

Issue: Group III Written Notice with Termination (client neglect); Hearing Date: 05/04/17; Decision Issued: 06/08/17; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10981; Outcome: No Relief – Agency Upheld.



# ***COMMONWEALTH of VIRGINIA***

## ***Department of Human Resource Management***

### **OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

#### **DECISION OF HEARING OFFICER**

In re:

**Case Number: 10981**

Hearing Date: May 4, 2017

Decision Issued: June 8, 2017

#### **PROCEDURAL HISTORY**

On January 27, 2017, Grievant was issued a Group III Written Notice of disciplinary action for client neglect.

On February 21, 2017, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On March 15, 2017, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 4, 2017, a hearing was held at the Agency's office. Grievant was notified of the hearing date and time. He did not provide a list of witnesses or proposed exhibits by the exchange date deadline. He did not appear at the hearing.

#### **APPEARANCES**

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 Registered Nurse C/Administrator on Duty. No evidence of prior active disciplinary action was introduced during the hearing.

On December 13, 2016, Grievant was serving as the Administrator on Duty for the Facility.

The Patient was disruptive. Approximately a dozen employees entered the Patient’s room to restrain and extract the Patient. The Patient was combative and resisted the employees. She began spitting on employees. An employee placed a blue cloth blanket over and above the Patient’s head. Employees placed the Patient in a restraint chair. The blanket covered the Patient’s mouth, nose, eyes, and the top of her head. The chair had straps to secure the Patient and wheels to enable the Patient to be moved out of the room while in restraints. The Patient was rolled out of the room and into the day room. Grievant observed the Patient with her head covered by the blanket. He noticed that straps on the wheelchair were loose and dangling. He stopped the employee from moving the chair. He bent down, adjusted the straps and the blanket. When he was finished, the employee continued rolling the Patient into another room down a hallway and to another location. Grievant followed the Patient.

The Facility has spit masks for staff to use to prevent patients from spitting on them. The spit masks do not interfere with a patient’s ability to breath. Grievant did not delay moving the Patient until staff retrieved a spit mask.

### **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>1</sup> client abuse as:

This means any act or failure to act by an employee or other person responsible for the care of an individual in a Department facility that was performed or was failed to be performed knowingly, recklessly or intentionally, and that caused or might have caused physical or psychological harm, injury or death to a person receiving care or treatment for mental illness, mental retardation or substance abuse. Examples of abuse include, but are not limited to, acts such as:

- Rape, sexual assault, or other criminal sexual behavior
- Assault or battery
- Use of language that demeans, threatens, intimidates or humiliates the person;
- Misuse or misappropriation of the person’s assets, goods or property
- Use of excessive force when placing a person in physical or mechanical restraint
- Use of physical or mechanical restraints on a person that is not in compliance with federal and state laws, regulations, and policies, professionally accepted standards of practice or the person’s individual services plan; and
- Use of more restrictive or intensive services or denial of services to punish the person or that is not consistent with his individualized services plan.

For the Agency to meet its burden of proof in this case, it must show that (1) Grievant engaged in an act that he or she performed knowingly, recklessly, or intentionally and (2) Grievant’s act caused or might have caused physical or psychological harm to the Client. It is not necessary for the Agency to show that Grievant intended to abuse a client – the Agency must only show that Grievant intended to take the action that caused the abuse. It is also not necessary for the Agency to prove a client has been injured by the employee’s intentional act. All the Agency must show is that the Grievant might have caused physical or psychological harm to the client.

Facility Policy 450-035 governs Emergency Use of Seclusion or Restraint. This policy states:

Under no circumstances may staff hold an individual’s jaw/chin closed or place something that could obstruct breathing over the patient’s nose or mouth.<sup>2</sup>

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<sup>1</sup> See, Va. Code § 37.2-100 and 12 VAC 35-115-30.

<sup>2</sup> Agency Exhibit H.

Placing a blanket over the Patient's mouth and nose was a form of restraint intended to prevent the Patient from spitting on staff. Grievant could have asked staff to secure a spit mask while the employees were assembling outside of the Patient's room and before confronting the Patient. If the blanket had to be placed across the Patient's face to stop the Patient from spitting on staff, Grievant could have ensured that a spit mask was obtained once the Patient was in the restraint chair and prior to transporting the Patient to another location. It appears that Grievant permitted the blanket to remain covering the Patient's face for an excessive length of time thereby using excessive restraint on the Patient. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice with removal for client abuse.

*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 Human Resource Management ...."<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 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 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:

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<sup>3</sup> *Va. Code § 2.2-3005.*

Director  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR 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:

Office of Employment Dispute Resolution  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto:EDR@dhrm.virginia.gov), or by fax to (804) 786-1606.

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 provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative 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 EDR before filing a notice of appeal.