

Issues: Group III Written Notice (Client Abuse) and Termination; Hearing Date: 11/07/08; Decision Issued: 11/14/08; Agency: DMHMRSAS; AHO: Carl Wilson Schmidt, Esq.; Case No. 8963; Outcome: Full Relief. Attorney Fees Addendum issued 12/31/08.



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8963**

Hearing Date: November 7, 2008  
Decision Issued: November 14, 2008

**PROCEDURAL HISTORY**

On July 21, 2008, Grievant was issued a Group III Written Notice of disciplinary action with removal for client abuse.

On July 31, 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 October 6, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 7, 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 Service Professional II at one of the Agency's Facilities. Other than the facts giving rise to this grievance, the Agency considered Grievant's work performance satisfactory. No evidence of prior active disciplinary action was introduced during the hearing.

Client P and Client M reside in the same building at the Facility. Their rooms are across the hall from one another. Client P is non verbal. He has taken food from Client M on several occasions, thus, angering Client M. For example, on March 25, 2008, Client P took food from Client M and began eating it. Client M jumped up from the table and hit Client P across the forehead causing a scratch on Client P's forehead.<sup>1</sup>

Client M is verbal. He has been diagnosed with Obsessive-Compulsive Disorder and Bipolar I Disorder with psychotic features and receives psychotropic medication for these conditions. He engages in verbal and physical aggression, property destruction, and self-injurious behavior at varying rates. These behaviors might occur concurrently during an outburst.

On June 11, 2008, Grievant was working her customary shift from 2 p.m. to 10 p.m. at a resident cottage at the Facility. Ms. G was also working that shift. Client P took Client M's snack thereby angering Client M. Client P had done this on several

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<sup>1</sup> Grievant Exhibit 10.

occasions prior to June 11, 2008. Client M said to Ms. G that he wanted to “f—k him up” referring to Client P. Ms. G told Client M he could not do that and gave him another snack.

Neither Grievant nor Ms. G observed any injuries to Client P prior to their departure from the Facility at 10 p.m. on June 11, 2008. At 11:20 p.m., the DSPI was escorting Client P to the bathroom when she noticed bruising to his right eye and shoulder and scratches to the right side of his neck. She reported the matter to Agency managers and an investigation began.

On June 12, 2008, the Investigator gave Grievant a tape recorder and asked her and Ms. G to interview Client M to find out if he knew how Client P was injured. During the interview, Client M admitted he had hit Client P. When the tape recorder was presented to the Investigator, however, the tape was blank.

On June 12, 2008, the Investigator spoke with Client M because he was the only verbal client living in the cottage. The Investigator asked Client M if he knew what happened to Client P’s eye. Client M responded “Staff hurt [Client P].” The Investigator asked Client M which staff hurt Client P. Client M said “[Grievant’s first name].” The Investigator then asked Client M why Grievant hurt Client P. Client M responded, “Because he grabbed [Grievant] and took her soda.” Client M indicated no other staff observed Grievant’s actions.

## **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. \*\*\*\*

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.

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

The factual issue before the Hearing Officer is whether Grievant scratched Client P's face and punched him in the nose. Punching and scratching a client is clearly client abuse that would result in removal of an employee. The Agency argued Grievant is the one who punched and scratched Client P. Grievant argues it was Client M who harmed Client P.

The Agency presented the hearsay statements of Client M who told the Investigator he observed Grievant punch and scratch Client P because Client P tried to take Grievant's soda from her. The Investigator testified credibly that he believed Client M's statements to him because he had known Client M for several years and had observed Client M when Client M was being evasive or untruthful and when Client M was telling the truth. The Investigator knew that when Client M was being untruthful, he would look down after making his statement. The Investigator knew that when Client M was being truthful, he would not look down after making his statement. When the Investigator asked Client M if he knew what happened to Client P, Client M said that Grievant scratched Client P and punched Client P because Client P took Grievant's soda. Client M did not look down when he made this statement. The Investigator later asked Client M the same questions and Client M repeated his earlier response without looking down. When asked why the Investigator did not believe Grievant was telling him the truth, the Investigator testified that Grievant tried to "buddy up" to him during the investigation thereby suggesting to him she had something to hide.

The Agency presented the testimony of the Team Leader. The Team Leader has known Client M for approximately 12 years. The Team Leader indicated he had never seen Client M punch with a closed fist or scratch. He had never known Client M to fabricate stories or place blame on someone else for his own actions. The Team Leader considered it out of character for Client M to attack other people especially as revenge for taking his food. The Team Leader spoke with Client M and asked him what happened to Client P. Client M said that Grievant had hit and pushed Client P and Client P fell down.

