

Issue: Group III Written Notice with termination (client abuse); Hearing Date:
12/17/02; Decision Date: 12/18/02; Agency: DMHMRSAS; AHO: Carl Wilson
Schmidt, Esq.; Case No.: 5580



COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5580

Hearing Date: December 17, 2002
Decision Issued: December 18, 2002

PROCEDURAL HISTORY

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

Violation of Departmental Instruction 201, Reporting & Investigating Abuse & Neglect of Clients. Based on client's statements, demeanor, reaction when shown pictures of staff, and manager's report that you fit the description of the client's testimony, abuse was substantiated.

On October 15, 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 November 7, 2002, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 17, 2002, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Advocate
Facility Director

QMRP
Seven HSCWs
Investigator
Investigator Manager
Two HSCW Supervisors
Two Assistant Program Managers

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 for approximately nine years as a Human Services Care Worker (HSCW) until her removal on October 1, 2002.

The Client resides at the Agency’s Facility. He lives in a cottage housing approximately 15 other clients. He is verbal and ambulatory with a diagnosis of Psychotic Disorder, NOS and Mild Mental Retardation. He has a good memory and refers to people by description rather than name. He does not respond well to people he does not know. He is 61 years old and stands approximately five feet tall.

On July 19, 2002, the Client left his cottage and traveled on a bus to the Habilitation Center.¹ The Habilitation Center consists of several connected large rooms. Individuals can position themselves twenty to thirty feet away and remain visible to others in the Center. Although not all of the staff were always present at the same time, nine staff worked at the Habilitation Center. The Client remained in the Habilitation Center throughout the day. During that time, none of the staff observed any

¹ Clients learn domestic and socialization skills at the Habilitation Center.

injuries to the Client's face. No one observed Grievant or anyone else have any sort of altercation or conflict with the Client.² At 2:30 p.m., the Client lined up with other clients to board a bus back to his cottage. The Human Services Care Worker Supervisor spoke³ to the Client and was able to see his face. She did not notice any markings on his face. The Client boarded a bus carrying two staff and several clients.

The bus ride from the Habilitation Center to the cottage lasted approximately ten minutes. When the Client got off the bus, a HSCW noticed a reddened area on the right side of the Client's forehead. The Client pulled up his left pant leg and revealed a knot and red area on the front of his leg. The HSCW asked the Client what happened to him and he responded, "Don't make me tell. I don't know what happened; she slapped me and kicked me. She had on purple lipstick." Another HSCW asked the Client what happened and the Client said, "I can't tell, she didn't tell me her name." Many women working at the Habilitation Center wore different shades of purple lipstick.

At 4 p.m. on July 19, 2002, the Facility Director examined the Client and observed multiple abrasions and bruises on the Client's face and extremities. Photos were taken of the injuries. The photograph of the Client's forehead revealed a red mark approximately one to two inches in length and width.

Agency investigators showed the Client color pictures of all of the Agency staff and the one female client at the Habilitation Center on July 19, 2002. Pictures were shown separately to the Client and only when he observed Grievant's picture did he become upset and cry. Staff repeatedly asked the Client if Grievant was the one who hit him, but he did not state that Grievant hit him. He only stated, she would not tell him her name.

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:

² No evidence was presented of any prior conflicts between Grievant and the Client.

³ The HSCW Supervisor testified she always says something to the Client because she thinks he has pretty eyelashes.

- 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.

Hitting a client in the head and kicking him on his legs is client abuse. The question in this case is whether the Agency has established that Grievant is the one who inflicted the injuries on the Client.

The Agency has not established that Grievant was the person who inflicted the injuries on the Client. There are several reasons for this. First, although the Client became upset when he viewed Grievant's picture, it remains uncertain why he became upset. The Client never identified Grievant as hurting him; he only said Grievant would not tell him her name. Second, none of the other employees working at the Habilitation unit observed Grievant having any significant interaction with the Client. She was preoccupied with her six clients. Third, no evidence was presented suggesting Grievant and the Client had any prior altercations or had any sort of confrontational relationship. Fourth, Grievant's denial was credible. Fifth, none of the employees working at the Habilitation unit during the day observed any injuries to the Client's face. Sixth, the HSCW Supervisor stood within five feet of the Client as he was getting on the bus to return to his cottage. She spoke to the Client and observed his eyes and face. She did not observe any injuries to the Client's face. After the Client boarded the bus, he rode on the bus for approximately ten minutes. His injuries were first noticed when he departed the bus after arriving at his cottage. Given the severity of the injuries the

Client suffered, those injuries would have been visible when the Client departed from the Habilitation unit. Since no one observed the Client's injuries before he left the Habilitation unit, it is reasonable to conclude his injuries did not occur while at the Habilitation unit where Grievant worked.

The Agency's analysis in this case is understandable. The Client was injured and he reacted in an unusual manner to Grievant's photograph. One could infer from this that Grievant was responsible for Grievant's injuries.⁴ Given the evidence from numerous credible witnesses who indicated they did not observe any injuries to the Client before he boarded the bus and no evidence suggesting Grievant and the Client were alone together, the Agency has not established by a preponderance of the evidence that Grievant is the person responsible for the injuries.

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 ordered to reinstate Grievant to her former position or, if occupied, to an objectively similar position. The Agency is ordered to provide Grievant with full back pay less any interim earnings with restoration of full benefits and seniority.

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.

⁴ It remains unknown why the Client acted adversely to Grievant's photograph. It is certainly possible that he reacted to Grievant's picture because she hit him, but a mere possibility of an event happening is not sufficient evidence to establish a preponderance of the evidence.

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 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.⁵

[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].

Carl Wilson Schmidt, Esq.
Hearing Officer

⁵ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.