Issue: Group III Written Notice with Termination (client abuse); Hearing Date: 06/03/02; Decision Date: 06/04/02; Agency: Dept. of Mental Health, Mental Retardation and Substance Abuse Services; AHO: David J. Latham, Esq.; Case No.: 5444

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5444

Hearing Date: June 3, 2002
Decision Issued: June 4, 2002

APPEARANCES

Grievant
Attorney for Grievant
One witness for Grievant
Representative for Agency
Four witnesses for Agency

ISSUES

Did the grievant's actions on March 15, 2002 warrant disciplinary action under the Commonwealth of Virginia Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

FINDINGS OF FACT

The grievant filed a timely appeal from a Group III Written Notice issued because she had physically abused a client.[1] The grievant was discharged from employment as part of the disciplinary action. Following failure to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.[2]

The Department of Mental Health, Mental Retardation and Substance Abuse Services (MHMRSAS) (Hereinafter referred to as "agency") has employed the grievant as a direct service associate (DSA) for 18 years. Her performance evaluation for the year ending October 22, 2001 rated her a "contributor." The two previous year's evaluations rated her as exceeding expectations.[3]

Section 201-1 of MHMRSAS Departmental Instruction 201 on Reporting and Investigation Abuse and Neglect of Clients states, in pertinent part: "The Department has zero tolerance for acts of abuse or neglect." Section 201-3 defines client abuse, in pertinent part:

> Abuse means any act or failure 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 substance abuse. Examples of abuse include, but are not limited to, acts such as assault or battery.[4]

This definition is reiterated in the facility's policy on client abuse.[5]

Grievant is assigned to work in a residence in the local community where two clients reside. Grievant works from 3:00 p.m. to 11:00 p.m. with one other DSA. On most days, grievant would work with client J while the other DSA worked with client L. Client L is a severely/profoundly retarded 45-year-old male and requires assistance with daily activities of living.[6] On March 12, 2002, a physician had seen client L for a sinus infection. On March 15, 2002, the other DSA had been working with client L throughout the day. During the day she had taken him to a supermarket, to her own residence for dinner, to a park and to a movie. They returned to the residence at about 10:00 p.m. At about 10:15 p.m., the client was tired from the day's activities and was sitting in a rocking chair.

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[1] Exhibit 12. Written Notice, issued April 10, 2002.
[2] Exhibit 12. Grievance Form A, filed April 18, 2002.
[3] Exhibit 17. Performance Evaluations for grievant.
[4] Exhibit 7. Departmental Instruction 201(RTS)00, *Reporting and Investigating Abuse and Neglect of Clients*, revised April 17, 2000.
[5] Exhibit 8. Facility Policy, *Client Abuse*, February 12, 2002.
[6] Exhibit 4. *Psychological Evaluation*, client L, January 11, 1996.

Grievant approached client L and asked him, "What's wrong?" and, "Why are you acting like that?" She asked the client to let her see his nose but he turned his head away. With her right hand, grievant grasped client L's left arm and assisted him up from the chair; the client voluntarily arose from the chair. Grievant led client L around the opening into the kitchen and placed him against the kitchen wall. Client L resisted but grievant restrained him by pushing him to the wall, placing her leg between the client's legs and one hand against his chest. She then grasped client L's chin with her hand, tilted his head back, and looked into his nose. She then released him, told him to sit down and the encounter ended. The client was not injured during this encounter.

The other DSA did not confront grievant about what she had done but noticed that client L appeared fearful during the incident. The other DSA had worked for the agency for just over one year and had worked with grievant for only two months. During the next four days, she did not report the incident to anyone because she didn't want to report someone who had 18 years of experience and, because she wasn't sure whether the incident constituted abuse. However, the incident weighed on her mind during this period. On March 20, 2002, grievant's supervisor had occasion to meet with grievant and the other DSA. When the grievant had to leave the meeting for another meeting, the other DSA told the supervisor about the incident of March 15th. The supervisor reported the matter to the facility director, who assigned an investigator to the case.

During the investigation, grievant told the investigator that she did not remember pushing client L against the wall, and did not remember placing her knee between his legs.[7] Grievant was suspended during the investigation[8] and subsequently discharged on April 10, 2002.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. Murray v. Stokes, 237 Va. 653, 656 (1989).

[7] Exhibit 6. Investigator's Summary, March 29, 2002.
[8] Exhibit 9. Letter from facility director to grievant, March 21, 2002.

