

Issues: Group III Written Notice (client abuse) and Termination; Hearing Date: 12/22/08; Decision Issued: 03/25/09; Agency: DMHMRSAS; AHO: Carl Wilson Schmidt, Esq.; Case No. 8977; 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: 8977

Hearing Date: December 22, 2008
Decision Issued: March 25, 2009

PROCEDURAL HISTORY

On August 22, 2008, Grievant was issued a Group III Written Notice of disciplinary action with removal for client abuse.

On August 28, 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 20, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 22, 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 at one of its Facilities. She was responsible for working with clients living at the Facility. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

The Client resides at the Facility. He is a 47 year old, verbal, ambulatory male. He has been diagnosed with intermitted esotropia, blepharitis, high myopia and profound hearing loss bilaterally. The Client functions intellectually within the range of mild intellectual disability. He communicates his wants and needs, likes and dislikes using single words, phrases, and on occasion, simple sentences.

On June 30, 2008, Grievant and the Client were sitting at a table in the dining room playing cards. The Client hit Grievant on the arm with the back of his hand. Grievant stood up from her chair and punched (hit) the Client on his arm.

On July 8, 2008, the Investigator spoke with the Client and asked him to look at the Investigator's face so he could read the Investigator's lips. The Investigator asked the Client to tell him who hit the Client on the Client's arm. The Client said, "[Grievant's first name] hit me." The Investigator asked the Client why Grievant hit him. The Client responded, "Because I hit her."

The Investigator showed the Client a group of pictures including Grievant and more than fifteen other female employees. The Investigator asked the Client to point to the person who hit him. Without hesitation, he pointed to Grievant's picture.

Grievant was removed from employment effective August 22, 2008.

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

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

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 intentionally hit the Client with her hand in response to his hitting her. She hit him with sufficient intensity that her hit could have caused him pain and harm. By hitting the Client, Grievant engaged in client abuse. Client abuse can be a Group III offense under DI 201. The Agency's issuance to Grievant of a Group III Written Notice with removal for client abuse must be upheld.

Grievant contends she did not hit the Client. There are several reasons to believe that Grievant hit the Client. First, Ms. L was seated several feet away from Grievant and the Client and she observed Grievant hit the Client. Her testimony during the hearing was credible.² Second, several minutes after Grievant hit the Client, Ms. L spoke to Mr. W who had been nearby in the medication room when the incident occurred. Ms. L told Mr. W that she had observed the Client hit Grievant and Grievant hit the Client back on his arm while they were sitting in the dining room. Ms. L's timely expression to Mr. W of what she observed confirms her credibility and the accuracy of what she testified she observed. Third, the Client told the Investigator that Grievant hit him. The Client's medical condition was not so severe as to render his ability to distinguish events and persons unreliable. The Investigator verified the Client's statement by showing the Client several pictures of staff and asking him to choose the person who hit him. The Client identified Grievant as the one who hit him. Fourth, Grievant, Ms. L, and another employee, Ms. S testified that the Client hit Grievant first. By hitting Grievant, the Client created a motive for Grievant to hit him back in response. There exists sufficient evidence to conclude by a preponderance that Grievant hit the Client.

Grievant argued that she passed a polygraph test as a result of the Agency's investigation and that factor should be considered. Va. Code § 8.01-418.2 provides:

The analysis of any polygraph test charts produced during any polygraph examination administered to a party or witness shall not be admissible in any proceeding conducted pursuant to Chapter 10 (§ [2.2-1000](#) et seq.) of Title 2.2 or conducted by any county, city or town over the objection of any party except as to disciplinary or other actions taken against a polygrapher.

² Grievant argued she and Ms. L had had conflicts in the past that might explain Ms. L's statements against her. Ms. L testified that their conflicts occurred several months prior to the incident and that they had worked through their conflicts. The evidence is insufficient for the Hearing Officer to believe that Ms. L's statements against Grievant were motivated by any reason other than the truth. Grievant also asserted that Ms. L was slow to report the incident. Although a few days passed from the time of the incident and when Ms. L reported it, it does not appear the delay related a desire to create a fictitious story about Grievant. Indeed, Ms. L immediately told another employee, Mr. W, what she observed. What she told Mr. W was consistent with what she later told the Investigator.

Grievant's conclusion that she passed a polygraph would constitute an analysis of that polygraph test. Accordingly, Grievant's testimony regarding whether or not she passed a polygraph test is not something the Hearing Officer may consider as evidence.

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.
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 *Va. Code § 2.2-3005.*

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.