

Issue: Group III Written Notice with Termination (client abuse); Hearing Date: 12/03/10; Decision Issued: 12/08/10; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 9456; Outcome: Full Relief.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9456

Hearing Date: December 3, 2010
Decision Issued: December 8, 2010

PROCEDURAL HISTORY

On August 31, 2010, Grievant was issued a Group III Written Notice of disciplinary action with removal for client abuse.

On September 13, 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 he requested a hearing. On November 2, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 3, 2010, a hearing was held at the Agency's 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 Direct Service Associate II at one of its Facilities. Grievant was responsible for providing services to residents at the Facility. 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 Resident is a 27 year-old man who has lived in one of the cottages at the Facility since July 2002. He exhibits signs of fetal alcohol syndrome. These include some facial features associated with the syndrome and difficulty with frustration, tolerance and impulse control. He has been given a diagnosis of Schizoaffective Disorder in the past, but his mental status and behavior seems to be more consistent with Impulse Control Disorder, Not Otherwise Specified. The Resident's cognitive and adaptive assessment scores fall within the expected range for an individual with severe intellectual disabilities. The Resident's vision and hearing are intact. His gross motor abilities allow him to participate in daily programming and vocational training. He has considerable difficulty with fine motor movements and struggles to operate electronic equipment. His expressive ability, while difficult to understand, is adequate for relaying his wants and needs, providing basic and historical information about himself, and engaging in social interaction and humor. His imitative motor skills are quite good when requested to reproduce novel motor movement. Some of the Resident's "Challenging Behavior" includes, cursing, yelling, screaming, name calling, teasing others, whining, moaning, and threatening to fire staff.

The Resident has a history of taking a medication called Enalapril. He took one tablet by mouth every morning at 9 a.m. during the month of August 2010.

On August 18, 2010, the Resident finished his dinner sometime between 5 p.m. and 5:30 p.m. He wanted to take a shower earlier than usual. He went to the shower room sometime between 6 p.m. and 6:30 p.m. and began taking a shower. Grievant believed that the Resident was taking too long in the shower and went to the shower area. Grievant told the Resident that he was taking too long in the shower and should come out. The Resident did not wish to come out and did not like being told to leave the shower early. Grievant and the Resident did not argue about whether the Resident should come out of the shower early. Had they argued loudly, they would have been overheard by other staff in the Cottage.

The Resident was in the shower for approximately 25 minutes. When the Resident left the shower, he approached Ms. R and told her that he had finished a shower and was going to bed. It surprised Ms. R that the Resident wanted to go to bed early and so she asked him if he was sure about going to bed. He said he was sure. The Resident appeared normal and in good spirits to Ms. R. She did not observe any swelling of the Resident's lower lip.

The Resident put his things away and then joined other residents and staff in the living room to watch a movie. The Resident received a snack. At approximately 9 p.m. the Resident received his medications. At approximately 9:30 p.m., the Resident told staff that he was going to bed. Ms. E observed the Resident when he was saying goodnight. She did not see any swelling of the Resident's lower lip. The Resident did not appear to her to be someone who had been hit in the mouth. The Resident went to his bedroom and locked the door.

At approximately 1 a.m. on August 19, 2010, the Resident woke up and was observed by Mr. E. Mr. E testified that when he looked at the Resident, he did not observe a swollen lip. However he wrote in his statement to the Investigator that when he observed the Resident, the Resident's lip was swollen. Mr. E testified that the written statement was an error.

At approximately 5:30 a.m. on August 19, 2010, the Registered Nurse examined the Resident. She asked the Resident what had happened to him. He responded "I don't know" and kept repeating "umm – umm." She looked at the Resident's lip and observed no abrasions or open areas. She instructed staff to apply a cold compress to the Resident's lip. She then left the cottage.

