Issue: Group III Written Notice with Termination (verbal abuse of patient); Hearing Date: 06/06/11; Decision Issued: 07/01/11; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 9606; Outcome: Partial Relief; **Administrative Review: AHO Reconsideration Request received 07/16/11; Reconsideration Decision issued 07/20/11; Outcome: Original decision affirmed; Administrative Review: EDR Ruling Request received 07/16/11; EDR Ruling No. 2012-3039 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: 9606

Hearing Date: June 6, 2011
Decision Issued: July 1, 2011

PROCEDURAL HISTORY

On February 1, 2011, Grievant was issued a Group III Written Notice of disciplinary action with removal for verbal abuse for asking a Client "Are you going to eat that damn food?"

On February 1, 2011, 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 May 17, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 6, 2011, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant Representative
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 Certified Nursing Assistant at one of its Facilities. He had been employed by the Agency for approximately 18 years prior to his removal effective February 1, 2011.

Grievant had prior active disciplinary action. On May 27, 2010, Grievant received a Group II Written Notice of disciplinary action for excessive tardiness. On June 10, 2009, Grievant received a Group I Written Notice with suspension for excessive tardiness.

The Client was admitted to the Facility on September 23, 2009 as a transfer from another Agency Facility. The Client had been diagnosed with Vascular Dementia Uncomplicated.

On January 11, 2011 at dinnertime, the Client wanted more salt and tried to take salt from another client's tray. Grievant told the Client he could not have more salt because his diet was sodium restricted. Grievant told the Client to eat his dinner and that he should see the dietitian and his doctor about changes to his diet. The Client slammed the plate down on the tray. Grievant told the Client "Eat the damn tray, or put it on the cart!" The Client said that he was going to eat his food and did so.

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[1] 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 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.

The Agency contends that Grievant engaged in client abuse because he used language that "demeans, threatens, intimidates or humiliates the person." The essence of Grievant's instruction to the Client was that the Client should either eat the food on his tray or not eat the food and put the tray in the cart. No evidence was presented to show that Grievant was prohibited from instructing a client to choose between eating

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

food or not eating food. The evidence showed that Grievant's voice level was slightly elevated. Grievant normally spoke with a loud voice. Grievant did not yell at the Client. Grievant did not make arm or hand gestures or other body movements that would have enhanced the significance of his voice level. The evidence is insufficient for the Hearing Officer to conclude that the voice level used by Grievant was sufficiently loud to support an allegation of client abuse. The evidence showed that it was inappropriate for Grievant to use the word "damn" as part of his interaction with the Client. Grievant used the word "damn" to refer to food and not to the Client. Grievant's statement did not serve to demean, threaten, intimidate, or humiliate the Client. Accordingly, the Agency has not established that Grievant engaged in client abuse.

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action."[2] Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

Failure to follow written policy is a Group II offense.[3] Agency Policy RI 050-20 governs Staff and Resident Interaction and Boundaries. The purpose of the policy is to "define appropriate and inappropriate behaviors in staff/resident interactions." "Behaviors considered inappropriate and to be unacceptable in a professional interaction between hospital staff or residents include, but are not limited to: *** [u]sing profanity, vulgarity, and/or abusive language with anyone at any time while working." The word "damn" constitutes profanity. On January 11, 2011, Grievant used profanity as part of his communication with the Client. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow policy.

Grievant has a prior active Group II Written Notice. Upon the accumulation of a second Group II Written Notice, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

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…."[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

[2] The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

[3] See, Attachment A, DHRM Policy 1.60.

[4] Va. Code § 2.2-3005.

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 **reduced** to a Group II Written Notice of disciplinary action. Grievant's removal is **upheld** based upon the accumulation of disciplinary action.

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.[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].

