

Issues: Group III Written Notice (client abuse), and Termination; Hearing Date: 04/09/09; Decision Issued: 04/27/09; Agency: DMHMRSAS; AHO: Carl Wilson Schmidt, Esq.; Case No. 9050; 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: 9050

Hearing Date: April 9, 2009
Decision Issued: April 27, 2009

PROCEDURAL HISTORY

On December 5, 2008, Grievant was issued a Group III Written Notice of disciplinary action with removal for client abuse.

On December 5, 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 he 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 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 Substance Abuse Services employed Grievant as a Direct Support Professional at one of its Facilities until his removal effective December 5, 2008. The purpose of his position was:

Works directly with 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, homelike 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 request of PHI.¹

Grievant received favorable evaluations. He received an overall rating of Contributor for his 2008 evaluation.

Agency employees including Grievant were trained in Therapeutic Options of Virginia "TOVA" techniques to enable them to physically restrain clients when such restraint is necessary. One of these techniques includes having an employee move behind a standing client. The employee should not be standing directly behind the

¹ Agency Exhibit 4.

client, but rather is to stand slightly to the side. The employee wraps his arms around the client's arms and body so that the client's elbows are touching the client's side. The employee uses his or her right hand to grab the client's left wrist and pulled the client's left arm towards the right side of the client's body. The employee uses his or her left hand to grab the client's right wrist and pulled the client's right arm towards the left side of the client's body. The objective is to stabilize the client so that the client will not hurt him or herself or others.

The Client is a 39-year-old male who was admitted to the Facility in 1986 for maladaptive behaviors, self-help and community and social skills. The Client displays aggressive behavior of hitting, kicking, slapping himself and others and biting himself and others. Agency staff were expected to keep the Client in their line of sight during waking hours for the Client's safety and because the Client had a tendency to fall to the ground.²

On November 8, 2008, Ms. K was working with the Client in a room of the Building at the Facility. The Client was standing and began to express a "behavior". He held his hands above his head and was twisting his hands back and forth. He began making clicking sounds. The Client had a history of sometimes harming himself or others after he began waving his arms and hands and making clicking sounds. Ms. K attempted to "redirect" the Client by drawing his attention to something else. Grievant observed the Client and recognized that the Client possibly was about to engage in behavior that would harm himself or others. Instead of attempting to redirect the Client, Grievant decided to use a TOVA hold to physically restrain the Client. Grievant placed himself directly behind the Client. Grievant wrapped his arms around the Client's waist. The Client's arms and hands remained free. Grievant used his feet to push the Client's feet forward. Grievant was attempting to walk the Client towards another area. The Client buckled his legs thereby removing his legs as support for his body. As the Client's body moved towards the floor, Grievant lost his balance and also begin falling towards the floor. The Client fell to the floor and to the side. Grievant fell on top of the Client. As a result of the fall, the Client's leg was broken.³ Ms. K instructed Grievant to leave and go on his break. Grievant left the 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 defines⁴ client abuse as:

² According to the Client's Physical Management Plan/Fall Precaution Plan, the Client was, "at high risk of falls." See Agency Exhibit 6.

³ It is not clear whether the Client's leg was broken because of the Client's initial fall or because Grievant fell on top of the Client.

⁴ See, *Va. Code* § 37.1-1 and 12 VAC 35-115-30.

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 he 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.

Facility Instruction 570 governs "Behavior Management". Physical restraint is defined as:

Also referred to as "manual hold" means the use of approved physical intervention or "hands on" holds to prevent a resident from moving his limbs or body to engage in a behavior that places him or others at risk of physical harm.

Section 7(A)(3) provides, "[r]estrictive techniques are used only when warranted by the severity of the behavior, and result in desired behavioral outcomes." Section 7 (A) (143) provides:

The general hierarchy of intervention techniques is outlined below, from the least restrictive to the most restrictive:

- a) Positive approaches including modeling appropriate behaviors, teaching appropriate responses by use of positive reinforcement techniques, and supportive instruction.
- b) Counseling and verbal redirection.
- c) Physical prompts and physical redirection.
- d) Time-out interventions within area and without prevention of egress.
- e) Time-out interventions involving removal from area with minimal effort to prevent egress.
- f) Response cost involving a rights restriction.
- g) Isolation Time Out (egress prevented).
- h) Mechanical Restraint.
- i) Physical Restraint.

Section 7(H)(2) requires that only "individuals who are currently certified as being trained under the program known as 'Therapeutic Options of Virginia' may apply physical restraints."

Grievant was trained and certified to use TOVA holds. He knew he was obligated to use proper TOVA holds as a form of physical restraint of clients.

Grievant engaged in client abuse. He used a physical restraint on the Client by attempting to use a TOVA hold to prevent the Client from injuring himself or others. The hold used by Grievant was not consistent with TOVA. Grievant placed his body directly behind the Client instead of partially to the side. Grievant wrapped his arms around the waist of the client without first causing the Client's elbows to be next to the Client's sides. Grievant failed to grab the wrists of the client. Grievant tried to walk the client forward even though nothing in TOVA would authorize this action. Grievant did not position himself in a manner to prevent losing balance when the Client let his legs give way so he could fall to the ground. Although Grievant's objective was at all times to protect the Client and other staff, Grievant failed to properly implement a TOVA hold. Use of a physical restraint contrary to the professionally accepted standards of practice as defined by TOVA, constitutes client abuse under DI 201. Accordingly, the Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, the agency may remove Grievant from employment.

Grievant argues that his judgment to restrain the Client was justified. Even if the Hearing Officer assumes this argument is true, the method by which Grievant chose to restrain the Client was not consistent with the Agency's policies and practices. It was not consistent with the training Grievant received. Grievant's failure to comply with TOVA establishes the Agency's claim that Grievant engaged in client abuse.

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....”⁵ 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. 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

⁵ 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.⁶

[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

⁶ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.