

Issue: Group III Written Notice with 5-day Suspension (client abuse); Hearing Date: June 25, 2002; Decision Date: June 26, 2002; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; AHO: Carl Wilson Schmidt, Esquire; Case Number: 5458



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5458

Hearing Date: June 25, 2002
Decision Issued: June 26, 2002

PROCEDURAL HISTORY

On March 28, 2002, Grievant was issued a Group III Written Notice of disciplinary action with five workday suspension for:

Client Abuse – On 02/27/02 one of our Social Workers was entering cottage 1C and over heard [Grievant], DDSII swear in the presence of one of the residents who lives in the cottage. The resident was preparing to go to the workshop and had apparently asked for another snack. [Grievant] admits that she was irritated that morning and said “You don’t need two goddamn snacks, now get to work.”

On April 17, 2002, 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 May 30, 2002, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 25, 2002, a hearing was held at the Agency’s regional office.

APPEARANCES

Grievant

Grievant's Representative
Agency Party Designee
Legal Assistant Advocate
Social Worker
Investigator
DDSI

ISSUE

Whether Grievant should receive a Group III Written Notice of disciplinary action with five workday suspension.

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 employs Grievant as a Developmental Disabilities Specialist II. She provided direct care services to patients at the Agency's Facility. These patients are referred to as residents. Many of the residents are individuals with significant mental health challenges who require constant supervision and attention.

The Resident is a 44 year old woman who has lived at the Facility since 1990. She is verbal and speaks in simple and complex sentences. She communicated her wants and needs and formulates appropriate questions throughout her day. She functions intellectually within the lower range of mild mental retardation. The Resident has been diagnosed with a major depressive disorder and receives antidepressant medication.

At approximately 8:40 a.m., on February 27, 2002, Ms. M was helping the Resident put on her coat so that the Resident would leave the resident cottage to go to another part of the Facility to work. The Resident wanted to take a second snack with her to work, so she reached out to take a snack. Grievant was standing a few feet away and observed the Resident. Grievant stated words to the effect of "You don't need two

goddamn snacks; now get out and go to work.” The Social Worker was outside the room and overhead Grievant yelling. She opened the door and entered the room. She asked who was yelling and Grievant answered it was her. The Social Worker immediately reported the incident to the Facility Director. When the Resident returned to the cottage later in the day, Grievant apologized to the Resident. During the Agency’s investigation, the Resident told the Investigator that she understood Grievant’s comments were directed at her and that the comments hurt her feelings.

Grievant had received a copy of the Agency’s policy regarding client abuse. She received annual updates in MANDT system training. The MANDT system is a program designed to reduce the potential for verbal or physical abuse.

CONCLUSIONS OF LAW

The Agency has a duty to the public to provide its residents 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 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 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 Grievant might have caused physical or psychological harm to the client.

Grievant's behavior constitutes "Use of language that demeans, threatens, intimidates or humiliates the person" because (1) she yelled, (2) she use the word "goddamn"¹, and (3) her statement was intended as a criticism of the Resident. Given the Resident's psychological state, Grievant's words caused or might have caused psychological harm to the Resident.

The usual discipline for client abuse is termination. Grievant's discipline was reduced to a five workday suspension.² There is no basis for further mitigation.

Grievant contends she did not engage in client abuse because her statements were directed at Ms. M rather than to the Resident. This distinction, however, is irrelevant. Ms. M was standing next to the Resident and the Resident could not help but overhear Grievant's statements, given the distance between Grievant and the Resident and the volume of Grievant's voice. The Resident knew Grievant was criticizing her. The effect of Grievant's statements was to intimidate or humiliate the Resident.

Grievant contends she was disciplined differently from other employees working at the Facility who had engaged in more serious behavior. Insufficient evidence was presented to support this conclusion.

Grievant contends she has been denied due process thereby justifying reversal of the disciplinary action. She argues that because she did not receive the Written Notice until after the suspension had already taken place, she was not given due process of law. If the Hearing Officer assumes for the sake of argument that Grievant was not properly given an opportunity to respond, her concern is now moot. Section 6.3 of the *Grievance Procedure Manual* sets forth the procedures a party must follow when that party believes the other party is out of compliance with the grievance procedure. By failing to follow these procedures, Grievant has forfeited her right to object at the hearing stage to the Agency's noncompliance.³

¹ Webster's New Universal Unabridged Dictionary, describes goddamn as "used as an exclamation of any strong feeling, esp. of disgust or irritation, and often fol. by it."

² The Agency appropriately recognized Grievant's regret for having spoken harshly to the Resident and her apology to the Resident.

³ Section 6.3 of the *Grievance Procedure Manual* states, "By proceeding with the grievance after becoming aware of a procedural violation, one may forfeit the right to challenge the noncompliance at a later time."

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with suspension 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 Resource 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.

Carl Wilson Schmidt, Esq.
Hearing Officer