

Issues: Group III Written Notice (client abuse) and Termination; Hearing Date: 06/09/08; Decision Issued: 06/17/08; Agency: DMHMRSAS; AHO: Carl Wilson Schmidt, Esq.; Case No. 8847, 8849; Outcome: No Relief – Agency Upheld in Full;  
**Administrative Review: HO Reconsideration Request received 07/01/08;**  
**Reconsideration Decision issued 07/02/08; Outcome: Original decision affirmed;**  
**Administrative Review: EDR Admin Review Request received 07/02/08; EDR**  
**Admin Review #2009-2058 issued 07/29/08; Outcome: HO's decision affirmed.**



***COMMONWEALTH of VIRGINIA***  
***Department of Employment Dispute Resolution***

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8847 / 8849**

Hearing Date: June 9, 2008  
Decision Issued: June 17, 2008

**PROCEDURAL HISTORY**

On February 25th 2008, Grievant J was issued a Group III Written Notice of disciplinary action with removal for client abuse. On February 25, 2008, Grievant P was issued a Group III Written Notice of disciplinary action with removal for client abuse.

The Grievants timely filed grievances to challenge the Agency's actions. The outcome of the Third Resolution Step was not satisfactory and each Grievant requested a hearing. On May 6, 2008, the EDR Director issued Ruling 2008-2012 and 2008-2013 consolidating the two grievances. On May 16, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 9, 2008, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant J  
Grievant P  
Agency Representative  
Witnesses

## **ISSUES**

1. Whether Grievants 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 actions against the Grievants were 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 J and Grievant P as Certified Nursing Assistants until their removal effective February 25, 2008. The work performance of both employees was otherwise satisfactory prior to the facts giving rise to this grievance. No evidence of prior active disciplinary action was introduced during the hearing.

The Client resided in room 240 at one of the Facility's housing buildings. A bathroom connected room 240 with room 239. Loud sounds coming from room 240 could be heard by someone located in room 239.

On October 5, 2007, Grievant P and Grievant J were in room 240 with the Client. The CNA was in room 239 attending to other clients. The CNA overheard the Client say "No! Stop it! Don't! Don't!" The Client's voice expressed distress and fear. The CNA walked through the bathroom into room 240. The CNA observed the Client in his bed and Grievant J leaning over the Client with her hand moving towards the Client. The Client was cringing and saying "Stop, don't!" The CNA said to Grievant J "Leave him alone, I'm tired of y'all picking on him." Grievant J said "He likes it." The CNA said, "He

does not, stop picking on him." Grievant P was also in room 240. The CNA sat down at the top of the Client's bed. The Client reached towards the CNA and wrapped his arms around her waist. The Client placed his head on the CNA's chest. The CNA told the Client "It's okay" as she held him. Grievant J said to the CNA "I am just playing with him." The CNA told the Client "It's okay, it's okay; don't look at them (referring to Grievant P and Grievant J)." Grievant J said "He likes it. He's laughing" and moved her arm toward the Client as if to poke him again.<sup>1</sup> Grievant P said, "He wants to suck on those titties." The CNA said, "You all stop that -- that's not funny, he's not like that." Grievant P said "whip one out" and then made a sucking noise.

## 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 defines<sup>2</sup> 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;
- 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.

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<sup>1</sup> Grievant J did not actually touch the Client while the CNA held the Client.

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

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.

Grievant J denied poking or touching the Client. She contends no witnesses observed her actually touching the Client.<sup>3</sup> The list of examples of client abuse under DI 201 is not all-inclusive. Poking at a client with the intent of aggravating the client is behavior that might cause psychological harm to a client. The Agency's clients require specialized mental health care and may be susceptible to emotional harm from actions that might not otherwise affect someone not in the Agency's care. In this case, the Client had limited ability to communicate and a limited ability to understand what Grievant J was doing when she was poking at him. He was able to express his objection through his words of telling Grievant J to "stop it", through the tone of distress from his voice, and his reaction of cringing. Grievant J continued to gesture toward the Client even after the CNA had asked her to stop. Grievant J engaged in client abuse.

