

Issue: Group III Written Notice with termination (verbal and physical abuse of a client, and client neglect); Hearing Date: 10/20/05; Decision Issued: 10/27/05; Agency: DMHMRSAS; AHO: Carl Wilson Schmidt, Esq.; Case No. 8184



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8184

Hearing Date: October 20, 2005
Decision Issued: October 27, 2005

PROCEDURAL HISTORY

On August 2, 2005, Grievant was issued a Group III Written Notice of disciplinary action with removal for:

Verbal and physical abuse of a client and neglect of a client by failure to provide appropriate supervision for a client for which she was responsible. Based on the findings of [the investigation] as confirmed and sustained by the DMHMRSAS Office of Health and Quality Control.

On August 10, 2005, 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 September 20, 2005, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 20, 2005, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Representative

Witnesses

ISSUE

Whether Grievant's actions warrant disciplinary action under the Standards of Conduct? If so, what is the appropriate level of disciplinary action?

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 employee at one of its Facilities. Many of the clients living at the Facility require extensive care due to mental and physical challenges they face. She had been working at the Facility for approximately two years until her removal effective August 2, 2005. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

On July 4, 2005, Grievant was working in a one-to-one relationship with the Client. The Client had a tendency to engage in self-injurious behavior such as hitting himself on the head. In a one-to-one relationship, Grievant was to stay with the Client at all times to ensure that the Client did not injure himself. The Client resided on side D of building 31.

The LPN needed to give the Client two medical treatments. One involved placing eye drops in the Client's eye and the second involved giving two aerosol puffs on the Client's face. The Client's doctor prescribed these treatments and the LPN was responsible for providing them to the Client.

Grievant had just gotten the Client to sleep. The LPN entered the room and said it was time for the Client to receive his treatments. Grievant asked if she could come back at a later time to avoid waking the Client. The LPN believed she was too busy to be able to return later in the evening¹ and the LPN touched the Client on the shoulder and then applied the treatments. The LPN left the room as the Client was awakening. As the Client awoke, he became more difficult to work with thereby frustrating Grievant.

¹ The LPN was responsible for providing assistance to approximately 40 clients that evening.

At approximately 9:25 p.m., the LPN went to her office on side 31C and began doing paperwork. After about five minutes, she heard sounds and turned around. She observed the Client in his wheelchair. He was sitting approximately six feet away facing the LPN. The Client was hitting himself on the top of his head. The LPN did not observe Grievant. The LPN rolled the Client down a hallway back to side 31D where another LPN, Ms. D, and an Aide, Mr. B, were located. The LPN told Ms. D that she could not find Grievant. The LPN then returned to her office on side 31C and continued her paperwork.

Grievant walked to 31D and into the office were the Client, Ms. D, and Mr. B were located. Grievant had taken a ten minute break. The Client was in the process of hitting himself on the top of his head. Grievant approached the Client from behind and placed her hand on his forearm and pushed his arm down into his lap. She did this in order to prevent the Client from hitting himself. She may have used a little more force than was necessary to have the Client lower his hand. Grievant then said, "Stop it, little fu-ker!" Ms. D and Mr. B were standing within a few feet of Grievant and clearly heard her comments. She then rolled the Client back to his room and put the Client in his bed.

One day later, the matter was reported to the Facility Director and an investigation began.

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 defines² 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 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.

Referring to a client as a "little fu-ker" is the use of language that demeans, threatens, intimidates or humiliates the Client. Grievant may have made her comments in a friendly or joking manner. Even if she did so, her statements remained demeaning and humiliating. The Agency has established that Grievant engaged in client abuse thereby justifying issuance of a Group III Written Notice.³ Removal from employment is the expected level of disciplinary upon the issuance of a Group III Written Notice for client abuse.⁴

Grievant contends she referred to the Client as a "little Focker" as in the movie "Meet the Fockers" which Grievant had recently watched. Grievant argues Ms. D and Mr. B did not like her because of comments she made about them to an Aide who formerly dated Mr. B. Grievant's argument fails for several reasons. First, the testimony of Ms. D and Mr. B was credible. They were standing a few feet from Grievant and heard her clearly. Second, the Aide testified that she did not tell Ms. D or Mr. B about Grievant's negative comments concerning them. There is no evidence

³ No credible evidence was presented to justify mitigation of the disciplinary action in accordance with the *Rules for Conducting Grievance Hearings*.

⁴ The Agency argued Grievant engaged in client abuse when she left the Client with the LPN without obtaining the LPN's agreement to watch the Client. Grievant testified that she asked the LPN to care for the Client during Grievant's break and believed the LPN said "ok". There is no reason to dispute Grievant's assertion. The Agency also argues Grievant engaged in client abuse by pushing the Client's arm down into his lap with too much force. The evidence is insufficient for the Hearing Officer to determine whether Grievant used excessive force when pushing the Client's hand into his lap. Even without these allegations, there remains sufficient evidence to establish client abuse based on the comments Grievant made to the Client and that were overheard by Ms. D and Mr. B.

showing Ms. D or Mr. B knew of Grievant's negative comments. And third, there is no evidence of any other conflicts between Grievant and Ms. D and Mr. B.

Grievant argues that the incident was not serious in nature as evidenced by the one day delay in reporting the matter to the Facility Director. Ms. D and Mr. B explained their delay was because their regular supervisor was not working on July 4th and they wished to wait until that supervisor returned to work. The failure of other employees to timely report the incident, does not have any bearing on the facts establishing Grievant's statement to the Client.

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 **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.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.