

Issues: Group III Written Notice (patient abuse/neglect) and Termination; Hearing Date: 10/03/08; Decision Issued: 12/16/08; Agency: DMHMRSAS; AHO: Carl Wilson Schmidt, Esq.; Case No. 8939; Outcome: Full Relief.



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8939**

Hearing Date: October 3, 2008  
Decision Issued: December 16, 2008

**PROCEDURAL HISTORY**

On June 23, 2008, Grievant was issued a Group III Written Notice of disciplinary action for client abuse/neglect. She was removed from employment effective June 23, 2008.

On July 18, 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 August 26, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 3, 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. She had been employed by the Agency for approximately 8 years and was familiar with the Agency's expectations regarding her interactions with clients. 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.

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

The Client is a 47-year-old woman who has resided at the Facility since 1970. She can speak fewer than 10 words and generally communicates with facial expressions, gestures, pointing, or by taking someone's hand and leading him or her to what she wants/needs. She has a behavior support plan in place for symptoms associated with Bipolar I Disorder, MRE unspecified; target behaviors include aggression to others and disruptive behaviors. She is visually impaired, wears glasses, and is in a formal training program regarding care of her glasses. She has an identified problem of urinary incontinence, but does not have a formal training program. She wears adult incontinence briefs and is routinely reminded to use the bathroom during the day. She is profoundly intellectually impaired.

The Trainee began working at the Facility on April 25, 2008. After spending the morning hours in orientation, the Trainee was released to her assigned work area for the afternoon. The Trainee sat on a couch in the day room. Between 3:30 p.m. and 4 p.m., a resident sat next to the Trainee. As the resident rose from the couch, the Trainee noticed that the resident had urinated on herself and her clothing was wet. An employee observed that the resident was wet and began angrily gesturing towards the resident while holding a paperback book in her hand and said something to the effect of "you know better than that... Look at you... You can sit in that until it's time for your bath tonight...." The resident reacted by holding her hands up in a guarded fashion while backing away from the employee. The resident then sat on the couch and remained there until the Trainee ended her shift and left the area at 5 p.m.

The Trainee had not received client abuse training on April 25, 2008. When she received the training the following week she recognized her obligation to report what she had observed. On May 8, 2008, the Trainee identified the resident as the Client and the employee as Grievant.

### **CONCLUSIONS OF POLICY**

The Agency contends Grievant engaged in client abuse/neglect thereby justifying the issuance of a Group III Written Notice with removal. The Agency relies upon several factors to support its conclusion. First, the Agency relies upon the statements made by the Trainee based on her direct observation of Grievant. The Trainee stated to other employees that a resident was wet and that an employee observed that the resident was wet. This occurred sometime after 3 p.m. on April 25, 2008.<sup>1</sup> That employee began angrily gesturing towards the resident while holding a paperback book in one hand and said something to the effect of "you know better than that... Look at you... You can sit in that until it's time for your bath tonight..." The resident reacted by holding her arms up in a guarded fashion while backing away from the employee. The resident sat on a couch where she remained until at least 5 p.m. when the Trainee ended her shift. The Trainee later identified the resident as the Client and the employee as Grievant.

Second, the Agency relies upon Grievant's reaction to the Investigator when he interviewed her about the incident. The Investigator wrote in his report:

When this investigator informed [Grievant] that an allegation had been made that she had been observed reading a paperback book while sitting in the living room, she bent her head forward and visibly sagged in her seat. She made no statements. When this investigator informed her that an allegation had been made that she had allowed someone to stay wet,

---

<sup>1</sup> The Investigator's report indicates that the incident occurred at 4:15 p.m. If the Investigator's time is accurate, it would mean that the resident remained in wet clothing for at least 45 minutes.

her body sagged even more, and she again did not make any statement. This investigator informed her that the individual was [the Client]; she did not respond. This investigator informed her that there was an allegation that she shook her finger/gestured towards [the Client] while verbally chastising her and that she told her something to the effect of "you're going to wear those until you take your bath", [Grievant] did not respond.

The Investigator concluded Grievant admitted to the allegations because she did not immediately deny them.

Grievant presented several reasons why the disciplinary action against her should be reversed. First, Grievant testified that she did not permit be Client to remain in wet clothing for several hours as alleged by the Agency. The Hearing Officer closely observed Grievant's demeanor as she testified. Grievant's denial was credible. The Hearing Officer was not able to discern any behavior by Grievant as she testified that would indicate untruthfulness. When Grievant was asked why she did not immediately deny the Investigator's allegations, Grievant responded that she was surprised and disheartened that such false allegations could be made against her. She contends her response to the Investigator reflected her disappointment and not an admission by her of responsibility. The Hearing Officer observed that Grievant is reserved and soft-spoken. Grievant's assertion that her response reflected disappointment is consistent with the Hearing Officer's assessment of Grievant's likely customary demeanor.

Second, Grievant asserts that the Agency's suggestion that she did not deny the allegations against her is a false assertion. For example, the Investigator interviewed Grievant on May 8, 2008 and wrote in his report:

This investigator asked her if she ever read in the living room, and she denied doing so, although she acknowledged sometimes reading the newspaper to individuals. When asked if she ever gestured angrily towards [the Client] or to any other individuals, she denied doing so, but acknowledged "fussing at them... You know, like family..." When asked if she allowed [the Client] or any other individuals to remain wet, she denied doing so. This investigator urged her to share information that would help support her position, to which she replied "What can I do? That's what they say."

On May 14, 2008, the Investigator spoke with Grievant by telephone for a second time. When the investigator asked her if she had made a threatening gesture towards the Client and/or told the Client to wear her wet clothing, Grievant simply stated "No, I did not." When Grievant was asked if she had any idea why someone would make such an allegation against her, Grievant stated "I don't know."

This case must be resolved based upon which party holds the burden of proof. The Agency has presented a logical basis to support its conclusion that Grievant engaged in client abuse. The Trainee, however, did not testify during the hearing. The

Hearing Officer was not able to determine the credibility of the Trainee's statements.<sup>2</sup> Grievant has also presented a logical basis to support her conclusion that she did not engage in client abuse. She denied mistreating the Client. Although her denial was not credible to the Investigator, her denial to the Hearing Officer was credible. As between the evidence presented by the Agency and the evidence presented by Grievant at the hearing, the Hearing Officer cannot conclude by a preponderance of the evidence that Grievant engaged in client abuse. Accordingly, the disciplinary action against her must be reversed.

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 he 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 **rescinded**. 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.

---

<sup>2</sup> Some parts of the Trainee's statements seem inconsistent with other facts in the record. For example, the Trainee indicated that the resident she observed did not wear glasses. The Investigator's report states that the Client wore glasses. In addition, the Trainee testified that the employee she observed was reading a paperback book. Grievant denied it was her practice to read paperback books while working. Although these discrepancies may not be of great significance, the Trainee's testimony would have helped resolve the uncertainty.

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>3</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*

---

Carl Wilson Schmidt, Esq.  
Hearing Officer

---

<sup>3</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.