

Issue: Group III Written Notice with Termination (client abuse); Hearing Date: 03/25/10; Decision Issued: 03/26/10; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 9286; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9286

Hearing Date: March 25, 2010
Decision Issued: March 26, 2010

PROCEDURAL HISTORY

On December 21, 2009, Grievant was issued a Group III Written Notice of disciplinary action with removal for client abuse.

On January 19, 2010, 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 8, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 25, 2010, 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 Behavioral Health and Developmental Services employed Grievant as a Direct Service Professional I at one of its Facilities. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

The Client is a 25 year old ambulatory, verbal female who lives in one of the cottages at the Facility. She functions intellectually within the range of moderate intellectual disability.

Grievant, Ms. S, and Ms. T were working with clients at the cottage on December 6, 2009. Agency staff working in the cottage were aware that the Client was at risk of choking on food and was not supposed to put large pieces of food in her mouth or was to be sure to chew her food.

On December 6, 2009 at approximately 7:20 p.m., the Client was sitting at a table with other clients. She wanted to eat one of the snacks not eaten by another client. She asked the Shift Leader, Ms. S, if she could eat the snack. Ms. S said no. The Client grabbed the snack and put it in her mouth. Ms. S said to the Client, "you know you were not to take her food!" As Grievant entered the room, Ms. S mentioned that the Client had taken a snack to eat. Grievant walked to the table and in a loud voice told the other clients to move away from the table. They did so with the Client remaining at the table. Grievant turned the Client's chair and in a loud voice told the Client to "Get up!" Grievant asked the Client "Where is the food?" as she escorted the Client towards the trashcan. The Client did not answer Grievant. While standing next

to the trashcan, the Client held her hands close together with her palms towards her stomach. Grievant raised her hand above her head and quickly brought it down to hit the back of the Client's hand causing the sound of a slap and the Client's hands moving downward. The Client covered slightly and moved slightly to the side as if in fear of Grievant. Grievant said in a loud voice, "Now go somewhere and sit down!" The Client moved to a place where she could sit down.

Ms. T observed the entire interaction between Grievant and the Client and heard the sound of the slap. Ms. T was "shocked" when she observed Grievant slap the Client's hand. She did not know what to do so she did nothing about the incident. After her shift ended and she went home, she began thinking about the incident and began crying. On the following day, she notified the Agency's managers of the incident and an investigation began.

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.

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

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 raised her hand above her head and pulled it down quickly to slap the Client on her hand. The Client reacted to the slap by acting as if she had been punished by Grievant. There was no therapeutic reason for Grievant to slap the Client.² Grievant's action was intentional. It could have caused physical or psychological harm to the Client and it appears to have frightened the Client. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for client abuse. Upon the issuance of a Group III Written Notice, the Agency may remove Grievant from her employment with the Agency.

Grievant denied slapping the Client.³ She contends she was merely concerned about the Client choking on the food. Grievant instructed the Client to spit out the food and escorted the Client to the trashcan so that the Client would spit out the food into the trashcan. Ms. F's testimony that Grievant slapped the Client was credible. Ms. F was standing approximately two yards behind and to the side of Grievant. Ms. F was watching Grievant's interaction with the Client. No credible evidence was presented to suggest that Ms. F had any personal dislike of Grievant or had any other motive to lie about what she observed. The Agency has presented sufficient credible evidence to prove that Grievant slapped the Client. Although Grievant was concerned about the Client choking, the evidence also suggests that Grievant decided to punish the Client for eating food and not spitting it out as instructed.

Grievant argued that there were inconsistencies between the testimony of Ms. T and the Investigator regarding what Ms. T told him. To the extent there were any inconsistencies, those inconsistencies were insignificant. The Hearing Officer observed Ms. T closely during her testimony and her statements were credible. Ms. T's testimony to the Hearing Officer was sufficient to support the facts of client abuse as alleged by the Agency.

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

² The Client was not choking; she had food in her mouth. If the Client had been choking the procedure to stop her from choking would not have involved slapping her hands.

³ Ms. S was not in the room when the slap occurred. She had stepped into the kitchen and did not hear the slap.

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 state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

⁴ Va. Code § 2.2-3005.

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].

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.