

Issue: Group III Written Notice with Termination (client neglect); Hearing Date: 05/13/10; Decision Issued: 05/20/10; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 9322; Outcome: No Relief – Agency Upheld; **Administrative Review: DHRM Ruling Request received 06/04/10; DHRM Ruling issued 06/21/10; Outcome: Declined to review.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9322

Hearing Date: May 13, 2010

Decision Issued: May 20, 2010

PROCEDURAL HISTORY

On February 17, 2010, Grievant was issued a Group III Written Notice of disciplinary action with removal for client neglect.

On February 22, 2010, 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 April 20, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 13, 2010, 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 Behavioral Health and Developmental Services employed Grievant as a DSA II at one of its Facilities until her removal effective February 17, 2010. Grievant had been employed by the Agency for approximately 25 years. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

The Client is a 25-year-old male who began living at the Facility in August 2004. He is nonverbal and has been diagnosed with Pervasive Developmental Disorder, NOS, Bipolar I Disorder and has a history of severe PICA. Having PICA means the Client will ingest inedible objects unless he is prevented from doing so. The Client had a history of attempting to ingest his bedding and clothing.

On December 14, 2009, Grievant was assigned to be in a one-to-one relationship with the Client. At approximately 4 a.m. on December 14, 2009, the Supervisor was making her rounds. She walked down a hall to check the refrigerator temperature gauge. She noticed that an individual's bedroom light was on. She turned around and walked up the hall to find Grievant and ask about the light. The Client was asleep in his bed and Grievant was inside the Client's room. The Supervisor approached the room and called Grievant's name. Grievant did not respond. The door to the Client's room was a few inches open. The Supervisor pushed the door open further and walked inside the room. Grievant was sitting in a chair facing the foot of the Client's bed. Grievant's feet were on the foot of the Client's bed. The Supervisor walked to the foot of the Client's bed and look directly at Grievant. She was standing a few feet from

Grievant. The Supervisor observed Grievant with her eyes shut and her head turned to the right facing the wall. Grievant was breathing deeply and slowly. The Supervisor observed Grievant sleeping for four or five minutes. As the Supervisor was leaving the room to get another staff member to observe Grievant, Grievant awoke and turned her head towards the Supervisor.

Grievant was later asked to provide a statement. She wrote "I might have nodded off due to working over time that day but not for long."

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 authorized removal for neglect.

Va. Code § 37.2-100 defines neglect as:

This means the failure by a person, program, or facility operated, licensed, or funded by the department, responsible for providing services to do so, including 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 was in a one-to-one assignment with an individual receiving services. This means the Client was to be "observed constantly by a staff member who must be within arm's reach (or within 'two steps'), if so specified on the physician's order) so that they may provide rapid intervention."¹ When Grievant fell asleep at 4 a.m., she was no longer constantly observing an individual in need of constant observation. Grievant was neglecting the individual. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, Grievant's removal from employment must be upheld.

Grievant argued that the Supervisor should have obtained a second employee to view Grievant sleeping in order to be certain. Although a second witness would have been desirable, Agency policy does not require one. The Supervisor's testimony was credible. The Agency has presented sufficient evidence to establish that Grievant was sleeping while in a one-to-one assignment. Although Grievant may have slept for only a few minutes, employees in a one-to-one with a client are expected to observe the client at all times without exception.

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

¹ Agency Exhibits 4.

Resolution....”² 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.

This case is unfortunate. Grievant is a long-term employee with close relationships with clients she served. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.³

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

² *Va. Code § 2.2-3005.*

³ Grievant argued that the Supervisor reported Grievant because of Grievant’s involvement with another employee who fell asleep several months earlier. Insufficient evidence was presented to support this allegation and its significance.

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.⁴

[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

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

June 21, 2010

Attorney for Grievant

RE: **Grievance of [Grievant] v. Department of Behavioral Health and Developmental Services**
Case No. 9322

Dear Attorney:

The agency head of the Department of Human Resource Management, Ms. Sara Redding Wilson, has asked that I respond to your request for an administrative review of the hearing officer's decision in the above referenced case. Please note that, pursuant to the Grievance Procedure Manual, §7.2(a), either party to the grievance may request an administrative review 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 (DHRM) to review the decision. You must refer to the specific policy and explain why you believe the decision is inconsistent with that policy.

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.

In each instance where a request is made to this Agency for an administrative review, the party making the request must identify with which human resource policy, either state or agency, the hearing decision is inconsistent. While you indicated that you believe the decision is inconsistent with state policy, you did not identify any specific state policy. Rather, it appears that you are disagreeing with how the hearing officer assessed the evidence, the conclusions he drew and the resulting decision. You implied that the hearing officer did not properly apply the provisions of Virginia Code § 2.2-3005.1 regarding "mitigating or reduction of the agency disciplinary action." This Department has no authority to interpret or apply the provisions of the Code. We must therefore we must respectfully decline to honor your request to conduct the review.

Sincerely,

Ernest G. Spratley
Assistant Director,
Office of Equal Employment Services