

Issues: Group III Written Notice (client abuse) and Termination; Hearing Date: 05/05/08; Decision Issued: 05/13/08; Agency: DMHMRSAS; AHO: William S. Davidson, Esq.; Case No. 8818; Outcome: Full Relief.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 8818

Hearing Date: May 5, 2008
Decision Issued: May 13, 2008

PROCEDURAL HISTORY

On December 20, 2007, the Grievant was issued a Group III Written Notice for multiple allegations of client abuse. Pursuant to this Group III Written Notice, the Grievant was terminated from employment.

On December 28, 2007, the Grievant timely filed a Grievance to challenge the Agency's action. On February 12, 2008, the matter was qualified by the Agency for a hearing before a Hearing Officer. The Hearing Officer was appointed on March 13, 2008 and attempted to schedule a hearing prior to April 17, 2008, when his report would be due. The representative for the Agency was unavailable until after April 17th and the representative for the Grievant consented to waiving the thirty-five (35) day time frame in which the Hearing Officer was to file his report. The matter was set by agreement of both parties for May 5, 2008 and, accordingly, a hearing was held at the Agency's location on May 5, 2008.

APPEARANCES

Grievant
Attorney for Grievant
Agency Party
Agency Representative
Witnesses

ISSUE

1. Did the Grievant engaged in multiple counts of client abuse as described in the Group III Written Notice that she was issued on December 20, 2007?
2. 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 Agency provided the Hearing Officer with a notebook containing ten (10) tabbed sections, nine (9) of which had documents, and that notebook was accepted in its entirety as Agency Exhibit 1. The Grievant provided the Hearing Officer with a notebook containing two (2) tabbed sections and that notebook was accepted in its entirety as Grievant’s Exhibit 1.

The Department of Mental Health, Mental Retardation and Substance Abuse Services employed the Grievant as a Human Service Care Lead Worker in Cottage 38. She was removed from employment, effective December 21, 2007.

On October 11, 2007, the Grievant was assigned to Cottage 38. A new employee of the Agency alleged that the Grievant hit Consumer K.B. on his arm twice, open-handed, because he would not sit in the seat to the Grievant’s liking. This employee reported this to the Agency Investigator.¹ When interviewed by the Agency Investigator, the Grievant denied that she hit Consumer K.B. on the arm. She also denied striking Consumer K.B. in testimony before the Hearing Officer.

In Agency Exhibit 1, Tab 3, there are allegations that another employee of the Agency abused Consumer A.D. There was no evidence introduced at the hearing to link the Grievant to any incident where Consumer A.D. was abused. Accordingly, the Hearing Officer will not consider any evidence at Tab 3 of Agency Exhibit 1.

The same new employee alleged that on October 10, 2007, the Grievant slapped Consumer C.E. across the face numerous times.² She also alleged that she saw another employee of the Agency slap Consumer C.E. several times on the face on this same date. The Grievant denied this allegation both to the Agency Investigator and in testimony before the Hearing Officer. The Agency Investigator suggested a lie detector test and it was taken. After taking the lie detector test, the Grievant signed a written statement prepared by the Polygraph Examiner indicating that she had slapped this Consumer on his hand sometimes.³ There is no way for the Hearing Officer to link the allegation of this Consumer being slapped in the face with the written statement of her slapping him on the hand. Further, in another written statement prepared by the

¹ Agency Exhibit 1, Tab 2, Page 2

² Agency Exhibit 1, Tab 4, Page 2

³ Agency Exhibit 1, Tab 4, Page 14

Polygraph Examiner, the Grievant indicated that she had pushed or held this Consumer.⁴ The new employee who made this allegation both to the Investigator and at the hearing made no reference to this particular Consumer being slapped on the hand or pushed or held and always insisted that he was slapped on the face. The Agency did not call the Polygraph Examiner as a witness.

During the hearing, the Hearing Officer heard from several witnesses that this Consumer bruised easily. The Agency Investigator testified that she saw no indication of bruising on or about his face, even though she observed him within twenty-four (24) hours of the alleged incident.