At approximately 7 a.m., the Registered Nurse returned to the cottage to check the Resident's condition. She called the Resident's Authorized Representative¹ and told

¹ An Authorized Representative is a resident's family member who serves in a capacity similar to that of a guardian.

her of the Resident's condition. The Authorized Representative asked the Registered Nurse to hand the telephone to the Resident. The Registered Nurse did so. As the Resident spoke with the Authorized Representative, the Resident repeated "uhm, uhm" while nodding his head. He then handed the telephone to the Registered Nurse so she could talk to the Authorized Representative. The Authorized Representative told the Registered Nurse that the Resident "will not tell me because he is afraid to say the truth." The Registered Nurse ended the telephone conversation with the Authorized Representative and began asking the Resident additional questions. The Registered Nurse again asked the Resident what happened to him. The Resident began "blubbing" several names that the Registered Nurse could not understand. After mentioning a name, the Resident made a "push gesture". The Registered Nurse asked him if "somebody pushed you?" The Resident indicated yes. When she asked who it was who pushed him, he said "may".² She asked "may? Who's May?" She then mentioned the name of Resident M whose first name began with a sound similar to "May." The Resident nodded his head to indicate yes. The Registered Nurse then asked the Resident how he fell and when it happened. The Resident either said "push" or made a gesture using his hand as being pushed. The Resident indicated that it had happened outside in the evening. The Registered Nurse asked the Resident how he fell and if it hurt his knees or elbows when he fell. The Resident used his right hand to illustrate how his body fell flat on the ground. The Registered Nurse asked him where his lip landed and he pointed on the floor and said "ground". The Registered Nurse checked his face but did not see any abrasions and no open areas, scratches, abrasions to his lower lip, elbows, or knees. The Registered Nurse then called the Authorized Representative and told her what she had learned from the Resident.

On August 19, 2010, the Investigator interviewed the Resident. The Resident said that he was in the shower when Grievant entered and told him to get out of the shower. The Resident stated that when he told Grievant "no", Grievant got in his face and stated "Get out of the shower!" The Resident told the Investigator that he yelled "get out of face [Grievant's first name]". Grievant then punched the Resident in the mouth, according to the Resident.

On August 19, 2010 at approximately 8:45 a.m., the Authorized Representative came to the Facility to inquire about the injury to the Resident. The Investigator and Authorized Representative met with the Resident in his room. The Authorized Representative asked the Resident what happened to his lip and the Resident stated that Grievant hit him in the mouth. When the Authorized Representative asked the Resident why Grievant hit the Resident in the mouth, the Resident said that he was in the shower and Grievant told him to get out and the Resident said "no".

On August 19, 2010, the Investigator escorted the Resident to the Facility Director's office. The Investigator asked the Resident what happened to his lip. The Resident told the Facility Director, "[Grievant's first name] hit me in my mouth."

² Mr. E believed that the Resident named Grievant and Resident M as the ones who had pushed him outside.

On August 20, 2010, the Investigator and Ms. S from Adult Protective Services met with the Resident. The Resident stated that he was in the shower and Grievant entered the bathroom and told him to get out of the shower. When the Resident said "no, get out of face", Grievant hit the Resident in the mouth, according to the Resident.

CONCLUSIONS OF POLICY

The Agency takes allegations of client abuse seriously. Many of its clients are unable to adequately protect themselves from mistreatment by employees. The Agency rigorously investigates allegations of client abuse and removes employees who engage in client abuse pursuant to its written policy.

When the facts of this case are considered as a whole, the Agency has not presented sufficient evidence to meet its burden of proof to show that Grievant engaged in client abuse. At most, the Agency can establish that it is equally likely that Grievant hit the Resident as it is likely that Grievant did not hit the Resident. The Agency's burden is to prove that it is more probable than not that the Grievant hit the Resident.