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

> It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . . To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.[9]

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the Code of Virginia, the Department of Personnel and Training[10] promulgated Standards of Conduct Policy No. 1.60 effective September 16, 1993. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action. Section V.B.3 of the Commonwealth of Virginia's *Department of Personnel and Training Manual* Standards of Conduct Policy No. 1.60 provides that Group III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal from employment.[11] The agency's policy on patient abuse provides that an employee found to have abused a client would normally be discharged.[12]

Whether this incident occurred must be resolved by a credibility determination. Grievant flatly denies touching client L in any way on the evening of March 15, 2002. The only other witness capable of testifying is the other DSA. After carefully evaluating the testimony and evidence, it is concluded for three reasons that the incident occurred as described in the Findings of Fact. First, the other DSA's testimony was detailed, consistent and unshaken under cross-examination. Her description of the incident was essentially the same when she related it to her supervisor, when the investigator questioned her, and when she testified during the hearing. Second, the fact that grievant took client L into the kitchen, where there was better lighting to examine the client, is a detail that the other DSA would have been unlikely to fabricate. Third, grievant has provided no

[9] § 5.8 Department of Employment Dispute Resolution *Grievance Procedure Manual*
[10] Now known as the Department of Human Resource Management (DHRM).
[11] Exhibit 11. DHRM Policy No. 1.60, *Standards of Conduct*, September 16, 1993.
[12] Exhibit 7. Section 201-8, DI 201(RTS)00, *Ibid.*

credible motivation for the other DSA to fabricate this incident. Grievant's somewhat facile denial that she did not touch the client, and her statements that she didn't remember restraining him are less credible than the consistent and detailed testimony of the other DSA.

Grievant argues that this incident does not meet the definition of abuse. The agency's definition of abuse is extremely broad and encompasses everything from demeaning language to criminal assault. The agency interprets abuse very liberally because of its obligation to protect disabled clients from anyone who might take advantage of them. In this case, the agency's position is that physical restraint of the client against his will constituted abuse because it was, in effect, a form of battery. "Battery" is defined as "wrongful physical violence or constraint, inflicted on a human being without his consent."[13] Here, the client did not consent to, and in fact resisted, grievant's restraint. It might be argued that grievant's attempt to examine client L was for his benefit and therefore, not wrongful. However, grievant has not demonstrated that there was any pressing need to examine client L. Therefore, her forced examination was neither necessary nor appropriate. As such, it was an act that was performed knowingly and recklessly that might have caused physical or psychological harm – the definition of abuse.

However, it must be observed that the abuse in this case was far less serious than abuse that results in injury, or abuse that was intentionally intended to cause harm. There is no evidence that grievant intended to harm the client. To the contrary, she was apparently motivated to follow up on the client's sinus infection problem by ascertaining whether his sinuses were still draining. Assuming that grievant acted with proper motivation, her performance was nonetheless sufficiently reckless that it crossed the line that delineates reasonable client examination from abuse.

Grievant argues that the other DSA should have received disciplinary action because she failed to immediately report the abuse to the facility director. The other DSA has explained that she was unsure whether the incident constituted abuse, that she did not want to get grievant in trouble, and that she worried about the event over four days and nights before reporting it. Given her relatively short time with the agency, her respect for grievant's knowledge and long service, the other DSA's explanation is reasonable and understandable. The supervisor did, in fact, verbally counsel the other DSA to promptly report any suspected abuse in the future. Under the circumstances, and pursuant to the Standards of Conduct, verbal counseling of a short-term employee is an appropriate corrective action.

Grievant also suggests that the other DSA may have been resentful because grievant would sometimes correct her on procedures, and that this could be a motivation for the other DSA to fabricate the event. However, the

[13] Black's Law Dictionary, Revised Fourth Edition.

other DSA testified that she recognized grievant's long service and more extensive knowledge of agency procedures. She harbored no resentment from any constructive criticism offered by grievant. The other DSA acknowledged that she was quite puzzled by grievant wanting to examine client L when it was the other DSA who had been caring for client L during the entire work shift. However, she bore no ill will toward grievant over this incident.

The facility takes the position that it must terminate grievant's employment because agency policy states, "It is expected that a facility director will terminate an employee(s) found to have abused or neglected a client."[14] However, this sentence must be considered in conjunction with the language immediately following, which states that penalties less than termination can be imposed when mitigating factors warrant lesser penalties. In this case, grievant is a long-term employee with a good prior record. Further, the level of abuse was sufficiently minimal that the hearing officer might be inclined to consider a lesser penalty but for two factors. First, rather than acknowledging her actions, grievant has simply denied restraining the client. Second, grievant has demonstrated no remorse for her actions. If grievant had acknowledged that she may have been overly anxious and energetic in examining the resident, or that she may have been upset about other matters, or provided some other reasonable explanation, a lesser penalty than termination of employment could be considered. Absent acknowledgement, remorse and a reasonable explanation, the disciplinary action must be upheld.

DECISION

The disciplinary action of the agency is affirmed.

The Group III Written Notice issued to the grievant on April 10, 2002 and his discharge from employment are AFFIRMED. The disciplinary action shall remain active pursuant to the guidelines in Section VII.B.2 of the Standards of Conduct.

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:

[14] Exhibit 7. *Ibid.*

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 HRM, 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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David J. Latham, Esq.
Hearing Officer