

Issues: Group III Written Notice (patient neglect) and Termination; Hearing Date: 07/22/08; Decision Issued: 09/22/08; Agency: DMHMRSAS; AHO: Carl Wilson Schmidt, Esq.; Case No. 8884; Outcome: No Relief – Agency Upheld in Full;  
**Administrative Review: AHO Reconsideration Request received 10/03/08; Reconsideration Decision issued 10/10/08; Outcome: Original decision affirmed;**  
**Administrative Review: DHRM Admin Review request received 10/07/08; Outcome pending; Judicial Review: To be appealed to Circuit Court in Lynchburg when all Administrative Reviews are issued.**



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8884**

Hearing Date: July 22, 2008  
Decision Issued: September 22, 2008

**PROCEDURAL HISTORY**

On April 8, 2008, Grievant was issued a Group III Written Notice of disciplinary action with removal for client neglect.

On April 14, 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 11, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 22, 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 DSA II at one of its facilities. Grievant was responsible for providing direct care to clients.

On September 8, 2007, Grievant was working in a housing unit providing direct care services to clients. The Charge Aide served as the shift supervisor that evening. Grievant reported to the Charge Aide during that shift. The Charge Aide was providing direct services to several other clients. Those clients did not require a one-to-one relationship by the Charge Aide.

On September 8, 2007 at 5:30 p.m., Grievant entered a one-to-one relationship with the Client. Grievant was expected to remain within a few feet of the Client at all times and be able to see and observe the Client at all times. Grievant's one-to-one relationship initially was scheduled to end at 7:30 p.m. Another DSA II, Ms. C, was scheduled to assume the one-to-one relationship with the Client at 7:30 p.m. Grievant knew that she could not end the one-to-one relationship unless another employee agreed to take over for her.

At 6:55 p.m. Ms. C asked the Charge Aide if she could take her dinner break. Ms. C told the Charge Aide she would be back by 7:30 p.m. to take over the one-to-one relationship with the Client. Ms. C asked the Charge Aide to sign her out on the Living Area Report. The Charge Aid wrote on the Living Area Report that Ms. C. was "out" at 7 p.m.

At 7:30 p.m., Ms. C had not yet returned from her dinner break. Grievant could not end the one-to-one relationship with the Client unless someone assumed her duties. Ms. C was supposed to assume the one-to-one relationship but Ms. C had not yet returned. Grievant told the Charge Aide that she was going to dinner. The Charge Aide asked Grievant to wait until Ms. C got back from dinner because the one-to-one relationship would not be covered. Grievant paused for a second. She then wrote the number "7" without writing any numbers after the "7" on the Living Area Report. She wrote this under the column entitled "Dinner Break".<sup>1</sup> Grievant then left the living area. She was no longer within arms distance of the Client and was no longer able to see the Client.

At approximately 7:35 p.m. or 7:40 p.m., the Supervisor arrived at the living area. The Supervisor asked the Charge Aide where everyone was. The Charge Aide said Ms. C was still on dinner break and that Grievant had left for dinner. The Charge Aide was upset and told the Supervisor that she was "tired of it". The Charge Aide told the Supervisor that Grievant had left the Client "uncovered".

At approximately 7:40 p.m. or 7:45 p.m., Grievant returned to the living area. At approximately 7:45 p.m., the Supervisor signed the Living Area Report to indicate the start of her "Rounds". At approximately 7:53 p.m., Ms. C returned to the living area. Ms. C. returned to the living area approximately 23 minutes late.

At approximately 8 p.m., Grievant wrote the number "8" over the number "7" that she had written under the "Dinner Break" column of the Living Area Report. She also wrote two zeros after the "8". She wrote that she had returned from her dinner break at 8:30 p.m.

### **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. Departmental Instruction ("DI") 201 defines<sup>2</sup> client neglect as:

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 the person receiving care or treatment for mental illness, mental retardation or substance abuse.

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<sup>1</sup> It appeared to be common practice for Grievant and Ms. C to "pre-sign" the Living Area Report. Grievant wrote "7" but did not write in the number of minutes. When Ms. C would return, Grievant would fill in the minutes so that their breaks would appear to happen in sequence.

<sup>2</sup> See, *Va. Code* § 37.1-1 and 12 VAC 35-115-30.

Grievant was in a one-to-one relationship with the Client. The one-to-one relationship was necessary for the health, safety, and welfare of the Client. Grievant knew she could not leave that relationship until another employee agreed to assume that responsibility. At approximately 7:30 p.m., Grievant abandoned the one-to-one relationship with the Client and walked out of the living area. When Grievant walked out of the living area, she was no longer providing the required care and services she was obligated to provide the Client. Grievant engaged in client neglect. DI 201 authorizes the Agency to issue a Group III Written Notice with removal to an employee found to have engaged in client neglect. Accordingly, the Agency's disciplinary action in this case must be upheld.

Grievant contends that she did not go on her dinner break. Instead, she contends she notified the Charge Aide that she would be taking a short restroom break. Grievant assumed that the Charge Aide would take over the one-to-one relationship with the Client while Grievant was in the restroom.

Grievant's argument fails for several reasons. First, Grievant told the Charge Aide that she would be taking her dinner break. Grievant did not tell the Charge Aide that she was going to the restroom. Grievant did not ask the Charge Aide to watch the Client for a short period of time while she went to the restroom. Second, the Living Area Report is a form with blank spaces to write in the times when Grievant was taking her dinner break, and two other breaks. Grievant took a break from 4:50 p.m. to 5 p.m. That information appears in the Living Area Report. Grievant left blank the second column entitled "Break". As she was about to leave the living area, Grievant wrote the number "7" in a column entitled "Dinner Break". This indicates that Grievant intended to take a dinner break rather than a regular break when she left the living area at 7:30 p.m. Third, the Charge Aide reported to the Supervisor that Grievant told the Charge Aide that Grievant would be taking her dinner break. Fourth, the Supervisor testified that the Charge Aide was upset because Grievant told the Charge Aide that Grievant was going on dinner break and Ms. C had not yet returned to assume the one-to-one relationship. This confirms the Charge Aide's statement that Grievant said she would be leaving for her dinner break. Fifth, if Grievant, in fact, intended to take a short restroom break rather than a dinner break, Grievant failed to obtain permission from the Charge Aide and failed to obtain the Charge Aide's agreement to assume the one-to-one in Grievant's absence.

*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

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<sup>3</sup> *Va. Code § 2.2-3005.*

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.

## 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  
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.<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.



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case No: 8884-R**

Reconsideration Decision Issued: October 10, 2008

**RECONSIDERATION DECISION**

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. “[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis ...” to grant the request.

Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the hearing ended. However, the fact that a party discovered the evidence after the hearing does not necessarily make it “newly discovered.” Rather, the party must show that:

- (1) the evidence is newly discovered since the date of the Hearing Decision;
- (2) due diligence on the part of the party seeking reconsideration to discover the new evidence has been exercised;
- (3) the evidence is not merely cumulative or impeaching;
- (4) the evidence is material;
- and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the Hearing Decision to be amended.

Grievant has not presented any newly discovered evidence. She disputes many of the facts in the original Hearing decision. Grievant presented her version of the dispute during the hearing. The Hearing Officer considered Grievant’s evidence and the Agency’s evidence and concluded that much of the Agency’s evidence was more reliable than Grievant’s evidence.

Grievant has not presented any argument regarding incorrect legal conclusions.

For these reasons, the request for reconsideration is **denied**.



## APPEAL RIGHTS

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

### Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

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Carl Wilson Schmidt, Esq.  
Hearing Officer