

Issue: Group III Written Notice with termination (patient abuse); Hearing Date: 10/16/02; Decision Date: 11/04/02; Agency: DMHMRSAS; AHO: Carl Wilson Schmidt, Esq.; Case No.: 5529; **Administrative Review: Hearing Officer Reconsideration Request received 11/14/02; Reconsideration Decision date: 12/03/02; Outcome: No newly discovered evidence or incorrect legal conclusions. Request to reconsider denied.**



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 5529**

Hearing Date: October 16, 2002  
Decision Issued: November 4, 2002

**PROCEDURAL HISTORY**

On July 19, 2002, Grievant was issued a Group III Written Notice of disciplinary action with removal for:

*Violation D.I. 201, Reporting and Investigation Abuse and Neglect of Clients, as defined in Section 201-3 for substantiated allegation of verbal/psychological abuse: The investigation substantiated the allegation that on June 17, 2002 and on at least two (2) other occasions you referred to patient as "babe" and "boy" in the presence of others which caused the patient to be extremely upset and agitated. You admitted to addressing the patient in this manner by verbal and written statements.*

On August 8, 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 September 12, 2002, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 16, 2002, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Grievant's Representative  
Agency Party Designee  
Human Rights Advocate  
Supervisor  
Director of Nursing  
Abuse Neglect Investigator  
Three Psych. Tech.

## **ISSUE**

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

## **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 Psychiatric Technician I until her removal on July 19, 2002. The purpose of her position was, "to perform direct nursing care duties as well as deliver treatment programs and services to individuals and groups of individuals with a serious mental illness under the general supervision of a Registered Nurse."<sup>1</sup> One of the performance measures under her Employee Work Profile is, "Greet patients by name."<sup>2</sup>

The Client is a 46 year-old male. He is morbidly obese with a history of schizoaffective disorder, alcohol likely dependence, and cannabis abuse in remission in a controlled environment with a diagnosis of personality disorder. He was admitted to the Facility because a court determined he was not guilty by reason of insanity.

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<sup>1</sup> Agency Exhibit 1.

<sup>2</sup> Agency Exhibit 1.

On June 17, 2002 between 2 and 3 p.m., the Client sat in the Facility's Atrium, an area outside of the Client's assigned unit. At 3 p.m., clients are supposed to return to their assigned units, but the Client remained in the Atrium. Grievant waited for a few minutes after 3 p.m. and then said to the Client, "[Client's first name], babe its time to go back to the unit!"<sup>3</sup> The Client became upset and started yelling at Grievant stating "I'm not your babe, your boy ...." Grievant apologized to the Client, but he continued by yelling obscenities at Grievant. Social workers standing nearby heard the Client's outburst and came to the Atrium. Grievant was asked to leave while the Client calmed down.

Early in Grievant's employment at the Facility, she sometimes referred to patients with "pet names." Because of this, Grievant's Supervisor inserted a handwritten amendment in Grievant's 1999 Performance Plan<sup>4</sup> requiring Grievant to:

Maintain professional boundaries: a. Avoid use of personal terms (e.g. honey, sweetheart) ....

The Supervisor inserted similar language in Grievant's 2000 Performance Plan.

## **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<sup>5</sup> 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;

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<sup>3</sup> Agency Exhibit 5.

<sup>4</sup> Agency Exhibit 1.

<sup>5</sup> See, *Va. Code* § 37.1-1 and 12 VAC 35-115-30.

- 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.

Clients receiving services from the Agency have certain rights. Agency employees are required to protect, respect, and support clients in the exercise of these rights. One of these rights is to, "Use his preferred or legal name."<sup>6</sup> The Facility's Policy # A-15 requires Facility staff to, "Use the patient's preferred or legal name."<sup>7</sup> Grievant knew she was obligated to refer to the Client by his preferred or legal name. The Supervisor used Grievant's performance plan to inform Grievant that she should avoid use of personal terms.

Grievant intentionally referred to the Client as "babe." Referring to an adult male as "babe" may be demeaning or humiliating to the adult. Given the Client's frail mental health status and his reaction to being called "babe", Grievant's act may have caused psychological harm. Grievant's behavior constitutes client abuse under DI 201.

Upon first reflection, one might consider as trivial referring to a client as "babe." Grievant likely intended the term as a pleasantry and to show affection for the Client. When placed in the context of a mental health Facility, however, the significance of seemingly harmless comments may become magnified from the perspective of a person requiring mental health treatment.

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<sup>6</sup> 12 VAC 35-115-50.

<sup>7</sup> Agency Exhibit 4.

Grievant contends she did not intend to abuse the Client and that she only spontaneously referred to the patient as “babe.” One person familiar with Grievant wrote, “Because of her upbringing she constantly uses terms of endearment that may seem out of place to those not familiar with using these terms themselves.”<sup>8</sup> There is little doubt that Grievant did not intend to harm the Client and her expression was intended as a term of endearment. Although this may explain Grievant’s behavior, it does not justify it. The Agency has adequately informed Grievant that she should not refer to clients by names other than the client’s preferred or legal name. Grievant was solely in control of how she referred to the Client and she acted contrary to the numerous instructions she had received.

Grievant contends the discipline against her was a continuation of retaliation and harassment she has suffered while working at the Facility. No credible evidence was presented to support this contention.

## 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

You may file an administrative review request within **10 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy.
3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 10 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing

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<sup>8</sup> Grievant Exhibit 1.

officer's **decision becomes final** when the 10-calendar day period has expired, or when administrative requests for review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.<sup>9</sup>

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>9</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case No: 5529-R**

Reconsideration Decision Issued: December 3, 2002

**RECONSIDERATION DECISION**

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. “[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis ...” to grant the request.

Grievant contends the Agency has not met its burden of proof because the Agency failed to prove all of what it alleged in its written notice; namely, that Grievant repeatedly referred to the patient as “Boy” and “in the presence of other people which caused the patient to be extremely upset and agitated.” Grievant also argues the patient’s normal behavior is to become upset and agitated for little reason and, thus, Grievant’s words could not have cause psychological harm.

It is not necessary for the Agency to prove every detail specified in the Written Notice as long as the Agency proves sufficient details to support issuance of the disciplinary action. Grievant wrote an Interdisciplinary Note indicating she had called the patient a “Babe” and then the patient became very upset. This evidence alone is sufficient to support the Agency’s zero tolerance policy regarding client abuse. DI 201 lists some examples of behavior that may cause psychological harm including, “Use of language that demeans, threatens, intimidates or humiliates the person.” Grievant’s language demeaned and humiliated the patient thereby justifying issuance of the Group III Written Notice.

Grievant’s request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. Grievant simply restates the arguments and evidence presented at the hearing. For this reason, Grievant’s request for reconsideration is **denied**.



## APPEAL RIGHTS

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