Grievant presented her testimony and the testimony of Ms. G, another employee working with Grievant. Grievant denied scratching and punching Client P. Her denial was credible. The Hearing Officer observed Grievant's demeanor closely and was unable to discern untruthfulness or exaggeration in her denial of harming Client P. In addition to denying striking Client P, Grievant testified she and Ms. G were asked by the Investigator to interview Client M and record his responses on a tape recorder. The Investigator made this request prior to suspecting Grievant was the one who harmed Client P. The Investigator asked Grievant and Ms. G to conduct the interview because Grievant was the one with the closest relationship with Client M. During the interview with Client M, Client M admitted he had scratched and punched Client P. Grievant tape recorded the interview and gave the tape to the Investigator. For some unknown reason, the tape was blank when the Investigator listened to it.

Ms. G testified that she worked the same shift with Grievant and during that shift did not observe Client P with any injuries to his face. When she observed Client P she did not observe any scratches or bruises to Client P's face and head. Ms. G's shift ended at 10 p.m. on June 11, 2008. Ms. G participated in the interview of Client M on

June 12, 2008. She heard Client M admit that he was the one who scratched and punched Client P because Client P had taken Client M's food. Ms. G's testimony was highly credible. The Hearing Officer observed Ms. G's demeanor closely and could not detect any untruthfulness or exaggeration by Ms. G.

This case must be resolved based on the party with the burden of proof. The Agency has presented a logical and coherent case to support its position that Grievant is the one who harmed Client P. Grievant has also presented a logical and coherent case to show that she was not the one who harmed Client P and that it was Client M who harmed Client P in retaliation for taking his snack earlier in the day. The Agency has not established that its assertion of the material facts is more likely to be true than Grievant's assertion of the material facts. Since the Agency has the burden of proof in disciplinary actions and it has not established that its case is more likely than Grievant's case, the outcome of this grievance must be resolved in favor of the Grievant. The disciplinary action must be reversed.

The Virginia General Assembly enacted *Va. Code § 2.2-3005.1(A)* providing, "In grievances challenging discharge, if the hearing officer finds that the employee has substantially prevailed on the merits of the grievance, the employee shall be entitled to recover reasonable attorneys' fees, unless special circumstances would make an award unjust." Grievant has substantially prevailed on the merits of the grievance because he is to be re-instated. There are no special circumstances making an award of attorney's fees unjust. Accordingly, Grievant's attorney is advised to submit an attorneys' fee petition to the Hearing Officer within 15 days of this Decision. The petition should be in accordance with the EDR Director's *Rules for Conducting Grievance Hearings*.

## 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 **rescinded**. The Agency is ordered to reinstate Grievant to Grievant's former position, or if occupied, to an objectively similar position. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal and credit for leave and seniority that the employee did not otherwise accrue.

## 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 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>3</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>3</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**

**ADDENDUM TO DECISION OF HEARING OFFICER**

In re:

**Case No: 8963-A**

Addendum Issued: December 31, 2008

**DISCUSSION**

The grievance statute provides that for those issues qualified for a hearing, the Hearing Officer may order relief including reasonable attorneys' fees in grievances challenging discharge if the Hearing Officer finds that the employee "substantially prevailed" on the merits of the grievance, unless special circumstances would make an award unjust.<sup>4</sup> For an employee to "substantially prevail" in a discharge grievance, the Hearing Officer's decision must contain an order that the agency reinstate the employee to his or her former (or an objectively similar) position.<sup>5</sup>

The Hearing Officer ordered reinstatement of the Grievant in this case. She was represented by an attorney licensed in Virginia who submitted a detailed billing statement and affidavit seeking reimbursement at the EDR hourly rate of \$131. Grievant seeks reimbursement for attorney hours incurred beginning in July 28, 2008 through November 18, 2008. The Hearing Officer finds that attorney hours from July 28, 2008 through August 22, 2008 related to the Grievance Step Process and are not in preparation for the hearing. Accordingly, reimbursement for those hours is denied.

**AWARD**

Grievant is awarded attorneys' fees incurred from September 3, 2008 through November 18, 2008 as listed on the attorney's invoice submitted with the petition. The petition for fees for services prior to September 3, 2008, is denied. Thus, Grievant is awarded attorney's fees in the amount of \$2,135.30 for 16.30 hours rendered by her attorney.

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<sup>4</sup> Va. Code § 2.2-3005.1(A).

<sup>5</sup> § 7.2(e) Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004. § VI(D) *EDR Rules for Conducting Grievance Hearings*, effective August 30, 2004.



## APPEAL RIGHTS

If neither party petitions the EDR Director for a ruling on the propriety of the fees addendum within 10 calendar days of its issuance, the hearing decision and its fees addendum may be appealed to the Circuit Court as a final hearing decision. Once the EDR Director issues a ruling on the propriety of the fees addendum, and if ordered by EDR, the hearing officer has issued a revised fees addendum, the original hearing decision becomes “final” as described in §VII(B) of the *Rules* and may be appealed to the Circuit Court in accordance with §VII(C) of the *Rules* and §7.3(a) of the *Grievance Procedure Manual*. The fees addendum shall be considered part of the final decision. Final hearing decisions are not enforceable until the conclusion of any judicial appeals.

*S/Carl Wilson Schmidt*  
Carl Wilson Schmidt, Esq.  
Hearing Officer