

Issue: Group III Written Notice with termination (client abuse); Hearing Date: 03/23/05; Decision Issued: 03/28/05; Agency: DMHMRSAS; AHO: Carl Wilson Schmidt, Esq.; Case No. 8014; **Addendum Decision addressing attorney's fees issued 04/14/05**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8014

Hearing Date: March 23, 2005
Decision Issued: March 28, 2005

PROCEDURAL HISTORY

On October 8, 2004, Grievant was issued a Group III Written Notice of disciplinary action with removal for:

Client Abuse: Based on findings of [Investigation] as confirmed by the Department of Mental Health Mental Retardation and Substance Abuse Services Central Office.

On October 21, 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 February 23, 2005, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 23, 2005, 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 Care Worker at one of its Facilities. No evidence of prior disciplinary action against Grievant was introduced during the hearing.

The Client is a 58 year old ambulatory woman with adequate vision and hearing. She resides at the Agency’s Facility. The Client chooses to be nonverbal, although she occasionally does say a few words. For example, when there is too much noise in the area around her, she may say “shut up.” She says “cold out there” and “no” when she chooses to do so. She communicates her dislikes by gestures, vocalizations, and actions.¹

Grievant was one of three direct care employees working in the living area on November 23, 2003. Grievant worked the First Shift beginning at 7 a.m. and ending at 3 p.m. Each employee was assigned responsibility for four clients. Grievant was assigned primary responsibility for the Client. Although each of the employees was assigned to particular clients, the employees sometime worked as a team or assisted each other as necessary to accomplish their daily tasks.

On November 23, 2003 at approximately 7:35 p.m., while the Client was being bathed, Agency staff noticed bruises to the Client’s upper thighs. Because of the possibility of client abuse, the bruises were reported to Facility managers who initiated an investigation. At approximately 8 p.m. or 8:30 p.m. on November 23, 2003, the Investigator began his investigation. He took pictures of the Client’s bruises and began interviewing potential witnesses.

¹ Agency Exhibit 13.

As a result of the investigation and consideration of the nature of the bruises, the Agency investigator and managers concluded that someone took a key ring with a short rope attached to the ring, and hit the Client in the thighs using a whipping motion. Bruises on the Client's thighs were about the size of an unusually shaped key appearing on Key Ring 1 which was assigned to Grievant and in her possession for most of her shift.

The Investigator drafted a report dated December 10, 2003 in which he concluded that "It is unfortunate that there is insufficient evidence to substantiate abuse/neglect in this case in accordance with DI 201." He submitted the report to the Agency's Central Office staff for review.

The Agency's Central Office investigative staff were concerned about the nature of the injuries. The matter was referred to the Virginia State Police for investigation. A Special Agent from the Virginia State Police conducted his own investigation. On May 26, 2004, he presented his findings to the local Commonwealth's Attorney for criminal prosecution. The Commonwealth's Attorney declined to prosecute because there was not enough evidence to bring criminal charges.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

² Grievant was suspended with pay during the period of investigation. Whether the Agency complied with DHRM policies regarding suspension was not an issue before the Hearing Officer.

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

- 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.

The Agency has established that the Client was abused contrary to DI 201. Marks on the Client's legs reveal that someone used an instrument, possibly a set of keys, to strike the Client at least five times. What the Agency has not established is the identify of the person who engaged in client abuse.

The Agency's evidence that Grievant was responsible for the Client's injuries rests on three primary considerations. First, Grievant was assigned responsibility to care for the Client during the day. Second, Grievant was assigned Key Ring 1 and retained possession of Key Ring 1 during the time of the injury. And third, Key Ring 1 contained an unusually shaped key that likely left an imprint on the Client's thighs.