Grievant P used language that would demean or humiliate the Client when Grievant P suggested that the Client would suck on the CNA's breasts. Grievant P engaged in client abuse as defined under DI 201.

Grievant P denies saying anything about sucking on breasts or whipping one out (referring to a breast). The Agency presented credible evidence to support its allegations that Grievant P made these statements in front of the Client. The CNA's testimony was credible. Moreover, Grievant J informed the Agency's investigator that Grievant P said "'all she has to do is pull out the titty and he'll suck it' or something to that effect."

Grievant P argues that her comments were directed at the CNA and not the Client and that the Client did not likely understand what she was saying. Many of the Agency's clients may not be able to understand fully the actions of staff directed towards them. The Training Manager testified that employees, including Grievant P, received training informing them that the Agency had a zero tolerance towards client abuse and that directing demeaning or humiliating comments towards clients would constitute client abuse even if a client does not fully understand the words used.

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<sup>3</sup> Grievant J also argued that the Client was not upset or in distress. The CNA was not the only person who heard the Client expressing his distress. Another CNA and the RN also heard the Client yelling as if in agony. The evidence is sufficient for the Hearing Officer to include that the Client was not playing with either Grievant.

The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice to Grievant P and Grievant J. Upon the issuance of a Group III Written Notice, the Agency may remove the Grievants from employment.

*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....”<sup>4</sup> 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 actions against Grievant P and Grievant J.

## DECISION

For the reasons stated herein, the Agency’s issuance to Grievant P of a Group III Written Notice of disciplinary action with removal is **upheld**. The Agency’s issuance to Grievant J 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

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<sup>4</sup> *Va. Code § 2.2-3005.*

101 North 14<sup>th</sup> St., 12<sup>th</sup> 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.<sup>5</sup>

[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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>5</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.



**COMMONWEALTH of VIRGINIA**  
**Department of Employment Dispute Resolution**

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case No: 8847 / 8849-R**

Reconsideration Decision Issued: July 2, 2008

**RECONSIDERATION DECISION**

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. “[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis ...” to grant the request.

Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the hearing ended. However, the fact that a party discovered the evidence after the hearing does not necessarily make it “newly discovered.” Rather, the party must show that:

- (1) the evidence is newly discovered since the date of the Hearing Decision;
- (2) due diligence on the part of the party seeking reconsideration to discover the new evidence has been exercised;
- (3) the evidence is not merely cumulative or impeaching;
- (4) the evidence is material;
- and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the Hearing Decision to be amended.

Grievant J seeks reconsideration because the Agency issued disciplinary action against her for verbal abuse but failed to prove she verbally abused the Client. Although the Agency failed to show that Grievant J verbally abused the Client, the Agency showed that she abused him by poking and jabbing towards him in a non-therapeutic manner. The Agency presented sufficient evidence to support the issuance of a Group III Written Notice with removal.



Grievant J admitted to touching the Client's leg.<sup>6</sup> Her act of touching the Client's leg is irrelevant. She was not disciplined for touching the Client's leg and the Hearing Officer did not consider this action when upholding the disciplinary action.

Grievant J argues that the CNA's testimony was not credible because she changed her story several times and failed to report Grievant J's behavior to the proper person. The Hearing Officer's observation of the CNA while she testified revealed that her testimony was credible. Whether the CNA properly reported her observations has no bearing on the outcome of this case.

The request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. For this reason, the request for reconsideration is **denied**.

### **APPEAL RIGHTS**

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

#### Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

*S/Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>6</sup> Although Grievant J poked at the Client, no one observed her finger touching the Client's body. It is not necessary for the Agency to show that Grievant J's fingers actually touched the Client's body. The movement of Grievant J's hands along with the Client's reaction was sufficient to establish abuse.