The Agency contends that Grievant engaged in client abuse by hitting the Resident in the mouth while the Resident was taking a shower on August 18, 2010. The Resident is the only person in support of the Agency's case alleged to have witnessed the interaction. The Resident consistently reported to the Investigator that Grievant hit him in the mouth. The Agency contends that the Grievant confirmed the Resident's statements because the Grievant falsely informed the Investigator that he did not have any contact with the Resident while the Resident was taking a shower.

There are several reasons why the Agency's evidence is not sufficient to meet its burden of proof in this case. First, the Resident was inconsistent regarding what caused the injury. Initially, he told the Registered Nurse that he did not know why his lip was swollen. A few hours later he told the Registered Nurse that another resident caused the injury. There is no credible evidence support the assertion that another resident caused the Resident's injury. Second, the Resident was inconsistent regarding the location where he was injured. Initially, the Resident said he was injured outside of the cottage in which he lived. Later, he said he was injured while in the shower. Third, the Resident was inconsistent regarding how he was injured. Initially, he stated he was pushed to the ground and his lip hit the ground. Later, he stated he was hit in the mouth while he was standing in the shower. Fourth, the Resident's injury did not occur at the time claimed by the Resident. The Resident told the Investigator that Grievant struck him while he was in the shower. The Resident took a shower on August 18, 2010 between 6 p.m. and 6:30 p.m. Grievant presented the testimony of a Board Certified Emergency Room Physician who testified that he had treated numerous patients who had presented to the Emergency Room swollen lips.³ He testified that had the Resident

³ The Emergency Room Physician had not treated the Resident but had viewed a photograph taken of the Resident's swollen lower lip.

been punched in the mouth, his lip would have begun as well shortly after the hit. The swelling would not have been delayed for several hours. At least two employees observed the Resident after he left the shower at approximately 6:30 p.m. and before he went to sleep a few hours later. Neither employee observed any swelling to the Resident's lip. The logical inference from this evidence is that the Resident was not hit in the mouth while taking a shower on August 18, 2010. Fifth, it is not clear that the Resident was hit in the mouth. The Registered Nurse checked the Resident but did not observe any abrasions to his lip or bleeding. If the Resident had been hit in the mouth, the inside of his lip would have pressed against his teeth possibly causing a cut or abrasion. Sixth, Grievant presented a logical explanation of what might have happened to cause swelling of the Resident's lip. The Emergency Room Physician testified that he had observed many instances of patients whose lips had swollen because they were taking certain blood pressure medications. He testified that patients can take medication for months without incident and all of a sudden experience a swelling of the lips. Patients can experience one lip swelling while the other lip remains normal. Enalapril is one of the medications that can cause unexpected swelling. The evidence showed that the Resident was taking Enalapril during the month of August 2010. A swelling of his lip could have been caused by this medication rather than from someone hitting him in the mouth.

Although Grievant's failure to accurately respond to the Investigator's questions is consistent with someone who has something to hide, it is not, in itself, sufficient to show Grievant hit the Resident in the mouth. Although Grievant's failure to fully respond to the Investigator's questions raises concern, it is not sufficient to bolster the otherwise unreliable hearsay statements of the Resident.

The Virginia General Assembly enacted *Va. Code § 2.2-3005.1(A)* providing, "In grievances challenging discharge, if the hearing officer finds that the employee has substantially prevailed on the merits of the grievance, the employee shall be entitled to recover reasonable attorneys' fees, unless special circumstances would make an award unjust." Grievant has substantially prevailed on the merits of the grievance because he is to be reinstated. There are no special circumstances making an award of attorney's fees unjust. Accordingly, Grievant's attorney is advised to submit an attorneys' fee petition to the Hearing Officer within 15 days of this Decision. The petition should be in accordance with the EDR Director's *Rules for Conducting Grievance Hearings*.

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 **rescinded**. The Agency is ordered to reinstate Grievant to Grievant's former position, or if occupied, to an objectively similar position. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal and credit for leave and seniority that the employee did not otherwise accrue.

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.⁴

⁴ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

[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