Several reasons reveal that insufficient evidence exists to establish that Grievant was responsible for client abuse. First, the Client was observed nude by four staff at approximately 1:15 p.m. on November 23, 2003. None of the staff observed any injuries or bruises on the Client's thighs. The person striking the Client did so after 1:15 p.m.⁴ Although Grievant was assigned initial responsibility for the Client, Grievant was not always with the Client after 1:15 p.m. At approximately 1:50 p.m., Grievant and another employee took several clients to church while the Client remained at the living unit. Grievant did not return until approximately 2:50 p.m. During that one hour period of time, another person could have injured the Client. During the period from 1:15 p.m. until 1:50 p.m., Grievant may have been alone⁵ with the Client but there is no reason to

⁴ If someone had struck the Client prior to 1:15 p.m., there would have been some skin discoloration or abrasion evident even if bruises had not yet fully developed.

⁵ None of the other employees working on Grievant's shift observed the Client gesturing or otherwise attempting to communicate any dissatisfaction with or fear of Grievant.

believe she was in an area where others could not have heard the Client yell if Grievant had injured the Client.⁶

Second, Grievant was assigned one of four sets of key rings. She retained possession of Key Ring 1 from the beginning of her shift until 3 p.m. At approximately 3 p.m., Grievant placed Key Ring 1 on a table in the living area and walked to another area of the building to complete paperwork and finalize her departure. She left at approximately 3:30 p.m., when her shift ended. Employees working the Second Shift arrive at the Facility at 3 p.m. One of the first things Second Shift employees do is to pick up their keys from the table in the living area. While Grievant was attending to other duties, an employee on the Second Shift was in possession of Key Ring 1 and could have injured the Client.⁷

Third, the Agency concluded that the injuries were caused by Key Ring 1 because this key ring was the only one with an unusually shaped key. No one knew the key's use. It appears to have been left on the key ring after the object it opened or turned on was no longer in use. One end of the key has two prongs giving the key a "U" or "V" shape to that end. One of the bruises on the Client's right leg appears to form a shape that would match the usually shaped key. Upon reviewing the picture of the bruise, however, one can plainly see that the top of the bruise has a third prong in the middle. The middle prong in itself appears to form a star or cross. When the bruise is examined by itself, it appears that an object with at least three prongs caused the injury. Since the unusual key has only two prongs, it is equally likely that the unusual key was not the cause of the injury as it is likely that the unusual key caused the injury.⁸

Based on the evidence presented, it is possible that Grievant used Key Ring 1 to strike the Client and cause the bruises. On the other hand, it is equally likely that someone other than Grievant used any one of four key rings, including Key Ring 1, to strike the Client and cause the injuries. Because of the burden of proof rests on the Agency, the Hearing Officer must decide this case in favor of the Grievant.

⁶ The Client is capable of yelling when injured and likely did so when she was hit at least five times hard enough to leave distinct bruises on her legs.

⁷ At approximately 9 p.m., the Agency's physician examined the Client and reluctantly told the Investigator that the bruises appeared to be between six and ten hours old. The physician was reluctant to give an estimate since the rate of bruising is often unique to the individual based on the individual's age, health, skin, and other factors. Assuming the physician's estimate is valid, the injuries to the Client could have occurred at approximately 3 p.m. when Grievant was away from the Client.

⁸ The Agency sent the unusual key and pictures of the bruises to the criminal lab for examination. Experts at the criminal lab concluded that the bruising shown in pictures of the Client's leg "conforms to the approximate size and shape of the [unusual key] and the [key ring and attached rope]. However, due to the indistinct nature of the images, a further definite association could not be made." See Agency Exhibit 14. The three other key rings were not submitted to the criminal lab. The Hearing Officer has no reason to believe that the experts would not have reached the same conclusion upon reviewing the other sets of keys. Keys on the other three key rings were of the approximate size and shape so as to cause the injuries.

