

Issues: Group III Written Notice (client neglect), and Termination; Hearing Date: 04/10/09; Decision Issued: 04/28/09; Agency: DMHMRSAS; AHO: Carl Wilson Schmidt, Esq.; Case No. 9043; 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: 9043

Hearing Date: April 10, 2009
Decision Issued: April 28, 2009

PROCEDURAL HISTORY

On December 3, 2008, Grievant was issued a Group III Written Notice of disciplinary action with removal for violation of Departmental Instruction 201.¹

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 March 4, 2009, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 10, 2009, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee
Agency Counsel
Witnesses

¹ Grievant received adequate notice of the allegations against him. In his grievance, he wrote that the issue was "giving a group III and termination for seeing a co-worker prompt a client to perform a sexual act on another client and not reporting it."

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 Support Professional at one of its Facilities. Grievant received favorable evaluations from the Agency for his work performance.

In November 2008, the Grandmother of Client T received an anonymous call indicating that staff at the Facility had taken off her grandson's clothes and encouraged him to have oral sex with another client. The Agency began an investigation.

Client A and Client T reside at the Facility. Client A was admitted to the Facility in 1998 for maladaptive behaviors and training to improve activities of daily living. He had been diagnosed with autism. He uses sign language and a communication device to interact as his primary means of communication. Client T was admitted to the Facility in 1995 for maladaptive behaviors. He displays severe disruption of screaming, crying, flinging arms, and aggressively slapping others. He may also display aggression of slapping, biting, kicking, hitting and head butting and running away from the group. He has good receptive skills. He communicates by answering yes/no questions, using an augmentative communication device and pointing to pictures. Neither client has the

mental capacity to give consent to sexual behavior. The Agency considers them to be incapacitated adults. If either client was to engage in sexual behavior, that behavior would be unlawful.

In October of 2007, Grievant was with Client A in his room. Another employee, Mr. W, brought Client T into Client A's room. Client T was not wearing clothing. Grievant jumped up from his seat and walked towards Mr. W. Grievant was wondering what was going on but after thinking for a few seconds, Grievant realized what was going on. Grievant stood and chatted and laughed with Mr. W. Mr. W motioned to Client A.² Client A put his mouth on Client T's penis. Grievant then turned and left the room. As he left he was thinking he and Mr. W would be fired for client neglect. Nothing happened as far as Grievant knew and over time he forgot about the matter. Grievant did not report what he observed to the Facility Director or anyone else.

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.

² Mr. W placed his hand to his mouth in a manner to suggest oral sex.

Mr. W engaged in client abuse by enabling Client A and Client T to engage in sexual behavior.

DI 201-6 states that:

Any workforce member who has any knowledge or reason to believe that a patient or resident of a state facility may have been abused or neglected, or both, shall immediately report this information directly to the facility director or his designee. Knowledge or reason to believe abuse or neglect has occurred may be based on, but not limited to, the following:

- Direct observation;
- A report made by an individual receiving services;
- A report from another workforce member ; or
- Behavior or physical indicators of abuse or neglect, including age-specific indicators.

Grievant observed Mr. W engage in client abuse but Grievant failed to report his observation to the Facility Director as required by policy.

DI 201-6 provides that, “[e]mployees shall be subject to the full range of disciplinary actions, up to and including termination, as outlined in the Employee Standards of Conduct and Performance when they: Fail to report incidents of suspected abuse or neglect of individuals receiving service.” Grievant failed to report client abuse thereby justifying the Agency’s issuance to him of a Group III Written Notice. Upon the issuance of a Group III Written Notice, the Agency was authorized to remove Grievant from employment.

Grievant argues he was youthful at the time and did not have sufficient training to deal with sexual activity between clients. The evidence showed that Grievant received necessary training on the reporting requirements of DI 201 and the standards for client abuse. In one of Grievant’s training classes he was informed that an example of sexual abuse was:

Allowing a person, who is not capable of understanding sex and sexuality and/or not capable of giving consent, to participate in sexual activities with another person.³

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....”⁴ Under the *Rules for Conducting Grievance Hearings*, “[a] hearing

³ Agency Exhibit 8.

⁴ Va. Code § 2.2-3005.

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. 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.⁵

[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

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