

Issues: Group III Written Notice (client abuse) and Termination; Hearing Date: 04/09/09; Decision Issued: 04/13/09; Agency: DMHMRSAS; AHO: Carl Wilson Schmidt, Esq.; Case No. 9049; Outcome: No Relief – Agency Upheld in Full; **Judicial Review: Appealed to Carroll County Circuit Court on 05/05/09; Outcome pending.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9049

Hearing Date: April 9, 2009
Decision Issued: April 13, 2009

PROCEDURAL HISTORY

On November 6, 2008, Grievant was issued a Group III Written Notice of disciplinary action with removal for client abuse.

On December 1, 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 March 4, 2009, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 9, 2009, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's Counsel
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 Abuse Services employed Grievant as a Direct Service Professional at one of its Facilities prior to her removal. The purpose of her position was:

Works directly with the mentally retarded individuals, supplying them with all their basic needs, including medical, personal hygiene, training needs, etc. Implements program plans assuring active treatment is provided (works as a member of ID team). Ensures a safe, home like environment is provided. Completes required documentation. HIPAA Level Two Access -- Complete access to PHI only for the clients served/assigned. Utilization of information will be in accordance with HIPAA regulations regarding use limitations, disclosure and requests of PHI.¹

With the exception of the facts giving rise to this disciplinary action, Grievant's work performance was otherwise satisfactory to the Agency. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

The Client is "large" female who is sometimes stubborn and loud. In order to get her way, she will yell at staff. She usually uses a wheelchair but sometimes uses a

¹ Agency Exhibit 4.

walker to move around the living area. She is a diabetic and has to be weighed in the morning.

On September 24, 2008, Grievant was working the Third Shift which began at approximately 11 p.m. and ended at approximately 7 a.m. the following morning. At approximately 6:15 a.m. or 6:30 a.m., Grievant was moving the Client from her bedroom to a large scale to be weighed. As they moved closer to the scale, the Client believed she was going to fall and started yelling that she was falling. The Client was yelling "help me!" The Client persisted in yelling without interruption. The Client's behavior was aggravating to Grievant and to the other residents in the living area. Several other residents began to react to the Client's yelling. Grievant wanted to calm down and quiet the Client. She asked the Client to be quiet but that did not work. Grievant placed her hand across the Client's mouth to stop the Client from yelling. The Client resisted Grievant's efforts to quiet her and continued yelling. Grievant used the palm of her hand to slap the Client's face. Grievant was speaking louder than the Client so that the Client would hear Grievant. Grievant yelled at the Client to "get her fat ass up on the scales." The RN heard the yelling and came from the next room to help Grievant. They were able to get the Client on the scales. After they removed the Client from the scales, Grievant told the Client to "get her fat ass into the living room." The Client entered the living room.

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 defines² 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

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

- 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 attempted to physically restrain the Client from speaking by covering the Client's mouth several times. Her action was non-therapeutic. Grievant engaged in battery by slapping the Client's face. Grievant used demeaning language by saying she had a "fat ass." Grievant's behavior may have caused physical or psychological harm to the Client. The Agency has presented sufficient evidence to support the issuance to Grievant 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 contends she did not slap the Client, speak poorly of the Client or attempt to cover the Client's mouth. Grievant testified that she placed her fingers against the Client's lips to help communicate to the Client to be quiet. Grievant asserts that the Agency's witness were not credible. Grievant points out that Ms. V's written statement did not contain the detail to which she testified during the hearing. Grievant points out that Ms. V did not immediately report the matter as required by DI 201.

There are several reasons to believe Ms. V's account of what happened on the day of the incident. First, Ms. V's testimony before the Hearing Officer was credible. Second, Ms. V was standing a few feet away from Grievant during the entire incident³ and had a clear view of what happened. Third, Ms. V did not have any personal conflict with Grievant. The incident occurred on the third day that Ms. V worked with Grievant. Fourth, Ms. V confided in another employee that she was upset about what she observed and was considering resigning rather than continue working at the Facility. The matter was then reported to Agency managers.

³ The Registered Nurse did not view the entire incident. She observed Grievant putting her hand up to the Client's mouth and yelling "shut up and get on the scales". Another employee, Ms. B, was in a one to one relationship with a client in another room. She could hear but not see what was occurring between Grievant and the Client in the hallway. She could not recall what happened that day.

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 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 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

⁴ Va. Code § 2.2-3005.

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.