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 **rescinded**. The Agency is ordered to reinstate Grievant to her former position, or if occupied, to an objectively similar position. She is to be awarded full **back pay** from which any interim earning must be deducted. She is to be restored to full benefits and seniority. Grievant is further entitled to recover a reasonable **attorney's fee**, which cost shall be borne by the Agency.⁹ Grievant's attorney is advised of his obligation to timely submit a fee petition to the Hearing Officer.¹⁰

APPEAL RIGHTS

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

⁹ Va. Code § 2.2-3005.1.A & B.

¹⁰ Section VI.D, *Rules for Conducting Grievance Hearings*, effective August 30, 2004. Counsel for the grievant shall ensure that the hearing officer *receives*, within 15 calendar days of the issuance of the hearing decision, counsel's petition for reasonable attorneys' fees.

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.¹¹

[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

¹¹ 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

ADDENDUM TO DECISION OF HEARING OFFICER

In re:

Case No: 8014-A

Addendum Issued: April 14, 2005

DISCUSSION

The grievance statute provides that for those issues qualified for a hearing, the Hearing Officer may order relief including reasonable attorneys' fees in grievances challenging discharge if the Hearing Officer finds that the employee "substantially prevailed" on the merits of the grievance, unless special circumstances would make an award unjust.¹² For an employee to "substantially prevail" in a discharge grievance, the Hearing Officer's decision must contain an order that the agency reinstate the employee to his or her former (or an objectively similar) position.¹³

This decision rescinded the discipline and reinstated grievant to her position. Accordingly, it is held that grievant substantially prevailed in this case. Following issuance of the Hearing Officer's decision ordering reinstatement of the grievant, grievant submitted a petition for attorney's fees. Grievant's petition includes attorney's fees for services rendered by her attorney prior to the February 9, 2005 qualification of her grievance for hearing. Not all grievances proceed to a hearing; only grievances that challenge certain actions qualify for a hearing.¹⁴ The Hearing Officer may award relief only for those issues that qualify for hearing. Further, the statute provides that an agency is required to bear only the expense for the Hearing Officer and other associated *hearing* expenses including grievant's attorneys' fees.¹⁵ Attorney's fees incurred during the grievance procedure's Management Resolution Step stage are not expenses arising from the hearing. Accordingly, a Hearing Officer may award only those attorney's fees incurred subsequent to qualification of the grievance for hearing

¹² Va. Code § 2.2-3005.1.A.

¹³ § 7.2(e) Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004. § VI(D) *EDR Rules for Conducting Grievance Hearings*, effective August 30, 2004.

¹⁴ Va. Code § 2.2-3004.A. See also §4, Qualification for a Hearing, *Grievance Procedure Manual*, August 30, 2004.

¹⁵ Va. Code § 2.2-3005.1.B.

and as a direct result of the hearing process. Therefore, attorney's fees for services performed prior to February 9, 2005 are not included in the award. In addition, attorney's fees are awarded at the hourly rate incurred not to exceed \$120 per hour.

AWARD

The grievant is awarded attorney's fees for 14 hours at \$100 per hour and for 5 hours at \$120 per hour for a total of \$2,000. This is for services rendered from February 9, 2005 through March 29, 2005 as listed on the attorney's invoice submitted with the petition. The petition for services prior to February 9, 2005 is denied.

APPEAL RIGHTS

If neither party petitions the EDR Director for a ruling on the propriety of the fees addendum within 10 calendar days of its issuance, the hearing decision and its fees addendum may be appealed to the Circuit Court as a final hearing decision. Once the EDR Director issues a ruling on the propriety of the fees addendum, and if ordered by EDR, the Hearing Officer has issued a revised fees addendum, the original hearing decision becomes "final" as described in §VII(B) of the *Rules* and may be appealed to the Circuit Court in accordance with §VII(C) of the *Rules* and §7.3(a) of the *Grievance Procedure Manual*. The fees addendum shall be considered part of the final decision. Final hearing decisions are not enforceable until the conclusion of any judicial appeals.

Carl Wilson Schmidt, Esq.
Hearing Officer