

Issue: Group III Written Notice with Termination (client abuse); Hearing Date: 04/09/18; Decision Issued: 04/10/18; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 11172; 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: 11172

Hearing Date: April 9, 2018
Decision Issued: April 10, 2018

PROCEDURAL HISTORY

On December 29, 2017, Grievant was issued a Group III Written Notice of disciplinary action with removal for client abuse.

On January 22, 2018, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On February 19, 2018, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On April 9, 2018, a hearing was held at the Agency's office.

APPEARANCES

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 a Direct Service Associate II. No evidence of prior active disciplinary action was introduced during the hearing.

The Resident is an individual with moderate intellectual disability. He is a verbal individual who uses words and phrases as well as simple and complex sentences to communicate with others in his environment. He walks slowly. The Resident can be very difficult to redirect. He easily becomes fixated on specific staff. Grievant worked with the Resident approximately 80 percent of the time when he was at the Facility.

The Agency typically assigned an employee to work in a one-to-one relationship with Resident O. Resident O could become aggressive towards anyone who entered his personal space with the exception of the employee assigned to work with him.

Ms. B often worked with the Resident during her shift. On December 15, 2017, Ms. B asked to work with Resident O and was assigned by the Shift Leader to work with Resident O.

Before Grievant began his shift, the Resident spoke with Ms. B. The Resident wanted to work with Ms. B. He wanted Ms. B to be the last person who worked with him before he went to bed shortly after 7 p.m. The Resident asked Ms. B to work with him.

Ms. B told the Resident that she would see him at 7 p.m. The Resident repeated that Ms. B would see him at 7 p.m. The Resident became fixated with seeing Ms. B at 7 p.m. He refused to receive assistance from any other employees. Ms. B should not have told the Resident she would see him at 7 p.m. because she made it difficult for the Resident to agree to work with Grievant.

When Grievant began his shift, he was assigned to work with the Resident. Grievant repeatedly told the Resident that Grievant was his staff that night and that Ms. B was working another individual. The Resident did not want to have Grievant work with him. He wanted to work with Ms. B and repeatedly communicated this to Grievant.

Grievant spoke with the Resident in a hallway near resident bedrooms. In order to prevent another resident from being awakened, Grievant pushed the Resident into a restroom to continue their discussion. Grievant and the Resident left the restroom. Both men walked to the living room.

Ms. B was in the living room working with Resident O. Although she was focused on Resident O, she observed some of Grievant's interaction with the Resident.

In the living room, Grievant attempted to direct the Resident out of the living room and to the Resident's room. The Resident resisted and insisted on remaining in the living room. The Resident attempted to walk towards Ms. B, but Grievant positioned himself between the Resident and Ms. B and pressed his body against the Resident's body in a manner to block the Resident. Grievant pointed to the Resident's recliner as he held the Resident and talked to the Resident. The Resident moved to his side and positioned himself in front of the recliner. The Resident sat down in his recliner briefly, but stood up again and began moving to his right. Grievant stepped to his left to remain facing the Resident. Grievant placed his left hand on the Resident's right arm and his right hand on the Resident's left side. Grievant slightly twisted the Resident's body and moved him towards the recliner. Grievant pushed the Resident down into the recliner. Grievant stepped back but bent over to continue his conversation with the Resident. Grievant spoke with the Resident for approximately a minute. Then he reached forward with both hands to grab the Resident's right arm. Grievant tried to pull the Resident out of the chair, but the Resident resisted and repositioned himself in the recliner as Grievant held on to the Resident. Grievant adjusted his grip on the Resident. Grievant used his left hand to grasp the Resident's clothing at his waist. Grievant positioned his left hand on the left side of the Resident's body. Grievant again pulled the Resident partly out of the recliner as the Resident resisted Grievant. The Resident pulled away and fell back seated into the recliner with his legs extended forward. The Resident kicked Grievant's shins to keep Grievant away from him. Grievant moved backward to avoid being kicked. The Resident continued to kick in the air to prevent Grievant from getting closer to him. Grievant then decided that he and Ms. B should switch residents. Grievant moved away from the Resident and walked to Ms. B. Once Grievant was away from the Resident, the Resident stood up and began walking towards Ms. B. Grievant went to Resident O and began to escort him to another room. The Resident

walked to Ms. B and put his right arm on her left shoulder as if to hug Ms. B. Grievant expressed his frustration with Ms. B to Ms. B as Grievant was leaving the room.

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 defines¹ 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.

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

Client abuse is a Group III offense.² On December 15, 2017, Grievant pushed the Resident into the recliner. He then grabbed the Resident and attempted twice to pull the Resident out of his recliner against the Resident's will. Grievant was not authorized to use force to remove the Resident from his recliner. He did not use a Therapeutic Options of Virginia approved method to remove the Resident. Grievant used unnecessary force improperly to restrain the Resident. The Agency has established that Grievant engaged in client abuse thereby justifying the Agency's issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

Grievant was frustrated that the Resident refused to work with him. Grievant was frustrated that Ms. B had informed the Resident that she would see him at 7 p.m. Grievant's frustration was understandable. When the Resident asked to work with Ms. B, she should have told the Resident she would not be working with him that day. Ms. B's errors in judgment, however, do not excuse Grievant's behavior. Grievant could have let the Resident remain in the chair.

Grievant argued that he was trying to keep the Resident separated from Resident O because if they had interacted then it would have been a peer on peer conflict that could have resulted in the accusation of client neglect. The evidence showed at the time Grievant attempted to forcefully remove the Resident, the Resident wanted to remain in his recliner which was located approximately 10 feet away from Resident O and Ms. B. It was unnecessary to remove the Resident from the recliner because the Resident was not at risk of coming close to Resident O.

Grievant argued that the Facility's Director failed to appear at the hearing and that Ms. B refused to testify fully. The Agency indicated that the Facility Director was on pre-approved leave for a vacation. The Agency should have had the Facility Director available to answer Grievant's questions. The Facility Director could have testified by telephone. The Agency's failure to have the Facility Director testify does not affect the outcome of this case. The Hearing Officer does not believe the Facility Director would have provided information that would have excused or justified Grievant's interactions with the Resident. There is no reason to believe that Grievant was treated differently from any other employee who may have pushed and pulled a resident.

Grievant argued that the Agency failed to provide him with an adequate opportunity to present his defenses to the Agency as part of the issuance of the Written Notice. He responded to the Agency's Written Notice by sending a letter informing the Agency he believed the allegations were false and asked for any evidence to support the disciplinary action as well as the rules and policies violated. He argued he was improperly denied an opportunity to view the video before he was removed from employment. He argues that the Agency failed to provide him with pre-disciplinary due process. Grievant's arguments do not affect the outcome of his case. To the extent the Agency may have failed to fully inform him of the basis for its disciplinary action, the

² See, Attachment A, DHRM Policy 1.60.

hearing process cured such defect. The Agency was required to provide Grievant and the Hearing Officer with a copy of its proposed exhibits and a list of proposed witnesses four workdays prior to the hearing. He was permitted to view the video of the incident prior to the hearing. Grievant had the opportunity to present any relevant defenses during the hearing. He was not denied procedural due process.

Grievant argued that Ms. B falsely alleged he engaged in client abuse because she was angry that Grievant questioned her actions towards the Resident. Grievant alleged that Ms. B knew that if she alleged client abuse by Grievant, it would immediately result in his suspension. The Hearing Officer can assume for the sake of argument that Ms. B's decision to report Grievant was for an improper purpose and because she was angry at Grievant. The reason for the investigation is not a basis to reverse disciplinary action in this case. The Agency's process was to investigate every allegation of abuse regardless of the reason why the allegation was made. Upon the conclusion of the investigation, the Agency determined that Grievant engaged in 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"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. 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 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.

³ Va. Code § 2.2-3005.

Please address your request to:

Office of Equal Employment and Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to 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.^[1]

[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].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

^[1] Agencies must request and receive prior approval from EEDR before filing a notice of appeal.