

Issue: Group III Written Notice with termination (client abuse); Hearing Date: 07/31/02; Decision Date: 07/31/02; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; AHO: Carl Wilson Schmidt, Esq.; Case No.: 5490; **Judicial Review: Appealed to the Circuit Court in the City of Petersburg on 08/30/02; Outcome: Upheld decision of AHO. Found not contradictory to law. Ruling dated 01/02/03**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5490

Hearing Date: July 31, 2002
Decision Issued: July 31, 2002

PROCEDURAL HISTORY

On May 1, 2002, Grievant was issued a Group III Written Notice of disciplinary action with removal for:

Violation of D.I. No. 201, Reporting and Investigating Abuse and Neglect of Clients. Abuse was substantiated based on witness statement and your own admission to slapping client on neck.

On May 31, 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 July 10, 2002, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 31, 2002, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Legal Assistant Advocate

Facility Director
Investigator
Assistant Program Manager

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 Human Services Care Worker for eleven years until her removal effective May 1, 2002. No evidence of any prior disciplinary action against Grievant was presented.

Individuals with mental retardation reside at the Agency's Facility and receive continuous care and attention by staff. The Agency refers to these individuals as clients. Many clients are completely dependent on the staff who care for them.

The Client is an individual with mental retardation residing at the Agency's Facility. He is non-verbal but recognizes familiar staff and tends to respond to requests made of him. He is able to enjoy interactions and displays various emotions. He stands over six feet tall and smiles and rocks when pleased. He can also be aggressive and demanding or even confrontational with some peers. He has an adaptive age equivalence of 2.11 years.

On April 15, 2002, Grievant and the Client were inside cottage 32. Grievant was working by herself and attending to approximately six other clients. The Assistant Program Manager was walking downstairs from cottage 33 to cottage 32 and heard Grievant yelling at the Client to "Get out of the bathroom". The Client had entered the bathroom and was tearing up paper towels. Grievant repeated her instruction

approximately six times. As the Assistant Program Manager turned the corner around the stairs, she observed the Client a few feet outside of the bathroom doorway (as if just exiting the bathroom) with Grievant directly behind the Client and also outside of the bathroom doorway. The Assistant Program Manager was standing approximately eight to ten feet away from Grievant and the Client looking at their left sides. She observed Grievant touch the Client near the hemline of his shirt and push him forward while holding on to the shirt with her left hand. As she completed pushing the Client forward, she raised her right hand upward and with an open hand slapped the Client on the back of the right side of his neck. The Assistant Program Manager could hear the sound of the slap. Grievant then noticed that the Assistant Program Manager was in the room and Grievant apologized. The Assistant Program Manager said words to the effect of "This will break my heart, but I have to report it."

The Agency began its investigation on April 15, 2002 and obtained statements from the Assistant Program Manager and from Grievant. Grievant writes about the Client in her statement, "I slap on the neck and said 'Stop [Client]'"

Grievant has completed annual client abuse training, including MANDT certification.

CONCLUSIONS OF LAW AND 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 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 intentionally pushed and then slapped the Client in the back of the neck. Her actions may have caused physical or psychological harm to the Client. Her behavior rises to the level of client abuse. DI 201 states, "It is expected that a facility director will terminate an employee(s) found to have abused or neglected a client." The Agency has met its burden of proof to justify issuance of a Group III Written Notice with removal.

Grievant contends that the Assistant Program Manager misconstrued the events she observed. She contends she was following MANDT procedures when she was directing the Client away from the bathroom. As she had her hand gently touching the back of his elbow, the Client abruptly bent backwards as if to attempt to return to the bathroom. In order to prevent the Client from injuring himself, Grievant quickly raised her right hand and the Client's neck hit her hand causing the slapping sound. Grievant contends her actions prevented injury to the Client.

Grievant's account of the events is not credible for two reasons. First, the detail of her account at the hearing is far greater than the detail of her account given on April 15, 2002 as part of her statement. Her April 15th statement also includes an admission that she slapped the Client.¹ Second, no evidence was presented challenging the credibility of the Assistant Program Manager. She and Grievant appeared to have a good working relationship. In her written statement, the Assistant Program Manager described Grievant as "a hard and good worker" who is "very passionate about her job" and "feels solely responsible for her clients." The Assistant Program Manager was standing only a few feet away from Grievant and the Client and was focusing on what they were doing. Her testimony remained unshaken even after rigorous cross-examination. The Assistant Program Manager's testimony was quite credible.

¹ Grievant contends she poorly chose her words in the statement and did not mean that she slapped the Client. It is difficult for the Hearing Officer to believe Grievant did not understand the meaning of the word "slap", especially in light of the annual training she receives regarding client abuse.

Grievant contends that she did not intend to engage in client abuse. The Hearing Officer has little doubt that Grievant sincerely cared for her clients and was dedicated to their well-being. For eleven years she had endured and enjoyed an extremely difficult job that few individuals have the ability to perform. The Agency has an extraordinarily high standard for client abuse because of the type of patient for whom it cares. That high standard justifies severe punishment of even a momentary lapse of judgment.

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

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