

Issue: Group III Written Notice with termination (client abuse); Hearing Date:
11/10/04; Decision Issued: 12/10/04; Agency: DMHMRSAS; AHO: Carl Wilson
Schmidt, Esq.; Case No. 7894



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 7894

Hearing Date: November 10, 2004
Decision Issued: December 10, 2004

PROCEDURAL HISTORY

On July 2, 2004, Grievant was issued a Group III Written Notice of disciplinary action with removal for:

Abuse & neglect of a client as evidenced by the following: 1) Unauthorized use of restraint. 2) Violation of a client's rights to reasonable privacy & dignity. 3) Falsification of State records.

On July 29, 2004, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On October 13, 2004, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 10, 2004, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee
Agency Representative
Witnesses

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 direct care worker at one of its facilities. Clients with severe or profound mental retardation reside at the Facility and are cared for on a continuous basis. Grievant began working for the Agency over six years ago. No evidence of prior disciplinary action against Grievant was introduced at the hearing.

On June 2, 2004, Grievant worked the evening shift (3 p.m. to 11 p.m.). A New Employee was assigned to work with Grievant so that Grievant could mentor the New Employee. During the course of her orientation, the New Employee observed several events she believed were contrary to Agency and Facility policy and she reported her concerns to Agency managers. The Agency conducted an investigation confirming the New Employee's allegations.

Medical staff located in another building called Grievant's unit and asked that Client TP be brought to the medical unit. Grievant's supervisor told Grievant to put Client TP in a wheelchair belonging to another client so that Client TP could go to a medical appointment. Grievant did so. Client TP is ambulatory. She does not need to use a wheelchair. No medical order was given to place her in a seatbelt or wheelchair to be transported.

Female clients in the residence building were undressed at the same time in the bathroom and then given showers in an "assembly line" fashion. Grievant assisted in showering clients in this manner. Seven clients were washed within a five to ten minute period.

After showers were finished, Client TP was placed by another employee on the toileting chair and held there using a seat belt. No medical order or behavioral program authorized Grievant to place Client TP into a seat belt restraint while toileting. Client TP remained on the toileting chair from approximately 8 p.m. until 9:10 p.m.¹ Grievant explained to the New Employee that it was easier to seat belt Client TP on the chair in order to prevent her from getting up and playing with water or smearing fecal matter all over the bathroom floor.

Grievant fed Client TP her while she was sitting on the toilet. Grievant explained to the New Employee that it was routine to feed clients on the toilet.

Grievant received training regarding DI 201 and client abuse. She also received training on regulations governing human rights.²

CONCLUSIONS OF 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 defines³ 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,

¹ The employee who placed Client TP on the toilet took a break at approximately 8:30 p.m. and Grievant was aware that the employee was on break.

² Agency Exhibit 5.

³ See, *Va. Code* § 37.1-1 and 12 VAC 35-115-30.

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 engaged in client abuse by failing to remove Client TP after Client TP had been placed on the toilet in a seatbelt and left there for over an hour.⁴ Upon realizing Client TP had remained restrained for a lengthy period of time, Grievant should have initiated removal of the restraints.⁵ Leaving Client TP on the toilet for such a lengthy time may have caused her physical harm. Client TP may also have suffered psychological harm because of frustration arising from being restricted for such a lengthy period of time.

Grievant engaged in client abuse by placing Client TP in a wheelchair belonging to another client and using a seatbelt to restrain Client TP in the wheelchair. Client TP did not have a medical order authorizing her to be placed in a wheelchair or in restraints while in a wheelchair. Grievant used physical restraints contrary to Agency policy requiring an interdisciplinary team to authorize use of restraints.⁶

Grievant did not engage in client abuse by feeding Client TP while Client TP was on the toilet, but Grievant did act contrary to the Agency's policy requiring that clients be treated with privacy, dignity, respect, and consideration.⁷

Grievant did not engage in client abuse by showering clients in an "assembly line" fashion. Client are supposed to be called individually into the bathroom for

⁴ Client TP could not be placed in a restraint without procedures designed by an Interdisciplinary team of experts working on behalf of the Facility. See Agency Exhibit 6, Instruction 5300. Moreover, 12 VAC 35-115-110 states that the Agency "shall not use seclusion or restraint ... for the convenience of staff."

⁵ Once Client TP was placed in restraints, Grievant should have continuously monitored Client TP, certainly from the point the other employee left on break. Grievant did not monitor Client TP in a one-on-one relationship. See Departmental Instructions 212-8 and 213-6.

⁶ See Departmental Instructions 212 and 213.

⁷ 12 VAC 35-115-50(C)(3)(a) requires clients to be afforded "reasonable privacy."

showering.⁸ Staff are supposed to use showering as an opportunity to teach each client how to undress, turn on the water, shower, and dress. Only one client is permitted to shower at a time. An “assembly line” approach would be improper. Grievant’s actions were contrary to Agency’s policy requiring that clients be treated with privacy, and dignity. Grievant argues she was just following her supervisor’s instructions. This argument fails because Grievant should have recognized that showing clients as a group was improper even though she had been working on the evening shift for only three months.

The Agency contends Grievant falsified documents. The evidence is insufficient to conclude that Grievant intended to falsify documents. By entering check marks and initials to show completion of tasks, Grievant intended to indicate she had completed the task – she was not making a statement regarding how she has completed the tasks.

Grievant argues that another employee told Grievant to place Client TP on the toilet with the seatbelt. Grievant knew or should have known that Client TP did not have a medical order permitting her to be placed on the toilet with a seatbelt. Grievant should have informed the other employee that Client TP could not be placed in a restraint. By failing to object to the other employee’s request, Grievant became responsible for placing Client TP in an unauthorized restraint contrary to DI 201.

Grievant contends it was logical to place Client TP in a wheelchair to transport her given her limited ability to see and walk. Grievant’s argument fails because Grievant knew that the client did not have an order requiring the use of a wheelchair. Grievant should have contested to her supervisor’s instructions rather than engage in client abuse. On prior occasions, Grievant had questioned supervisor’s instructions when those instructions were not appropriate for patient care.

Grievant argues that she did not intend to abuse the Client. It is not necessary for the Agency to show that the Grievant intended to engage in client abuse as long as the Agency can show that the Grievant intended to take the actions that amounted to abuse. The Agency has done so in this case.

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

⁸ Client TP had a Physical Management Plan providing that “Bathing: stands to shower, total staff assistance with client participation.” See Agency Exhibit 2.

You may file an administrative review request within **15 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. Please address your request to:

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

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. Please address your request to:

Director
Department of Employment Dispute Resolution
830 East Main St. STE 400
Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 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 15-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.⁹

[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].

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

Carl Wilson Schmidt, Esq.
Hearing Officer