

Issue: Group III Written Notice with Termination (Patient Neglect); Hearing Date: 06/15/10; Decision Issued: 06/24/10; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq; Case No. 9335; Outcome: Partial Relief. **Fee Addendum issued 07/23/10 awarding \$2,648.04.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9335

Hearing Date: June 15, 2010

Decision Issued: June 24, 2010

PROCEDURAL HISTORY

On March 22, 2010, Grievant was issued a Group III Written Notice of disciplinary action with removal for neglect of an individual in residence.

On March 30, 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 May 17, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 15, 2010, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant 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 Direct Service Associate II at one of its Facilities. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

The Shower Room in the Building at the Facility included a shower stall¹ and a detached tub. In the shower stall was a chair secured to the wall and floor. The seat in the chair resembled a toilet seat in shape. The chair had a belt to secure the person sitting in the chair during the shower. The belt fastened in the front of the person in a manner similar to a car seat belt. If a person was sitting in the shower when the shower was on, the water would flow from the wall to the person's left side.²

The water heater for the shower and the tub was located on the floor below the Shower Room. The water heater was supposed to heat water to approximately 120° before the water traveled through water lines up to the Shower Room. The Agency previously had some problems with maintaining the water temperature in the water heater. Although some of the Agency's employees were aware of these problems,

¹ The Shower Room had two shower stalls but for the simplicity of discussion, the Hearing Officer will refer to only one shower.

² The shower head could be removed from the holster towards the top of the shower and used to spray the individual as needed. When the shower head was in the holster, it was located towards the upper side of the wall and angled downward towards the chair.

Grievant was not. On January 18, 2010, the water heater malfunctioned resulting in water temperatures over 190°.

On January 18, 2010 at approximately 7 p.m., Grievant was in the process of bathing the Client. Under the Client's treatment plan, the Client was supposed to be bathed in the tub. Instead, Grievant bathed the Client in the shower. Because the water heater malfunctioned, the water coming from the shower burned the Client resulting in second and third degree burns over the left side of her body. The Client experienced significant pain from the burns and had to be rushed to the local hospital emergency room.

At approximately 8 p.m. on January 18, 2010, Mr. T measured the temperature of the water flowing from the shower head and tub spigot. The water temperature in the shower was at least 150°. The water temperature in the tub was approximately 123°.

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's treatment plan required that she be bathed in the tub. Grievant bathed the Client in the shower thereby acting contrary to the Client's treatment plan. It was necessary to the Client's health that she be bathed in the tub and not in the shower. Accordingly, Grievant engaged in Client neglect.

This case is close. Grievant argued that she bathed the Client in the tub and not in the shower. She presented two witnesses to support her testimony. The Agency presented no witnesses who observed the Client being bathed in the shower. The reason the Agency is able to meet its burden of proof is because of the pictures showing the burn markings on the Client's body. Grievant testified that she was standing on the Client's left side and used a shower wand from the tub to rinse off the Client. Grievant testified that her motion was from left to right across the Client's body. The burn markings, however, are solely on the Client's left side. The burn markings on the Client's left hip and bottom reflect the pattern of someone sitting on the shower seat and not in the tub.

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....”³ 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.

An employee who engages in client neglect may be removed from employment unless mitigating circumstances exist to reduce the disciplinary action. In this case, mitigating circumstances exist to reduce the disciplinary action from a Group III Written Notice with removal to a Group II Written Notice with a 10 work day suspension.

The injuries to the Client were severe and devastating but they were caused by a malfunctioning water heater not by the Grievant. Grievant did not know that the water heater was malfunctioning and that bathing the Client would place her at risk of injury from scalding. The Client’s treatment plan required that she be bathed in the tub in order to reduce the risk of a urinary tract infection and not because the tub presented a lower risk of being burned from scalding water. Had the Agency’s water heater system not malfunctioned, the Client would not have been burned regardless of how Grievant bathed the Client.

Grievant was responsible for checking the water temperature prior to bathing the Client. Grievant testified that she checked the water temperature. No credible evidence has been presented to suggest that she did not check the water temperature. If Grievant checked the water temperature at the shower head when she first turned it on, the water may not yet have reached over 150 degrees. A short period of time was required for the hot water in the basement to reach the Shower Room. The Agency contends that Grievant turned on the shower and left the Client alone unattended. There is no credible evidence to support this assertion. Given the temperature of the scalding water, it could have taken less than a minute for the water to have burned the Client. The evidence is not sufficient to show that Grievant disregarded her obligation to check the temperature of the water before bathing the Client.

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

³ *Va. Code § 2.2-3005.*

unjust.” Grievant has substantially prevailed on the merits of the grievance because she is to be reinstated. 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 **reduced** to a Group II Written Notice of disciplinary action with a 10 work day suspension. The Agency is ordered to **reinstate** Grievant to Grievant’s former position, or if occupied, to an objectively similar position. After accounting for the ten workday suspension, 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.
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
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].

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.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

ADDENDUM TO DECISION OF HEARING OFFICER

In re:

Case No: 9335-A

Addendum Issued: July 23, 2010

DISCUSSION

The grievance statute provides that for those issues qualified for a hearing, the Hearing Officer may order relief including reasonable attorneys' fees in grievances challenging discharge if the Hearing Officer finds that the employee "substantially prevailed" on the merits of the grievance, unless special circumstances would make an award unjust.⁵ For an employee to "substantially prevail" in a discharge grievance, the Hearing Officer's decision must contain an order that the agency reinstate the employee to his or her former (or an objectively similar) position.⁶

To determine whether attorneys' fees are reasonable, the Hearing Officer considers the time and effort expended by the attorney, the nature of the services rendered, the complexity of the services, the value of the services to the client, the results obtained, whether the fees incurred were consistent with those generally charged for similar services, and whether the services were necessary and appropriate.

Grievant's attorney submitted a petition showing hours worked of 18.84. Those hours were reasonable. The hourly rate allowable by EDR is \$131. Grievant is entitled to attorneys' fees in the amount of \$2,468.04.

AWARD

The Grievant is awarded attorneys' fees in the amount of \$2,468.04.

⁵ Va. Code § 2.2-3005.1(A).

⁶ § 7.2(e) Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004. § VI(D) *EDR Rules for Conducting Grievance Hearings*, effective August 30, 2004.

APPEAL RIGHTS

If neither party petitions the EDR Director for a ruling on the propriety of the fees addendum within 10 calendar days of its issuance, the hearing decision and its fees addendum may be appealed to the Circuit Court as a final hearing decision. Once the EDR Director issues a ruling on the propriety of the fees addendum, and if ordered by EDR, the hearing officer has issued a revised fees addendum, the original hearing decision becomes “final” as described in §VII(B) of the *Rules* and may be appealed to the Circuit Court in accordance with §VII(C) of the *Rules* and §7.3(a) of the *Grievance Procedure Manual*. The fees addendum shall be considered part of the final decision. Final hearing decisions are not enforceable until the conclusion of any judicial appeals.

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer