

Issue: Group III Written Notice with termination (client abuse); Hearing Date: January 31, 2002; Decision Date: February 4, 2002; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; AHO: Carl Wilson Schmidt, Esquire; Case Number: 5349



**COMMONWEALTH of VIRGINIA**  
**Department of Employment Dispute Resolution**

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 5349**

Hearing Date: January 31, 2002  
Decision Issued: February 4, 2002

**PROCEDURAL HISTORY**

On October 22, 2001, Grievant was issued a Group III Written Notice of disciplinary action with removal for:

*Client Abuse: Based on findings of [investigation] as confirmed by the Department of Mental Health, Mental Retardation and Substance Abuse Services (DMHMRSAS) Central Office.*

On November 19, 2001, Grievant timely filed a grievance to challenge the disciplinary action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On December 11, 2001, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 31, 2002, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Grievant's Attorney  
Agency Representative  
Three DSA II

Psychologist  
Instructor Trainer  
Facility Director  
Escort  
Two Charge Aides  
Trainer and Instructor

## **ISSUE**

Whether Grievant should receive a Group III Written Notice of disciplinary action with removal.

## **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 Mental Health Mental Retardation and Substance Abuse Services employed Grievant as a direct care worker for 29 years and nine months until her removal on October 22, 2001. She provided direct care services to patients at the Agency's Facility. These patients are referred to as clients. Many of the clients are individuals with significant retardation who require constant supervision and attention.

On September 17, 2001, Grievant was working in building 49 of the Agency's Facilities. She and one or two other staff were attending to several clients and were preparing them to leave the room and walk to another area for lunch. At approximately 11:15 a.m., a group of five new employees and a tour guide walked into the room to observe the activities. The Client is an individual with mental retardation who cannot communicate except by expressing sounds. He wears a helmet in order to prevent him from indiscriminately ingesting objects. One of the double doors to the room was open. The Client saw the open door and quickly walked towards the open door. Grievant quickly followed the Client and caught up with him as he was nearing the exit. She placed her hand on the back of his shirt collar. As she touched the Client, the Client fell to the ground of his own will. Since the Client was blocking the exit area, Grievant

pulled the Client by his shirt collar backwards several feet.<sup>1</sup> The tour group then left the room.

On the way to the lunch area, each of the five new employees was concerned about the way Grievant treated the Client. They believed the Client had been treated inappropriately and asked the tour guide whether Grievant's actions constituted client abuse. The tour guide did not see the incident. When later asked about the incident, Grievant did not remember the events. She did not remember anything unusual.

After learning of the abuse allegation, the Agency had a medical professional examine the Client for any injuries. He did not suffer any physical injuries.

None of the tour group had ever met Grievant before. They did not know her name at the time of the incident. They were all within a few feet of Grievant when she stopped the Client from leaving the room.

Direct care staff, including Grievant, receive annual training regarding application of the Mandt System. The main goal of the Mandt System is to teach an individual how to effectively manage a potentially negative or dangerous situation by calming the individual's own emotional response and managing the individual's own behavior so the individual can interact with other people positively. (Mandt System Student Manual, page 7.) Staff also receive annual training regarding the Agency's client abuse policies, including Departmental Instruction 201.

## **CONCLUSIONS OF LAW**

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 client abuse<sup>2</sup> as:

Abuse means any act or failure to act by an employee or other person responsible for the care of an individual 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

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<sup>1</sup> In a statement written the day of the event, one member of the tour group described the events as:

A client tried to leave[. A]fter being re-directed by [the tour guide] [Grievant] grabbed him by the shirt at that point he fell or just lowered himself to the floor however she still had quite a bit of his shirt (enough that his waist and mid section was exposed) and used his shirt to pull him out of the way for us to pass through the doorway.

Agency Exhibit 3.

<sup>2</sup> The Agency's Facility has a client abuse policy patterned after DI 201. (Agency Exhibit 11).

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 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 client might have caused physical or psychological harm to the client.

Grievant knowingly and intentionally pulled the Client by his shirt collar and dragged him several feet. The action may have caused physical or psychological harm to the Client. Grievant's behavior rises to the level of client abuse thereby justifying a Group III Written Notice.

DI 201 states, "It is expected that a facility director will terminate an employee(s) found to have abused or neglected a client."<sup>3</sup>

Grievant contends that because the employees in the tour group were new and at least four of the five had recently attended MANDT training and client abuse training, they were overly sensitive to what constitutes client abuse. According to Grievant, their conclusions of the existence of client abuse are unreliable. If the Hearing Officer assumes for the sake of argument that Grievant's contention is true, the outcome of this case does not change. The Hearing Officer is not relying on the conclusion of any

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<sup>3</sup> Agency Exhibit 10.

witness that abuse occurred, but rather is relying on factual accounts of each witness as to the events that occurred. Based on those factual accounts, client abuse occurred.

It is not without a great deal of anguish that the Hearing Officer upholds Grievant's termination. She has been employed by the Agency for over 29 years without any prior allegations of client abuse. The Agency's policy is clearly one of zero tolerance for client abuse. Many of the Agency's clients are helpless to communicate any mistreatment inflicted upon them by staff or by other clients. An act (such as being dragged several feet) that may seem as merely an unpleasant discomfort to someone without mental retardation, may feel concussive to an individual with mental retardation. The extent to which the Agency trains its staff to avoid client abuse shows the importance it attaches to preventing any instance of client abuse. Grievant could have avoided dragging the Client had she followed the progressive approach and techniques specified in the Mandt System.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action is **upheld**.

## APPEAL RIGHTS

As Sections 7.1 through 7.3 of the Grievance Procedure Manual set 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.
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.

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 **10 calendar** days of the **date of the original hearing decision**. (Note: the 10-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 10 days; the day following the issuance of the decision is the first of the 10 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 10 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 contradictory 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.

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Carl Wilson Schmidt, Esq.  
Hearing Officer