S/Carl Wilson Schmidt

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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.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 9606-R

Reconsideration Decision Issued: July 20, 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 requests reconsideration based on several arguments he made during the hearing. For example, Grievant points out that his prior active disciplinary notices for tardiness resulted because his vehicle "broke down" and he had a difficult time getting to work until he obtained a new vehicle. The Hearing Officer cannot consider mitigating circumstances for prior active disciplinary action because those matters had not been assigned to the Hearing Officer for adjudication on their merits. The time to appeal those written notices has passed. Grievant's length of service, prior military service, and otherwise good employment record are not sufficient to mitigate the accumulation of disciplinary action under the standard set forth in EDR Rules for

Conducting Grievance Hearings. The Hearing Officer does not have the authority to vary from that standard.

Grievant's 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. 9606. 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 February 1, 2011, Grievant was issued a Group III Written Notice of disciplinary action with removal for verbal abuse for asking a Client "Are you going to eat that damn food?"

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FACTS

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. He had been employed by the Agency for approximately 18 years prior to his removal effective February 1, 2011.
>
> Grievant had prior active disciplinary action. On May 27, 2010, Grievant received a Group II Written Notice of disciplinary action for excessive tardiness. On June 10, 2009, Grievant received a Group I Written Notice with suspension for excessive tardiness.
>
> The Client was admitted to the Facility on September 23, 2009, as a transfer from another Agency Facility. The Client had been diagnosed with Vascular Dementia Uncomplicated.
>
> On January 11, 2011 at dinnertime, the Client wanted more salt and tried

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

to take salt from another client's tray. Grievant told the Client he could not have more salt because his diet was sodium restricted. Grievant told the Client to eat his dinner and that he should see the dietitian and his doctor about changes to his diet. The Client slammed the plate down on the tray. Grievant told the Client "Eat the damn tray, or put it on the cart!" The Client said that he was going to eat his food and did so.

In his Conclusions of Policy, the hearing officer state 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 (1101") 201 defines 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 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.

The Agency contends that Grievant engaged in client abuse because he

used language that "demeans, threatens, intimidates or humiliates the person." The essence of Grievant's instruction to the Client was that the Client should either eat the food on his tray or not eat the food and put the tray in the cart. No evidence was presented to show that Grievant was prohibited from instructing a client to choose between eating food or not eating food. The evidence showed that Grievant's voice level was slightly elevated. Grievant normally spoke with a loud voice. Grievant did not yell at the Client. Grievant did not make arm or hand gestures or other body movements that would have enhanced the significance of his voice level. The evidence is insufficient for the Hearing Officer to conclude that the voice level used by Grievant was sufficiently loud to support an allegation of client abuse. The evidence showed that it was inappropriate for Grievant to use the word "damn" as part of his interaction with the Client. Grievant used the word "damn" to refer to food and not to the Client. Grievant's statement did not serve to demean, threaten, intimidate, or humiliate the Client. Accordingly, the Agency has not established that Grievant engaged in client abuse.

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action." Group II offenses "include acts of misconduct of a more serious and/or repeat nature that requires formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

Failure to follow written policy is a Group II offense. Agency Policy RI 050-20 governs Staff and Resident Interaction and Boundaries. The purpose of the policy is to “define appropriate and inappropriate behaviors in staff/resident interactions." “Behaviors considered inappropriate and to be unacceptable in a professional interaction between hospital staff or residents Include, but are not limited to: *** [u]sing profanity. vulgarity, and/or abusive language with anyone at any time while working." The word "damn" constitutes profanity. On January 11, 2011, Grievant used profanity as part of his communication with the Client. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow policy.

Grievant has a prior active Group II Written Notice. Upon the accumulation of a second Group II Written Notice, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

Va. Code § *2.2w3005.* 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 .... "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 nonexclusive 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.

Based on his assessment of the evidence, the hearing stated the following in his Decision:

> For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action is **reduced** to a Group II Written Notice of disciplinary action. Grievant's removal is **upheld** based upon the accumulation of disciplinary action.

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 his request to this Department for an administrative review of the original hearing decision, the grievant submitted a document that requested that the Department of Human Resource Management consider mitigating circumstances in order to have him reinstated. He does not identify any human resource management policy, either state or agency, that the hearing decision violates. It is not the role of this Agency to consider mitigating circumstances in its administrative review. Rather, the DHRM's rulings are limited to determining if the hearing decisions comport with policy and procedure. 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