

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: 5350



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS
DECISION OF HEARING OFFICER

In re:

Case Number: 5350

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 19 of the Agency’s Facilities. She and one or two other staff were attending to several clients in the living area. At approximately 11:45 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 is 4’5” tall and weighs 69 pounds. He is very active and becomes excited easily.¹ The Client abruptly ran from the middle of the room to a chair in front of a table. As he sat down, he slammed his hands down onto the toys or other objects on the table and scattered them across and off the table. Grievant walked quickly behind the Client and touched him. What happened after this is unclear.

¹ Witnesses described the Client as “hyper.”

One of the new employees said Grievant placed her left hand on the back of the chair and her right hand on the Client's right shoulder. Grievant then pulled the chair and the Client backward and the Client rose out of the chair. A second new employee said Grievant "grabbed [the Client] by the arm, dragged him and the chair before getting out of the chair."² A third new employee said he saw Grievant place her right hand on the Client's left forearm and then jerk him upwards abruptly. She jerked him with such force that the Client's chair turned around. A fourth new employee provided a written statement that she observed Grievant pull "a client by the hand, arm, or shirt, I'm not [for] sure which one it was."³ A fifth new employee provided a written statement saying that Grievant "grabbed him by the arm and jerked him across the room."⁴ Grievant testified that she placed her left hand on the Client's right arm and gently raised his arm and led him away from the table. If the Client's chair turned, it was from the Client's own force of standing up.

The tour group left the room shortly after the incident. Each tour group member was concerned about Grievant's interaction with the Client.

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. Approximately 30 minutes earlier, they had observed Grievant engage in behavior that they believed was client abuse. They were all within a few feet of Grievant when she touched the Client.

CONCLUSIONS OF LAW

When five people observe a spontaneous event it is unlikely they will provide identical descriptions of the event. A certain level of inconsistency can be tolerated. The inconsistency between the five witness accounts in this case, however, is sufficiently different for the Hearing Officer to conclude that the Agency has not met its burden of proof to show that Grievant engaged in client abuse.

If Grievant approached the Client and touched his arm to lead him away from the table and if the chair turned based on the Client's motion, then Grievant has not engaged in client abuse. One witness said Grievant placed her left hand on the back of the Client's chair and pulled on the chair. None of the other witnesses offered this account. One witness said the Client's chair turned around, another said Grievant dragged the Client in the chair before Client got out of the chair. A third witness said Grievant dragged the Client across the room. One witness said Grievant grabbed the

² Agency Exhibit 2.

³ Agency Exhibit 4.

⁴ Agency Exhibit 5.

client on the forearm. Another witness was not sure if Grievant pulled the Client by the hand, arm, or shirt. The witness accounts are no more reliable than Grievant's account that she touched the Client and directed him away from the table.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action is **rescinded**. The Agency is directed to remove the Written Notice from Grievant's personnel file in accordance with DHRM 1.60(VII)(B)(4)(a).⁵

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

⁵ The Hearing Officer will not order that Grievant be reinstated to her former position because of the outcome in Case No. 5349.

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.

Carl Wilson Schmidt, Esq.
Hearing Officer