

Issue: Group III Written Notice (Client Abuse), Group II Written Notice (unprofessional, non-therapeutic interaction with patient), and Termination; Hearing Date: 04/14/11; Decision Issued: 07/01/11; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 9548, 9549; Outcome: Partial Relief; **Administrative Review: AHO Reconsideration Request received 07/16/11; Reconsideration Decision issued 07/21/11; Outcome: Original decision affirmed; Administrative Review: EDR AR Request received 07/16/11; EDR Ruling No. 2012-3040 issued 10/06/11; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 07/16/11; DHRM Ruling issued 08/10/11; Outcome: AHO's decision affirmed.**



**COMMONWEALTH of VIRGINIA**  
*Department of Employment Dispute Resolution*

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 9548, 9549**

Hearing Date: April 14, 2011  
Decision Issued: July 1, 2011

**PROCEDURAL HISTORY**

On January 26, 2011, Grievant was issued a Group III Written Notice of disciplinary action with removal for client abuse. On January 26, 2011, Grievant was issued a Group II Written Notice of disciplinary action with removal for unprofessional and non-therapeutic interaction that resulted in verbal/psychological abuse of a client.

On January 26, 2011, Grievant timely filed two grievances to challenge the Agency's actions. The outcomes of the Third Resolution Steps were not satisfactory to the Grievant and she requested a hearing. On March 4, 2011, the EDR Director issued Ruling No. 2011-2910, 2011-2911 consolidating the grievances for a single hearing. On March 21, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 14, 2011, a hearing was held at the Agency's office.

**APPEARANCES**

Grievant  
Grievant's Representative  
Agency's Representative  
Witnesses

**ISSUES**

1. Whether Grievant engaged in the behavior described in the Written Notices?
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 Certified Nursing Assistant at one of its Facilities. She had been working for the Agency for approximately three years prior to her removal effective January 26, 2011.

The Client resided at the Facility. She was admitted from a local jail. She had been incarcerated for assaulting staff. Her diagnosis included borderline personality disorder.

On December 31, 2010, the Client asked Grievant to receive an additional salad dressing with her meal. Grievant gave the Client an additional salad dressing. The Registered Nurse observed that the Client had an additional salad dressing and removed the salad dressing from the Client's tray. The Registered Nurse explained that the Client was on a special diet and could not receive food items beyond those specified in her diet. The Client became infuriated by the Registered Nurse's action. The Client turned over a table and yelled "f--k this damn shit!" Grievant smiled. The Client observed Grievant smiling and said to Grievant "you bony bitch, I'll smack your face." Grievant threw down the clipboard she was holding onto a chair and said to the Client "I wish you would." The Client responded "what'll happen". Grievant said "you'll find out."

Grievant began to take her earrings out in front of the Client. The Client perceived Grievant as getting ready to fight. Other staff intervened. Grievant went into the nurse's station and closed the door. The Client began throwing water at the window to the nurse's station and said "you stay in there forever".

Grievant had received Therapeutic Options of Virginia training. None of that training would sanction Grievant's response to the Client's outburst.

### **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 defines<sup>1</sup> 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.

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

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<sup>1</sup> See, Va. Code § 37.1-1 and 12 VAC 35-115-30.

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 mocked the Client when she said "I wish you would" in response to the Client's threat. This language served to demean the Client by daring the Client to respond. Grievant threw down the clipboard in a manner to intimidate the Client. When Grievant told the Client she would find out what would happen in response to the Client's statement that she would smack Grievant's face, Grievant's comments served to threaten an unspecified response to 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, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

Grievant argued that she put down the clipboard and removed her earrings because she believed the Client was about to hit her. The evidence showed that under TOVA training employees were taught to move away from an aggressive client. They are not taught to remove jewelry in preparation for physical contact. If Grievant had time to remove her earrings, surely she had time to leave the room to deescalate the conflict.

Grievant argued that the Registered Nurse inappropriately initiated the conflict with the Client. Although it may be true that the Registered Nurse initiated the conflict and could have handled the matter differently, this fact did not relieve Grievant of her obligation to respond appropriately to an angry patient.

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..."<sup>2</sup> 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.

The Agency also issued Grievant a Group II Written Notice based on the same facts as presented in the Group III Written Notice. Although it is possible that a single set of behavior could violate more than one policy and justify more than one written

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<sup>2</sup> Va. Code § 2.2-3005.

notice, this is not one of those cases. The non-therapeutic behavior alleged in the Group II Written Notice is sufficient to justify issuance of a Group III Written Notice. The Group II Written Notice is redundant. The Agency has not established any separation between the two written notices which would justify two distinct disciplinary actions. Accordingly, the Group II Written Notice must be reversed.

## 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**. The Group II Written Notice of disciplinary action is **rescinded**.

## 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 14<sup>th</sup> St., 12<sup>th</sup> 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.<sup>3</sup>

[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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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



**COMMONWEALTH of VIRGINIA**  
**Department of Employment Dispute Resolution**

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case No: 9548 9549-R**

Reconsideration Decision Issued: July 21, 2011

**RECONSIDERATION DECISION**

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. “[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis ...” to grant the request.

Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the hearing ended. However, the fact that a party discovered the evidence after the hearing does not necessarily make it “newly discovered.” Rather, the party must show that:

- (1) the evidence is newly discovered since the date of the Hearing Decision;
- (2) due diligence on the part of the party seeking reconsideration to discover the new evidence has been exercised;
- (3) the evidence is not merely cumulative or impeaching;
- (4) the evidence is material;
- and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the Hearing Decision to be amended.

Grievant argues that the outcome of her grievance should be changed because the Group II Written Notice issued was rescinded. The Hearing Officer upheld the Agency’s issuance of a Group III Written Notice. One Group III Written Notice is sufficient to uphold removal under the Standards of Conduct. Grievant argues that another employee was allowed to remain employed even after the Agency concluded the employee engaged in client abuse. As the Hearing Officer discussed in the original hearing decision, Grievant’s case and the case of that other employee were not so similar that the Hearing Officer could conclude that the Agency had singled her out for disciplinary action.



The request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. For this reason, the request for reconsideration is **denied**.

### **APPEAL RIGHTS**

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

#### Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

*S/Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

POLICY RULING OF THE DEPARTMENT OF  
HUMAN RESOURCE MANAGEMENT

In the Matter of the  
Department of Behavioral Health and  
Developmental Services

August 10, 2011

The grievant has requested an administrative review of the hearing officer's decision in Case No. 9548/9549. The grievant is challenging the decision because he believes the hearing decision is inconsistent with several policies. For the reasons stated below, we will not interfere with the application of this decision. The agency head of the Department of Human Resource Management (DHRM), Ms. Sara R. Wilson, has directed that I conduct this administrative review.\*

In his Procedural History, the hearing officer wrote, in part, the following:

On January 26, 2011, Grievant was issued a Group III Written Notice of disciplinary action with removal for client abuse. On January 26, 2011, Grievant was issued a Group II Written Notice of disciplinary action with removal for unprofessional and non-therapeutic interaction that resulted in verbal/psychological abuse of a client.

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In his Findings of Fact, the hearing officer wrote in relevant part, the following:

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 Certified Nursing Assistant at one of its Facilities. She had been working for the Agency for approximately three years prior to her removal effective January 26, 2011.

The Client resided at the Facility. She was admitted from a local jail. She had been incarcerated for assaulting staff. Her diagnosis included borderline personality disorder.

On December 31, 2010, the Client asked Grievant to receive an additional salad dressing with her meal. Grievant gave the Client an additional salad dressing. The Registered Nurse observed that the Client had an additional salad dressing and removed the salad dressing from the Client's tray. The Registered Nurse explained that the Client was on a special diet and could not receive food items beyond those specified in her diet. The Client became infuriated by the Registered Nurse's action. The Client turned over a table and yelled "f--k this damn shit" Grievant smiled. The Client observed Grievant smiling and said to Grievant "you bony bitch, I'll smack your face." Grievant threw down

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\* Footnotes contained in the original hearing decision are not included in this DHRM ruling.

the clipboard she was holding onto a chair and said to the Client "I wish you would." The Client responded "what 'll happen". Grievant said "you'll find out."

Grievant began to take her earrings out in front of the Client. The Client perceived Grievant as getting ready to fight. Other staff intervened. Grievant went into the nurse's station and closed the door. The Client began throwing water at the window to the nurse's station and said "you stay in there forever".

Grievant had received Therapeutic Options of Virginia training. None of that training would sanction Grievant's response to the Client's outburst.

In his Conclusions of Policy, the hearing officer wrote the following:

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 ("01") 201 define 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
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- 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 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 mocked the Client when she said "I wish you would" in response to the Client's threat. This language served to demean the Client by daring the Client to respond. Grievant threw down the clipboard in a manner to intimidate the Client. When Grievant told the Client she would find out what would happen in response to the Client's statement that she would smack Grievant's face, Grievant's comments served to threaten an unspecified response to 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, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

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The Agency also issued Grievant a Group II Written Notice based on the same facts as presented in the Group III Written Notice. Although it is possible that a single set of behavior could violate more than one policy and justify more than one written notice, this is not one of those cases. The non-therapeutic behavior alleged in the Group II Written Notice is sufficient to justify issuance of a Group III Written Notice. The Group II Written Notice is redundant. The Agency has not established any separation between the two written notices which would justify two distinct disciplinary actions. Accordingly, the Group II Written Notice must be reversed.

In his Decision, the hearing officer stated the following:

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. The Group II Written Notice of disciplinary action is rescinded.

### **DISCUSSION**

Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. By statute, the DHRM has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by DHRM or the agency in which the grievance is filed. The challenge must cite a particular mandate or provision in policy. This Department's authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

In her request to this Department for an administrative review of the original hearing decision, the grievant appears to indicate that her actions towards the client were not a terminable offense. However, as the hearing officer clearly pointed out in his decision, the grievant's actions are covered by Departmental Instruction ('01) 201. The Department of Human Resource Management concurs with the hearing officer's application and interpretation of Departmental Instruction 201. We therefore will not interfere with the application of this decision.

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Ernest G. Spratley, Assistant Director  
Office of Equal Employment Services