

Issue: Group III Written Notice with termination (failure to report client abuse); Hearing Date: 07/03/19; Decision Issued: July 23, 2019; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 11214; Outcome: No Relief – Agency Upheld.



# **COMMONWEALTH of VIRGINIA**

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

### **OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION**

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

In re:

**Case Number: 11214**

Hearing Date: July 3, 2018  
Decision Issued: July 23, 2018

#### **PROCEDURAL HISTORY**

On April 30, 2018, Grievant was issued a Group III Written Notice of disciplinary action with removal for failure to report client abuse.

On May 1, 2018, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On May 22, 2018, EEDR issued Ruling 2018-4727 and 2018-4728 consolidating two employee grievances for hearing. On May 24, 2018, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On July 3, 2018, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
Second Grievant  
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. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. 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 LPN at one of its Facilities. No evidence or prior active disciplinary action was introduced during the hearing.

Grievant is referred to as Mr. E in this decision.

The Patient was a 56 year old male admitted to the Facility on April 2, 2018 with a diagnosis of Bipolar Disorder.

Ms. N was a DSA working in the Unit Lobby.

Mr. B was a DSA working in the Unit Lobby.

Grievant reported to the Supervisor who was a Registered Nurse.

A male employee and Ms. N were seated at a table with four seats in the Unit Lobby. A stack of the Patient's clothing was on the table. At approximately 7:22 p.m., the Patient approached the table and argued with Ms. N. Ms. N told the Patient that the clothes did not belong on the table without a basket. The Patient took the stack of clothing from the table and dropped it on the floor next to the table. At approximately 7:24 p.m., Ms. N told Mr. B that the Patient had taken the stack of clothing from the table and dropped it to the floor. Ms. J sat at the table in a seat next to the stack of clothing. Mr. B went to find the Patient.

Mr. B escorted the Patient back to the table. The Patient picked up the stack of clothing from the floor and dropped it in the empty fourth seat at the table. The Patient argued with Ms. N. Mr. B positioned himself in front of the Patient touching the Patient to block the Patient's conversation with Ms. N. The Patient then pushed away and began walking away from Ms. N. The Patient stopped and began speaking to Mr. B. Mr. B stepped towards the Patient. Ms. J had turned to look at the back of Mr. B. Mr. B used his right arm and fist to punch the Patient on the right side of his face. Ms. J observed Mr. B punch the Patient. The Patient did not attempt to punch Mr. B. Ms. N got up from her seat and separated Mr. B and the Patient. The Patient touched his face and lip where he had been hit by Mr. B.

Mr. E walked into the Unit Lobby as Mr. B was punching the Patient. Mr. E walked to the Patient and spoke with the Patient. The Patient told Mr. E that Mr. B had just punched him in the face. As Mr. E and the Patient spoke, Ms. N stood next to Mr. E. Mr. B approached the group and Ms. N blocked Mr. B's advance and redirected him away from the Patient.

Mr. E and Ms. J knew that by punching the Patient, Mr. B had engaged in client abuse under the Agency's client abuse policy.

The Supervisor was not present when Mr. B punched the Patient. Mr. E called the Supervisor and asked her to come to the Unit Lobby. When the Supervisor came to the Unit Lobby, Mr. E informed the Supervisor<sup>1</sup> that Mr. B punched the Patient.<sup>2</sup> Mr. E asked the Supervisor what to do. The Supervisor said that she would take care of it. Approximately an hour later, Mr. E spoke with the Supervisor again about the assault and the Supervisor restated that she would take care of it. The Supervisor told Mr. E and Ms. J that she had "squashed it" meaning that the matter was resolved by the Supervisor. The Supervisor told Mr. E not to document anything. The Supervisor told Ms. N not to "write anything on it" and Ms. N told Ms. J what the Supervisor had said. The Supervisor told Mr. B "not to worry about it" and not to document anything.

Neither Mr. E, nor Ms. J reported Mr. B's behavior to the Facility Director or the Duty RNC.

The Supervisor did not remove Mr. B from the Unit Lobby. Mr. B continued to work causing the Patient to remain in fear of an additional assault.

On April 6, 2018, the Patient submitted a complaint to the Patient Relations Unit of the Facility alleging that Mr. B punched him in the face. The Agency began an investigation.

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<sup>1</sup> Mr. B also told the Supervisor that he punched the Patient in the face.

<sup>2</sup> The Supervisor later told the Agency Investigator that Mr. E told her the conflict was only a verbal altercation.

On April 6, 2018, Ms. N reported the assault to the Facility's Abuse Investigator's office and spoke with an employee in that office to report the incident.

Mr. B was removed from employment. Mr. E and Ms. J were removed from employment. Ms. N received a Group II Written Notice.

