

Issue: Group III Written Notice with termination (client abuse); Hearing Date: 11/21/03; Decision Issued: 11/26/03; Agency: DMHMRSAS; AHO: Carl Wilson Schmidt, Esq.; Case No. 5845; **Administrative Review: HO Reconsideration Request received 12/05/03; Reconsideration Request dated 12/30/03; Outcome: No newly discovered evidence of incorrect legal conclusions. Request to reconsider denied. Judicial Review: Appealed to the Circuit Court in Amherst County on 01/28/04; Outcome: HO's decision found not to be contradictory to law. HO's decision is affirmed. [CL04005992] (03/10/04)**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5845

Hearing Date: November 21, 2003
Decision Issued: November 26, 2003

PROCEDURAL HISTORY

On September 26, 2003, Grievant was issued a Group III Written Notice of disciplinary action with removal for:

Client Abuse: Based on findings of Investigation #707-2003-043 as confirmed by the Department of Mental Health, Mental Retardation and Substance Abuse Services (DHRMSAS) Central Office.

On September 26, 2003, 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 28, 2003, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 21, 2003, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
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 Service Associate II at one of its Facilities until her removal on September 26, 2003. She had been employed by the Agency for approximately 19 years. No evidence of prior disciplinary action against Grievant as introduced at the hearing.

The Client is a 72 year old woman who is 5'6" tall with a medium build. She has severe to profound mental retardation. She frequently believes she must use the restroom; sometimes 50 to 70 times per day. She requires assistance to undress and dress every time she goes to the restroom. Providing assistance is time consuming for the staff assisting the Client.

At approximately 11:15 a.m. on August 29, 2003, the Psychologist walked from the first floor to the second floor of a building where clients reside. She used a back stairway not often used. When she reached the top of the stairway and was about to push open a door with a glass window, the Psychologist observed Grievant and the Client approximately 30 to 40 feet away. Grievant was standing with her back to the restroom doorway and was facing the Client. The Psychologist was positioned at an angle enabling her to see the front of Grievant and the back of the Client. Grievant was attempting to block the Client from entering the restroom. Grievant had her right hand on top of the Client's left hand to hold the Client. Grievant raised her left hand and used the palm of her hand to quickly push the Client's forehead backwards approximately two to three inches.

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 defines¹ 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.

By quickly pushing the Client’s head backwards approximately two to three inches, Grievant may have caused physical or psychological harm to the Client. The Agency has met its burden of proof to show that Grievant engaged in client abuse contrary to DI 201.

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

Va. Code § 2.2-1001 requires the EDR Director to “[a]dopt rules ... for grievance hearings.” The *Rules for Conducting Grievance Hearings* set forth the Hearing Officer’s authority to mitigate disciplinary action. The Hearing Officer may mitigate based on considerations including whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action, and (3) the disciplinary action was free of improper motive. The *Rules* further require the Hearing Officer to “consider management’s right to exercise its good faith business judgement in employee matters. The agency’s right to manage its operations should be given due consideration when the contested management action is consistent with law and policy.” In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

Grievant denies pushing the Client. She argues that what the Psychologist testified to seeing did not actually happen. Through a rigorous and detailed cross examination and presentation, Grievant’s Counsel identified several inconsistencies and problems in the Agency’s case. Some examples include: (1) the Psychologist waited several days to report the incident, (2) the Psychologist told the Investigator that she had made eye contact with Grievant directly after Grievant pushed the Client, but the Psychologist testified she did not make direct eye contact with Grievant, and (3) the Psychologist wrote an incident report suggesting Grievant hit the Client on the side of the head, but testified that Grievant hit the Client’s forehead.

The Psychologist’s testimony was credible. Prior to this incident, the Psychologist had a favorable opinion of Grievant’s work performance with only minor exceptions. Neither Grievant nor the Psychologist testified to any prior personal or work-related disagreements or conflicts between them. The Psychologist’s hesitancy to report the matter was because she knew that client abuse would result in the termination of up to three employees² whom she believed were good employees. The Psychologist was clear regarding what she saw on August 29, 2003; she was not clear regarding what to do about it. When the evidence is considered in total, the Hearing Officer finds that the Psychologist’s testimony was sufficiently credible to enable the Agency to meet its burden of proof.

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**.

² The Psychologist incorrectly believed that two other employees may have observed Grievant’s actions and that their failure to report the abuse may have resulted in disciplinary action against them.

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. 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 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.³

[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].

³ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

Carl Wilson Schmidt, Esq.
Hearing Officer



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5845-R

Reconsideration Decision Issued: December 30, 2003

RECONSIDERATION DECISION

Grievant, by Counsel, seeks reconsideration of the “mitigation component” of Grievant’s case. Grievant seeks to supplement prior testimony in the record as it relates to her work history and discipline history.

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 does not offer newly discovered evidence since she seeks to present evidence of her work history and discipline history prior to her removal from employment and prior to the hearing. In addition, Grievant has not offered evidence of any incorrect legal conclusions. Accordingly, Grievant’s request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. 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.

Carl Wilson Schmidt, Esq.
Hearing Officer