Finally, on October 11, 2007, the same new employee alleged that the Grievant and another Agency employee kicked Consumer C.P. as he was exiting the shower.⁵ The Grievant denied that she had kicked this Consumer when questioned by the Investigator. Following the same pattern, the Agency Investigator asked if she would take a lie detector test, which she did. Following the test, the Polygraph Examiner prepared a statement for the Grievant to sign. In signing that statement, the Grievant reaffirmed that she had not kicked this Consumer. Strangely, the Agency Investigator concluded that her statement that she had not kicked anyone was an affirmation of the allegation that she had kicked Consumer C.P.

At no time in the hearing before this Hearing Officer was there any allegation that the Grievant failed to report abuse. The allegation before this Hearing Officer is that the Grievant abused clients.

The Agency, both through its written Exhibits and its testimony from witnesses at the hearing, presented various sections of Agency Policies indicating that abuse of clients would rise to a Group III Written Notice and subsequent termination. The problem here is that the Agency's evidence does not go far enough to have the Hearing Officer review whether or not any disciplinary action was warranted.

There is no evidence that links this Grievant to the allegations. In the matter of Consumer K.B., the Grievant had a witness who testified that she was in a one on one relationship with that Consumer on the day of the alleged abuse. That means that she was with this person every minute of the shift and she testified that she saw no abuse of Consumer K.B.

The Grievant has the exact same problem with the allegation made regarding Consumer C.E. and Consumer C.P. The Grievant denied the allegations before the Agency Investigator, denied them at the hearing, and the written note that she signed which was prepared by the Polygraph Examiner also contained her denial. Any admission made in the notes prepared by the Polygraph Examiner were to different actions, which are not before this Hearing Officer.

⁴ Agency Exhibit 1, Tab 2, Page 9

⁵ Agency Exhibit 1, Tab 5, Page 2

This matter involves one Agency employee saying that she saw abuse and the Grievant consistently saying that she did not commit those actions. The Grievant was able to produce a witness to directly refute the actions alleged against one Consumer, and was able to present evidence clearly indicating that the second Consumer should have had bruising, if the alleged action actually took place.

The Hearing Officer points out that the Agency, through its representative, clearly stated at the hearing that it could not use any results from a polygraph test in a grievance hearing. Virginia Code Section 40.1-51.4:4(D) provides that the analysis of any polygraph test charts produced during any polygraph examination administered to a party or witness shall not be submitted, referenced, referred to, offered or presented in any manner in any proceeding pursuant to Chapter 10(Section 2.2-1000 et seq.) of Title 2.2. This statutory prohibition is incorporated into Section 4(D) of the Rules for Conducting Grievance Hearings which states that the results of polygraph tests are not admissible in a Grievance Hearing over the objection of any party. The Agency was aware that it could not use polygraph evidence, yet, through its Investigator, it inquired as to whether the Grievant would take a polygraph examination. Then, after the polygraph, the Polygraph Examiner prepared written statements for the Grievant to sign. The Hearing Officer is left to wonder what was the Agency's intent in having the Grievant take a polygraph test knowing that it could not use the results of this test. The Hearing Officer also wonders why the Polygraph Examiner was not a witness to testify as to the language that he chose to use in the written statements that he made.

The Hearing Officer would note that, in Agency Exhibit 1, Tab 1, Page 4, it is part of the report found at that location that the Grievant "flunked" the polygraph test. The Grievant's attorney did not object to this introduction and the Hearing Officer, for the record, specifically states that he did not consider that as part of the evidence in this matter.

The Agency has not carried the burden in this matter regarding this Grievant and the alleged abuse incidents.

DECISION

For reasons stated herein, the Agency's removal of the Grievant from employment is **reversed.**

The Hearing Officer orders that the Agency reinstate the Grievant to her position. To the extent that the Grievant has lost wages, sick pay, vacation pay, retirement benefits or any other benefit which would have accrued to her pursuant to her employment, the Hearing Officer orders that the Agency reimburse her for such benefits and/or reinstall such benefits. The intent of this is that the Grievant will be returned to the exact status regarding all benefits as if she had never been terminated.

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 Street, 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 Street, Suite 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 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 a review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.⁶ 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.⁷

⁶An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. Virginia Department of State Police v. Barton, 39 Va. App. 439, 573 S.E.2d 319 (2002).

⁷Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

[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]

William S. Davidson
Hearing Officer