

Issue: Group III Written Notice with Termination (client abuse); Hearing Date: 07/12/11; Decision Issued: 07/13/11; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 9641; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9641

Hearing Date: July 12, 2011
Decision Issued: July 13, 2011

PROCEDURAL HISTORY

On March 24, 2011, Grievant was issued a Group III Written Notice of disciplinary action with removal for client abuse.

On April 19, 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 June 20, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 12, 2011, a hearing was held at the Agency's 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 II at one of its Facilities until his removal effective March 24, 2011. Grievant began working at the Facility on October 25, 2004.

Grievant had prior active disciplinary action. On March 20, 2008, Grievant received a Group III Written Notice with a 15 workday suspension for testing positive for cocaine following a random drug test. On September 10, 2009, Grievant received a Group I Written Notice for inadequate or unsatisfactory job performance.

The Client is a 44-year-old ambulatory, verbal male who has lived at the Facility since December 20, 1995. He functions intellectually at the level of moderate intellectual disability, generalized anxiety disorder, epilepsy, and attention deficit/hyperactive disorder. The Client has a history of biting staff and other clients. Approximately one year earlier, the Client bit Grievant. The Client weighs less than 120 pounds.

The Client resides in a Room in one of the Cottages at the Facility. The Client has a roommate. A dresser is located in the middle of the Client's room. When facing the dresser, the Roommate's bed is on the right side and the Client's bed is on the left side.

On March 22, 2011 at approximately 6:30 a.m., Grievant entered the room to wake up the Roommate. Grievant walked to the dresser with the objective of removing

clothing from the dresser to assist the Roommate with getting dressed. The Client was also in the room near his bed. The Client yelled at Grievant instructing Grievant to get out of the room. The Client moved towards Grievant and approached Grievant from Grievant's back left side. Grievant quickly turned to face the Client and used both arms and open hands to push the Client backwards. The Client fell to the floor. The left side of the Client's lip was split open and blood poured out of the wound. The Client was extremely upset and clenched his fists and held them towards his face as he bled. Grievant left the room and walked down the hallway. He encountered another employee and said, "Call the nurse, that boy is f--ked up!"

The Agency began an investigation. At approximately 8 a.m. the Investigator arrived at the Cottage. They went to the Client's bedroom. Grievant demonstrated how he reacted to the Client approaching him. At approximately 10:45 a.m., Grievant was placed on suspension pending the outcome of the investigation. Grievant was instructed to leave the Facility to be tested for illegal drugs. Grievant tested positive for an illegal drug and was issued a Group III Written Notice of disciplinary action with removal effective March 24, 2011. Grievant did not appeal the Group III Written Notice for illegal drug use.

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 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.

Grievant engaged in client abuse because he intentionally pushed the Client and did so with sufficient force to cause the Client to fall. Grievant cause physical harm to the Client as shown by the injury to the Client's face. Grievant might have caused psychological harm to the Client as shown by the Client's reaction to Grievant's push and the injury suffered by 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, the Agency's decision to remove Grievant must be upheld.

Grievant argued that his action was actually a reaction based on his fear that the Client would bite him as the Client had done on a previous occasion. Grievant argued that his action was self-defense. Grievant's argument fails. Although the evidence showed that the Client approached Grievant from Grievant's back and to Grievant's side, no credible evidence was presented to show that the Client was in the process of biting Grievant or was about to bite Grievant. No evidence was presented that the Client actually touched Grievant.

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

² Va. Code § 2.2-3005.

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:

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].

S/Carl Wilson Schmidt

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.