The Agency Investigator concluded the Supervisor failed to see to the welfare of the Patient, failed to comply with Departmental Instruction 201, and failed to remove Mr. B from the unit to safe guard the Patient from further aggression. The Supervisor resigned from the Agency on April 16, 2018 and avoided disciplinary action.

### **CONCLUSIONS OF POLICY**

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action."<sup>3</sup> Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

Departmental Instruction 201 governs Reporting and Investigating Abuse and Neglect of Individuals. Client abuse included assault or battery. Mr. B engaged in client abuse by punching the Patient.

DI 201 provides:

Workforce members shall report all incidents of suspected abuse or neglect of individuals receiving service in accordance with [this] DI. \*\*\*

Failure to report suspected abuse or neglect of children or aged or incapacitated adults may be subject to monetary penalties under §63.2-1509 and §63.2-1606 of the Code of Virginia.<sup>4</sup>

Facility Policy 050-057 governs Reporting and Investigating Abuse and Neglect of Patients. The Policy provides:

All alleged incidents of abuse or neglect will be reported immediately to the Hospital Director so that immediate action may be taken to safeguard individuals receiving services.

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<sup>3</sup> The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

<sup>4</sup> Agency Exhibit E.

Failure to report allegations of abuse/neglect may result in disciplinary action and may be considered a violation of the Mandated Reporter's Law.

After normal work hours, alleged incidents will be reported to the Duty RNC through the Hospital Information Center. The Hospital Director will notify the Advocate and Authorized Representative (AR), if applicable, and will initiate the investigation into the allegation within 24 hours of notification.

Section 1 of the Procedures for this Policy provides:

Any person observing/witnessing an incident of abuse or neglect must immediately intervene, as appropriate, to ensure the safety of the individual and report the situation, in detail, to the Hospital Director [at telephone number] or if after normal work hours to the Duty RNC through the Information Center at [telephone number].

The information must be reported immediately, should not exceed 24-hours after the discovery of the incident, and can be done by telephone or in person. The person making the report should identify him or herself, and if known, provide the date and time of the incident, name(s) of the individual victim(s) and staff members involved, location of the incident, full details of the incident, and the names of any possible witnesses. Reporting suspected abuse or neglect to one's supervisor or the Advocate does not fulfill the requirement for immediate reporting to the Hospital Director.<sup>5</sup>

On April 5, 2018, Grievant learned that Mr. B engaged in client abuse of the Patient. Grievant did not report that abuse as required by Agency policy. Grievant received annual training regarding the Agency's client abuse policies. The Agency considers failure to report client abuse to be client neglect because immediate reporting of client abuse is a service necessary for the safety of individuals. Grievant's failure to report client abuse rises to the level of a Group III offense. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, the Agency's decision to remove Grievant must be upheld.

*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>6</sup> Under the *Rules for Conducting Grievance Hearings*, "[a] hearing officer must give deference to the agency's consideration and assessment of any

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<sup>5</sup> Agency Exhibit C.

<sup>6</sup> Va. Code § 2.2-3005.

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.

Grievant argued that Mr. B's client abuse was reported to the Supervisor who instructed that she had taken care of the matter and that it should not be documented. Grievant argued that a subordinate is required to follow the instructions of a supervisor.

It is clear that Grievant was a victim of a Supervisor who attempted to cover up Mr. B's client abuse. The Supervisor falsely told several staff that the matter was resolved and they did not have to report it. Although the Supervisor's actions were a mitigating circumstance, the Agency's policy serves as an aggravating circumstance sufficient to counter any mitigation. The Agency's policy states:

Reporting suspected abuse or neglect to one's supervisor or the Advocate does not fulfill the requirement for immediate reporting to the Hospital Director.

Grievant knew or should have known that the Supervisor's instructions were not sufficient to satisfy Grievant's obligation under DI 201 and that Grievant remained obligated to report Mr. B's client abuse.

Grievant argued that Ms. N was allowed to remain employed by the Agency and, thus, the Agency treated differently similarly situated employees. The evidence showed that the Agency treated Ms. N differently because she reported Mr. B's behavior eleven hours after the incident to the Agency's Abuse Investigator's office and spoke with another employee there about the incident. Ms. N received a Group II Written Notice. Grievant and Ms. N were not similarly situated employees because Grievant did not report the incident to anyone other than the Supervisor. Ms. N reported the incident to an employee entrusted with investigating client abuse. The Agency has presented sufficient evidence to show that it did not single out Grievant for disciplinary action. In light of the standard set forth in the Rules, 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 request an administrative review by EEDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EEDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Equal Employment and 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 must also provide a copy of your appeal to the other party 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.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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>[1]</sup>

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>[1]</sup> Agencies must request and receive prior approval from EEDR before filing a notice of appeal.