

Issue: Group III Written Notice with termination (failure to report client abuse); Hearing Date: 11/29/05; Decision Issued: 12/16/05; Agency: DMHMRSAS; AHO: Carl Wilson Schmidt, Esq.; Case No. 8208; Outcome: Agency upheld in full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8208

Hearing Date: November 29, 2005
Decision Issued: December 16, 2005

PROCEDURAL HISTORY

On August 29, 2005, Grievant was issued a Group III Written Notice of disciplinary action with removal as the result of an investigation concluding that Grievant failed to report client abuse. On September 14, 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 he requested a hearing. On October 31, 2005, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 29, 2005, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Representative
Witnesses

ISSUE

1. Whether Grievant engaged in the behavior described in the Written Notice?

2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

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 until his removal effective August 29, 2005. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

The Client resides at the Agency's Facility. He has a diagnosis of mental retardation. He has profound bilateral hearing loss and a diagnosis of psychotic disorder and Pica. He has a history of aggressive behaviors, property destruction, and self-injurious behavior. He is able to use sign language to communicate.

Agency managers became concerned about the activities of certain staff working on a particular Unit. A hidden camera was installed to view the activities in the Unit. Staff working on the Unit were not informed of the camera's existence.

On August 2, 2005, Client became irritated regarding a soda provided for him to drink. He began signing to staff in the living area but his signing was ignored. He looked towards three staff sitting at a table along a wall, but they continued to ignore him. Grievant was sitting at the table. The Client walked to the table and picked up an object. He began to eat the object. A woman employee sitting at the table stood up and walked to the Client. She took the object from the Client and went back to the table. The Client continued to pace. He then walked to table and picked up an object

again. The woman got up again and removed the item from the Client and then returned to her seat. The Client walked to the table and attempted to pick up an object. The woman punched once towards the Client and raised her hand as if to strike the Client. Grievant was seated out of the camera view at that time.

Several minutes passed and the Client again approached the woman. The woman stood up and pushed the Client backwards but also grabbed the Client's shirt. Mr. SK stood up from the table as the woman pushed the Client backwards. Grievant also stood up. Grievant looked at the Client and the woman while he talked on a cell phone. The woman swung her hand at the Client in order to hit the Client in the face. Grievant watched as the woman hit the Client.¹ Mr. SK signed to the Client to stop. The Client ignored Mr. SK and walked towards the table. Mr. SK pulled the Client away from the table and signed for the Client to stop. The Client walked towards the table, but Mr. SK blocked the Client's movement forward. The Client turned away from the table and walked in Grievant's direction. Grievant held the Client's hand and directed him away from the area. Grievant was talking on the telephone while he escorted the Client away.

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 *** Assault or battery.

The woman employee engaged in client abuse when she pushed and hit the Client. She acted contrary to DI 201.

DI 201 provides, "[a]ll allegations of abuse or neglect of patients or residents in facilities and any information regarding such shall be reported directly to the facility director or his designee so that immediate action may be taken to safeguard individuals receiving services." Grievant observed client abuse by the woman employee but he did not report this abuse to the facility director as required by DI 201.

¹ Grievant was standing within 10 to 15 feet of the Client and the woman when the woman hit the Client.

² See, *Va. Code* § 37.1-1 and 12 VAC 35-115-30.

DI 201 states, “[e]mployees shall be subject to the full range of disciplinary actions, up to and including termination, as outlined in the Employee Standards of Conduct and Performance when they: Fail to report incidents of suspected abuse or neglect of individuals receiving service.” The Agency’s practice is to remove from employment employees witnessing client abuse but failing to report that abuse. Grievant failed to report the client abuse he observed. The Agency’s judgment³ that Grievant should receive a Group III Written Notice with removal is supported by the evidence.⁴

Grievant argues that he did not observe the woman abuse the Client because he was talking on the telephone at the time and his view of the incident was blocked by Mr. SK. The videotape, however, shows that Grievant was looking directly at the Client when the woman pushed and hit him and that Mr. SK was not blocking Grievant’s view of the events. In addition, the videotape shows Grievant standing and moving in a manner intended to position himself with a direct view of the Client and the woman. The Client moved away from and towards the woman several times during and immediately after the abuse. Grievant changed his position in order to shadow the movement of the Client and the woman. His line of sight was not broken. He must have been able to see the abuse despite talking on the telephone. As Mr. SK directed the Client away from the woman, Grievant held his hand out to escort the Client away even though he continued to talk on the telephone.

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.

³ DHRM Policy 1.60(V)(A).

⁴ No credible evidence was presented to justify mitigation of the disciplinary action in accordance with the *Rules for Conducting Grievance Hearings*. Grievant argued his satisfactory work performance justifies mitigation. The EDR Director has not listed in the *Rules* that an employee’s satisfactory work performance is a basis for the Hearing Officer to reduce disciplinary action.

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].

S/Carl Wilson Schmidt

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.