

Issue: Group III Written Notice with Termination (patient abuse); Hearing Date: 06/16/10; Decision Issued: 06/18/10; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 9333; Outcome: No Relief – Agency Upheld; **Administrative Review: DHRM Ruling Requested 07/02/10; Outcome pending.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9333

Hearing Date: June 16, 2010
Decision Issued: June 18, 2010

PROCEDURAL HISTORY

On March 17, 2010, Grievant was issued a Group III Written Notice of disciplinary action with removal for verbal abuse of a client.

On March 25, 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 May 17, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 16, 2010, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
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 Nursing Assistant at one of its Facilities. She had been employed by the Agency for approximately one year and ten months prior to her removal. No evidence of prior active disciplinary action was introduced during the hearing.

The Client resided in a room by himself at the Facility. His diagnosis included dementia and Parkinson's disease. One of his behaviors was to grab staff and other clients at the Facility. He was not hard of hearing but sometimes he behaved as if he had not heard what was said to him. He was nonambulatory. His wheelchair contained a belt to enable him to remain secure in the chair in the event he attempted to grab others. Several witnesses described the Client as a "difficult" patient. The Client was a retired police officer.

After the Client finished having dinner in a solarium on March 7, 2010, Grievant and Ms. M assisted the Client to his room. The Client was a tall and heavy enough man to require two employees to lift him from his chair and put him into his bed. Grievant and Ms. M began the process of moving the Client from his chair to his bed. They undid the belt securing the Client to his chair and were attempting to move him to his bed. The Client became disruptive and uncooperative. He would swing his arms in a manner as if to hit Grievant or Ms. M. Grievant's normal voice is loud when compared to the voices of other employees working at the Facility. Grievant elevated her voice above her normal loud voice and began yelling and screaming at the Client.

The LPN was standing in the hallway approximately 100 feet away from the opening of the Client's door. He could overhear Grievant yelling at the Client. He heard Grievant say "you could do this on your own." And "I won't tell you more than once." Because he was in the process of dispensing medication to patients from a medication cart, the LPN could not leave his location. The Registered Nurse was in her office approximately 20 feet from the Client's room. She overheard yelling but could not distinguish the words being said or identify the persons yelling. She walked out of her office and into the hall to determine the location of the yelling. The LPN observed the Registered Nurse and waved to her and pointed towards the Client's room. The Registered Nurse went into the Client's room and asked if everything was all right. The yelling stopped at that point. The Registered Nurse said "we all need to calm down" and then turned around and walked out of the room. As the Registered Nurse was leaving the room, the Client attempted to hit Grievant. His fist came very close to Grievant's face. Grievant told the Client "you are not supposed to hit a lady. You're a police officer, you should know better."

Grievant received training on Therapeutic Options of Virginia and on the Agency's client abuse standards.

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

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

- 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.

On March 7, 2010, Grievant began yelling and screaming at the Client because he was disruptive, angry, and non-cooperative. Being yelled at was not part of the Client's therapeutic plan and not consistent with the training Grievant received. She elevated her voice to a level and did so for a sufficient length of time that her actions could be construed as being demeaning or humiliating to the Client. In light of the Client's mental health, yelling at him and humiliating him could have resulted in psychological harm. 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, an agency may remove an employee from employment.

Grievant argued that she did not yell at the Client but rather her normal voice is loud and she was incorrectly construed as yelling at the Client. Several reasons support the Agency's assertion that Grievant yelled at the Client. First, Grievant's voice was loud enough that the LPN could hear her from approximately 100 feet away. Second, Grievant's voice was loud enough that the Registered Nurse concluded she had to interrupt her activities in her office to go find out the source of the commotion. Third, Grievant testified that she had to raise her voice to better communicate with the Client because he was not listening to her. These facts are consistent with someone who is yelling.

Grievant argues that the Agency failed to consider any options of discipline other than removal. The Agency has a zero tolerance for client abuse and, as such, the Agency may, but is not obligated, to consider a level of discipline short of removal. One could argue that a more logical approach would be to identify the problem for Grievant and asked her to refrain from yelling in the future. This approach would result in the re-writing of the Agency's policy which expresses no tolerance for any kind of abuse of clients. The Hearing Officer is not a "super-personnel officer" who is free to rewrite Agency's policies.

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....”² 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 state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

² 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.³

[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

³ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.