

Issues: Group III Written Notice (client abuse) and Termination; Hearing Date: 09/09/08; Decision Issued: 01/28/09; Agency: DMHMRSAS; AHO: Carl Wilson Schmidt, Esq.; Case No. 8933; 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: 8933

Hearing Date: September 9, 2008
Decision Issued: January 28, 2009

PROCEDURAL HISTORY

On June 17, 2008, Grievant was issued a Group III Written Notice of disciplinary action with removal for client abuse.

On June 21, 2008, 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 August 7, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 9, 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 Developmental Disabilities Specialist II at one of its facilities. She had been employed by the Agency for approximately 15 years prior to her removal effective June 17, 2008. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

The Client is a 52 year old ambulatory, verbal female who lives at the Facility. She functions at the level of mild intellectual disability. She has been diagnosed with Bipolar I Disorder with Psychotic Features and receives psychoactive medications. One of the Client's activities involves assembling puzzles.

On May 4, 2008, the Client was sitting on the floor. An employee, Ms. R, began sweeping pieces of a puzzle on the floor. The Client grabbed the broom and said "Don't throw my puzzle away." Ms. R could not get the Client to release the broom. Ms. R continued to hold onto the broom and it became a struggle for possession of the broom. Grievant walked over to Ms. R and the Client and then pulled the broom away from the Client's grasp. Grievant hit the Client with the bristles of the broom. The Client grabbed Ms. R's leg. Ms. R fell to the floor and the Client fell along with Ms. R. Ms. R was upset and went to the kitchen to wash her hands and face. She did not return to the room right away. Two or three minutes later she returned to the room. While Ms. R was out of the room, Grievant started cutting pieces of the puzzle with scissors. This upset the Client.

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:

- 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.

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 engaged in client abuse by hitting the Client with a broom. Such behavior constitutes battery. Grievant also engaged in client abuse by cutting the Client's puzzle. Such behavior constitutes psychological abuse. Grievant's interaction with the Client was non-therapeutic. The Agency has presented sufficient evidence to

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

support the issuance of a Group III Written Notice for client abuse. Upon the issuance of a Group III Written Notice, the Agency may remove Grievant from employment. Grievant's removal must be upheld.

Grievant denied cutting the Client's puzzles and hitting the Client with a broom. There are several reasons why the Hearing Officer concluded that Grievant's denial is not consistent with the evidence. First, Ms. B was located approximately ten feet from the incident and observed Grievant cutting the puzzle and hitting the Client. Ms. B's testimony was credible. Grievant argued that Ms. B falsely testified because Ms. B was pregnant and wanted full time employment. Grievant argued that Ms. B wanted Grievant removed from employment to take Grievant's position. Ms. B denied this allegation and indicated that although she subsequently became a full time employee, Grievant's position remained unfilled. Grievant has not presented sufficient evidence to undermine Ms. B's credible testimony. Second, Grievant was asked during the hearing whether she had hit the Client with a broom and whether she had observed anyone cut the puzzle. Grievant responded that she did not hit the Client with a broom and she did not cut up a puzzle. The Hearing Officer noted a change in her demeanor during her denial. This raises concerns whether Grievant was fully forthcoming during the hearing. Third, Grievant was inconsistent in her response to the Agency's investigator. When the Investigator first questioned Grievant about whether she had a physical confrontation or any physical contact with the Client on May 4, 2008, Grievant responded "No". When the Investigator spoke with Grievant a few days later, Grievant admitted that she observed the Client with both of her arms around Ms. R's legs and that Grievant pried the Client's hands from Ms. R's legs. Clearly, Grievant had physical contact with the Client. Grievant was evasive in her initial responses to the Investigator suggesting she had something to hide.²

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

² Grievant testified that she did not want to give the Investigator a statement when he first spoke to her and that she was scared. These are inadequate reasons to justify her inconsistent statements to the Investigator. Grievant's inconsistent statements made to the Investigator diminish the credibility of her subsequent denials.

³ *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
600 East Main St. STE 301
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].

S/Carl Wilson Schmidt

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.