

Issue: Group III Written Notice with Termination (client neglect); Hearing Date: 06/14/11; Decision Issued: 06/24/11; Agency: DBHDS; AHO: Frank G. Aschmann, Esq.; Case No. 9616; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION

DIVISION OF HEARINGS
DECISION OF HEARING OFFICER

In the matter of: Case No. 9616

Hearing Date: June 14, 2011
Decision Issued: June 24, 2011

PROCEDURAL ISSUE

No procedural issues raised.

APPEARANCES

Grievant
Agency Presenter
Recording Technician
Two Agency Witnesses
One Grievant Witness

ISSUE

Did the Grievant violate Agency policy in regard to client treatment on November 24, 2010, such as to warrant the issuance of a Group III Written Notice with employment termination?

FINDINGS OF FACT

The Grievant is employed by the Agency as a Direct Support Professional. The Grievant's job duties include direct support of agency clients. On November 24, 2010, a client field trip was planned. At approximately, 11:10am the staff, including the Grievant, began transitioning the clients into two vehicles for transportation on the field trip. The Grievant was the driver of one of the vehicles and designated "In-charge Staff." The Grievant's duties included taking a count of the clients on the vehicle and comparing it to a list of clients which were identified as scheduled to take the trip. During the process the passenger lists were changed when difficulties arose with one of the clients being on the wrong vehicle and refusing to move. Two lists were thus created, however, the Grievant had both lists. Another client was scheduled to go on the trip on the Grievant's vehicle and his name is on both lists. This client was not on the vehicle and remained in the facility. The Grievant marked the lists showing the client was not present. The client was left in the facility without proper supervision. The client has a high risk of falling, osteopenia and other medical conditions which require he remain under observation at all times. The client was alone in the facility from the time the staff left approximately 11:20am to 12:45pm, when he was discovered by a nurse. Other staff members were escorting the clients

from the facility to the vehicle while the Grievant loaded them on to the vehicle. The Grievant relied on the other staff members to bring all the clients to the vehicle. The Grievant marked the client absent but did not follow up and positively identify his whereabouts or check if he was being supervised.

During the trip, heavy traffic was encountered and the vehicle stopped and staff purchased food from a local restaurant and took a rest room break. The trip was longer than planned. The clients were scheduled to have lunch at 11:45am. The clients were not served lunch before they left and received lunch after they returned at approximately 1:15pm.

Upon discovery that the client had been left at the facility, it was reported to the Training Center Operations Manager (TCOM). The Grievant did not make any report to the facility director. The Agency made a finding that the Grievant abused or neglected a client. On December 17, 2010, the Grievant was issued a Group III Written Notice and his employment with the Agency was terminated. The Grievant has appealed this disciplinary action.

APPLICABLE LAW AND OPINION

The General assembly enacted the Virginia Personnel Act, Code of Virginia §2.2-2900 et seq., establishing the procedures and policies applicable to employment with the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. Murray v. Stokes, 237 Va. 653 (1989).

Code of Virginia §2.2-3000 et seq. sets forth the Commonwealth's grievance procedure. State employees are covered by this procedure unless otherwise exempt. Code of Virginia §2.2-3001A. In disciplinary actions, the Agency must show by a preponderance of the evidence that the disciplinary action was warranted and appropriate under the circumstances. Department of Employment Dispute Resolution Grievance Procedure Manual, §5.8 (2).

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Code of Virginia §2.2-1201, the Department of Human Resource Management promulgated Standards of Conduct Policy number 1.60. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards of Conduct serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action. The Agency uses these policies for its Standards of Conduct. Under the Standards of Conduct, abuse or neglect of clients is listed as a Group III offense. Group III offenses typically warrant employment termination.

In part, neglect is defined as failure to provide services which are necessary for the health,

safety or welfare of an agency client. Leaving the client alone in the facility was an act of neglect. The client could easily have come to harm through accident or medical emergency and no one was there to assist. The circumstances of this incident show that the Grievant was not solely responsible for the neglect but like others he failed to follow the established policies designed to prevent such occurrences. The Grievant should not have relied on others as it was his responsibility to check on anyone missing from the trip passenger list. He failed to do this and thereby contributed to the system break down which placed the client at risk. No one knew the client was alone further demonstrating a system wide failure. However, there being many people at fault does not absolve the Grievant of his failure to follow policy and subjects him to the disciplinary procedure.

The evidence also demonstrates that lunch was not served at the appropriate time. This is clearly a smaller issue but is also a violation of policy. Neglect includes failing to feed clients. The trip appears to have been poorly planned in this regard as not enough time was allotted to make the trip and return in time for lunch and the kitchen staff was not told to prepare lunch later in the day because of a special event. No evidence was presented which indicated these were the responsibilities of the Grievant. Management must take some responsibility for approving the trip with an inadequate plan.

The Grievant is a mandatory reporter for suspected abuse or neglect. The procedure governing reporting is covered in Departmental Instruction 201 (RTS) 03. The grievant made no report of the incident when he discovered that one of the clients which was under his care had been left alone on the unit. While there was confusion among the staff and with the TCOM about who should have reported the incident, there should not have been as they are all mandatory reporters and each of them should have known to report. The Grievant himself testified that the staff is reluctant to report incidents because it fears there will be disciplinary action. The Grievant's failure to independently report the incident is a violation of policy. The Grievant has argued that incidents are sometimes covered up at the Agency. This highlights the importance of individual accountability and responsibility for reporting. Mandatory reporters must act even in the face of whistle blower fears to protect their clients which is their duty. Thus the Grievant's failure to report is a serious violation.

The Grievant has argued that the sanction of employment termination is too harsh because the policy of employment termination for abuse or neglect of clients is not applied uniformly. The evidence does not support the Grievant's argument. The Grievant cites examples of incidents where neglect has occurred and testified that some of these employees were not fired. This is insufficient to establish that there were not good reasons for the Agency's action in those cases. Each case is unique, with its own facts and circumstances. The appropriate discipline must be considered on a case by case basis. The Grievant did not present any case which was like his own where the result was different or the details of the cases cited. The Agency presented evidence that disciplinary action in this matter was taken against many employees. The evidence also showed that the other employee who was most similarly situated to the Grievant resigned her position because she knew she would be fired. The Grievant can not vindicate himself by pointing out the failure of others. The Grievant had a responsibility to the client which was not met. The Grievant violated two policies which are very serious in nature and exist to protect the clients from harm.

DECISION

The disciplinary action of the Agency is affirmed.

APPEAL RIGHTS

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

ADMINISTRATIVE REVIEW: This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. A request to reconsider a decision or reopen a hearing is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.
2. A challenge that the hearing decision is inconsistent with state or agency policy is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, VA 23219 or faxed to (804) 371-7401.
3. A challenge that the hearing decision does not comply with grievance procedure is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the EDR Director, Main Street Centre, 600 East Main Street, Suite 301, Richmond, VA 23219 or faxed to (804) 786-0100.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within 15 calendar days of the date of the original hearing decision. (Note: the 15-day period, in which the appeal must occur, begins with the date of issuance of the decision, not receipt of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days). A copy of each appeal must be provided to the other party.

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 contrary 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.

Frank G. Aschmann
Hearing Officer