

Issues: Group III Written Notice (Client Abuse) and Termination; Hearing Date: 05/15/08; Decision Issued: 05/16/08; Agency: DMHMRSAS; AHO: Carl Wilson Schmidt, Esq.; Case No. 8839; Outcome: No Relief – Agency Upheld In Full;
Administrative Review: HO Reconsideration Request received 05/29/08;
Reconsideration Decision issued 06/02/08; Outcome: Original decision affirmed.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8839

Hearing Date: May 15, 2008
Decision Issued: May 16, 2008

PROCEDURAL HISTORY

On October 29, 2007, Grievant was issued a Group III Written Notice of disciplinary action with removal for client abuse.

On November 2, 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 he requested a hearing. On April 9, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 15, 2008, 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 employed Grievant as a Direct Care Worker until his removal effective October 29, 2007. He had been employed by the Agency since January 10, 2005. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

The Client is a thin and frail man who resides at the Facility. The Agency's mental health experts developed a treatment plan for the Client referred to as Goals, Objectives and Plans (GOP). One of the Client's goals was, "[the Client] will be trained to toilet himself." The objective was "[the Client] will tolerate sitting on the toilet every 02 hours with no more than 03 verbal prompts" Grievant and other employees working with the Client were advised of the GOP for the Client.

On October 2, 2007 at approximately 6:30 p.m., Grievant took the Client to the restroom. The MR Services Specialist II¹ observed the Client run out of the restroom with Grievant running after him to take him back to the restroom. Grievant shoved the Client towards the restroom to change the Client's soiled pants. Grievant grabbed the Client's wrist and took him back to the restroom. She heard the Client vocalizing as if unhappy while Grievant closed the door to the restroom. She followed the noise and entered the restroom. She observed Grievant repeatedly pushing and shoving the Client whenever the Client attempted to stand up and leave the toilet. The MR Services

¹ The MR Specialist II had been working with Grievant for approximately two weeks and could identify Grievant and distinguish him from other employees.

Specialist II confronted Grievant and indicated she was unhappy with how Grievant was treating the Client. Approximately one hour later, she informed the Supervisor of what she observed. The Agency began an investigation.

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: ***

- 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 he 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.

By shoving the Client, Grievant was attempting to physically restrain him near the toilet. Such restraint was not in accordance with Agency policy or procedures or an accepted standard of practice. Nothing in the Client’s Goals, Objectives and Plans (GOP) authorized using force to assist the Client with toileting. Indeed, the GOP requires staff to provide verbal prompting to the Client. By shoving the Client, Grievant could have caused him physical harm, especially given that the Client was thin and frail. The Agency has presented sufficient evidence to support the issuance of a Group III

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

Written Notice. Upon the issuance of a Group III Written Notice, the Standards of Conduct authorizes the Agency to remove Grievant from employment.

Grievant contends he had no contact with the Client on October 2, 2007. This assertion is not supported by the evidence. The Shift Accountability sheet for October 2, 2007 shows that the Agency assigned Grievant and one other employee to care for three clients, including the Client. Several employees observed Grievant in contact with the Client that evening.

Grievant contends he did not try to push the Client onto the toilet because the Client does not sit on the toilet. This is contradicted by the GOP which states, that the Client "will tolerate sitting on the toilet every 02 hours."

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...."³ 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 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 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.⁴

[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

⁴ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.