

Issue: Group III Written Notice with termination (patient abuse); Hearing Date: 02/15/08; Decision Issued: 02/19/08; Agency: DMHMRSAS; AHO: Carl Wilson Schmidt, Esq.; Case No. 8780; Outcome: No Relief – Agency Upheld In Full;
Administrative Review: AHO Reconsideration Request received 03/05/08; Reconsideration Decision issued 03/13/08; Outcome: Original decision affirmed;
Administrative Review: DHRM Ruling Request received 03/05/08; Outcome pending



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8780

Hearing Date: February 15, 2008
Decision Issued: February 19, 2008

PROCEDURAL HISTORY

On October 1, 2007, Grievant was issued a Group III Written Notice of disciplinary action with removal for resident abuse. On October 20, 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 January 14, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 15, 2008, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
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 employed Grievant as a Direct Support Professional I until her removal effective October 1, 2007. Her work performance had been otherwise satisfactory to the Agency. She had a reputation for truthfulness, punctuality, and competency among staff at the Facility. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

The Resident is a 25-year-old verbal, ambulatory female who has lived at the Facility since November 7, 2002. She has moderate mental retardation. She has right hemiparesis with contracture of the right elbow with limited use of the right arm and an unsteady gait.

On September 17, 2007, the Resident was a patient in a Hospital. Grievant was assigned responsibility to attend to the Resident while the Resident was in the hospital. Grievant was not as familiar with the Resident as she was with the other clients who lived in the cottage where Grievant worked at the Facility. At approximately 6:30 p.m., the bathroom call bell inside the Resident's room began to ring. Patient Care Tech O was standing outside of the nursing station when she heard the bell ring. She walked towards the Resident's room. The door to the Resident's room was open partially. Patient Care Tech O looked through the crack in the doorway and observed the Resident sitting on the toilet and Grievant standing to the side of the patient. The Resident was leaning to her left. Patient Care Tech O heard Grievant say "so you wanna spit on me". Patient Care Tech O stepped into the room and went to the

bathroom door which was also open. While standing a few feet from Grievant and the Resident, the Patient Care Tech O observed the Grievant use her right hand and forcefully hit the Resident in the mouth. Patient Tech O stepped back because she was shocked by Grievant's behavior. The Resident began to cry because she had been hit in the mouth. Patient Care Tech O walked out of the room and reported to the Nurse what she had just witnessed.

Immediately after Patient Care Tech O left the Resident's room, Patient Care Tech A responded to the call bell for the Resident's room. As she arrived at the Resident's room, Patient Care Tech A heard a loud cry and scream from inside the room. She entered the room and observed the Resident very upset and swinging her hands toward and hitting Grievant. Grievant said to the Resident, "if you hit me I'm going to hit you back". The Resident hit Grievant two or three times. Grievant said "I told you not to hit me". Grievant made a fist with her hand and hit the Resident on the Resident's thigh. Patient Care Tech A immediately left the room and went to the Charge Nurse to report what she had observed.

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:

- Assault or battery

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.

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

Grievant engaged in client abuse because she hit the Resident in the mouth and on her thigh.² The Resident became upset and cried because of Grievant's actions. Grievant knew or should have known that hitting the Resident in the mouth and on the thigh might have caused physical or psychological harm to the Resident. DI 201 authorizes the issuance of a Group III Written Notice with removal to an employee who is engaged in client abuse. Accordingly, the Agency has presented sufficient evidence to support the issuance to Grievant of a Group III Written Notice with removal.

Grievant denies that she hit the Resident. During the Agency's investigation, the Resident told the Investigator that Grievant hit her in the mouth. Grievant presented evidence suggesting that the Resident lacked the mental capacity to conclude that Grievant hit her. Grievant presented evidence suggesting that the Resident had been untruthful in the past and may have been motivated to falsely accuse Grievant. If the Hearing Officer excludes from any consideration the statements made by the Resident to the Investigator, there remains sufficient evidence to conclude that Grievant hit the Resident. The testimony of Patient Care Tech O was credible that she observed Grievant hit the Resident. The testimony of Patient Care Tech A was credible that she observed Grievant hit the Resident. Although Patient Care Tech A's testimony that she had observed Grievant earlier in the morning that day is not supported by the facts of this case, that inconsistency is not, in itself, sufficient to undermine her testimony of what she observed later in the day when Grievant hit the Resident.³ It is important to note, that the observations of Patient Care Tech O and Patient Care Tech A were independent of one another but within a sufficiently short time span so as to be consistent with one another. In other words, they both cannot be wrong regarding their conclusions that Grievant hit the Resident and that Grievant's actions were not therapeutic in nature.

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

² Grievant's behavior constitutes battery under the Agency's policy.

³ Patient Care Tech A testified that she had spoken with Grievant at the Hospital in the morning of September 17, 2007, but in fact Grievant did not go to the Hospital until the afternoon when her shift began.

⁴ *Va. Code § 2.2-3005.*

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 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 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.