Hearing Officer lacks sufficient evidence to conclude that Grievant's disciplinary action should be mitigated based on the inconsistent application of disciplinary action.

In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

### **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 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  
600 East Main St. STE 301  
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.<sup>4</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].

*S/Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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