

Issues: Group III Written Notice with termination (failure to report patient abuse);
Hearing Date: 10/16/07; Decision Issued 10/17/07; Agency: DMHMRSAS; AHO:
Carl Wilson Schmidt, Esq.; Case No. 8693; Outcome: No Relief, Agency Upheld in
Full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8693

Hearing Date: October 16, 2007
Decision Issued: October 17, 2007

PROCEDURAL HISTORY

On February 12, 2007, Grievant was issued a Group III Written Notice of disciplinary action for failing to cooperate with an investigation into patient abuse. On March 12, 2007, 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 11, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 16, 2007, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Representative
Witnesses

ISSUES

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 employs Grievant as a Direct Service Associate II at one of its Facilities. The purpose of her position is:

The Direct Service Associate II is directly responsible to the LPN, RN I, RN II, or RN MGR I for the provision of direct care to mentally ill patients in an assigned unit, according to the philosophy and objectives of [the Facility] and the Hospital's mission, goals and objectives.

Grievant began working for the Agency in July 2005. Her work performance has been satisfactory to the Agency. For example, on October 12, 2006, Grievant received an Acknowledgment of Extraordinary Contribution.¹

On November 23, 2006, Employee K slapped the Client in the face thereby engaging in client abuse contrary to the Agency's policy. The Client was slapped while several employees were attempting to place him in restraints. Grievant was nearby while the Client was being restrained. An anonymous male called an Agency employee and reported the abuse. The Agency began an investigation.

On November 24, 2006, Grievant spoke with Ms. M about what she observed the day before. Ms. M was not at work on November 23, 2006. Following her conversation with Grievant, Ms. M made an anonymous telephone call to the Agency to report the client abuse.

¹ Grievant Exhibit 1.

The Agency Investigator interviewed Grievant on December 6, 2006. Grievant told the Investigator that, "she didn't see [Employee K] or any staff member slap the Client."

On October 14, 2006, Ms. M wrote a letter to the Hospital Director and letter stating, in part:

On November 24, 2006, it was reported to me ... by [Grievant] that on the previous day (Thanksgiving), [Employee K] slapped [Client] in his face approx. three times because [Client] was spitting at her while he was being restrained for a previous behavior. [Grievant] stated that [Employee K] smacked [Client] in the face and pulled his hooded sweatshirt over his head covering his face. *** [Grievant] also stated that she was going to deny witnessing the abuse when questioned because she did not want to be involved.²

The Investigator interviewed Ms. M on December 20, 2006. Ms. M told the Investigator, "The day after Thanksgiving Day, when I returned to work, [Grievant] came to me in the hall and told me that [Employee K] slapped [the Client] three times, because he was spitting on her while she was trying to restrain him. She told me that [Employee K] smacked him in the face and pulled his hooded [sweatshirt] over his head covering his face."

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;

² Agency Exhibit 8.

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

- 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.

Slapping a Client is client abuse under Departmental Instruction 201. Grievant observed Employee K slap the Client.

Departmental Instruction 201-6, requires:

Any workforce member who has any knowledge or reason to believe that a patient or resident of a state facility may have been abused or neglected, or both, shall immediately report this information directly to the facility director or his designee.

Departmental Instruction 201-6, also provides:

Any action by an employee that compromises the integrity or outcome of a factual investigation may be cause for disciplinary action. Employee 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 services;
- Withholding information regarding abuse or neglect;
- Deliberately or knowingly misstate facts when questioned in an investigation or administrative proceeding; or
- Violate the confidentiality of an investigation or discuss an investigation with others during the course of the investigation.

Grievant did not report the client abuse she witnessed. Her omission was contrary to Departmental Instruction 201-6 thereby justifying the issuance of disciplinary action up to the level of removal from employment. The Agency chose to issue a Group III Written Notice without removal or suspension. The Agency chose to mitigate the disciplinary action because of Grievant's otherwise satisfactory work performance. The Agency's disciplinary action in this case must be upheld.

Grievant contends there is insufficient evidence to justify the Agency's conclusion that she should receive disciplinary action. She described the information presented to the Agency as "hearsay".

Hearsay is admissible in grievance hearings. Since Ms. M did not testify at the hearing, her statements to the Facility Director and Investigator are hearsay. The question is what weight to give to Ms. M's statements. Ms. M's statement contains details that were consistent with the details provided by witnesses other than Grievant. According to the Facility Director, Ms. M's had made reports of client abuse in the past. The Agency deemed those reports to be credible. No evidence was presented suggesting Ms. M had a reputation for untruthfulness. No evidence was presented suggesting Ms. M had a motive to lie about Grievant. No evidence was presented that Grievant and Ms. M had had conflicts in the past. Grievant testified she and Ms. M had a good working relationship. Based on the evidence presented, the Hearing Officer gives significant weight to the statements of Ms. M. Accordingly, there exists sufficient evidence to support the Agency's conclusion that Grievant observed client abuse and failed to report what she observed.

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including “mitigation or reduction of the agency disciplinary action.” Mitigation must be “in accordance with rules established by the Department of Employment Dispute Resolution....”⁴ Under the *Rules for Conducting Grievance Hearings*, “[a] hearing officer must give deference to the agency’s consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency’s discipline only if, under the record evidence, the agency’s discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency’s discipline, the hearing officer shall state in the hearing decision the basis for mitigation.” A non-exclusive list of examples includes 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 among similarly situated employees, and (3) the disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group III Written Notice of disciplinary action 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.

⁴ *Va. Code § 2.2-3005.*

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 all of your appeals to the other party and to the EDR Director. 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.