

Issue: Group III Written Notice with Termination (client neglect and abuse); Hearing Date: 10/20/11; Decision Issued: 11/01/11; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 9689; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9689

Hearing Date: October 20, 2011
Decision Issued: November 1, 2011

PROCEDURAL HISTORY

On August 9, 2011, Grievant was issued a Group III Written Notice of disciplinary action with removal for client neglect and client abuse.

On August 11, 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 she requested a hearing. On September 13, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The Hearing Officer found just cause to extend the time frame for issuing a decision in this grievance due to the unavailability of a party. On October 20, 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 Support Professional at one of its Facilities. The purpose of her position was:

Works directly with the intellectually disabled individuals, supplying them with all their basic needs, including medical, personal hygiene, training needs, etc. Implements program plans assuring active treatment is provided (works as a member of ID team). Ensures a safe, homelike environment is provided. Completes required documentation.¹

Grievant began working for the Agency approximately 4 years ago. She was removed from employment effective August 9, 2011. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

On June 10, 2011, Grievant attempted to have Client T use inappropriate language by having Client T "fill in the blank" in sentences. For example, Grievant said to Client T, "[Client T] is a pain in the ____." Client T would then say "ass". Grievant said to Client T "shoo-we, it smells like ____." Client T would then say "s—t".

¹ Agency Exhibit 4.

On June 10, 2011, Grievant, Ms. C, Ms. E, and Ms. B took several residents on a field trip away from the Facility. They arrived at the Restaurant at approximately 9:50 a.m. The Restaurant was not scheduled to open until 10:30 a.m. Grievant and Ms. B were allowed into the Restaurant at 10:20 a.m. While Grievant was inside the Restaurant, another employee escorted a client to a local store to use the restroom. When Grievant return to the bus she observed that the client was missing and said “what the f—k” in front of clients. Once the group reached the picnic area, several staff members put their drinks on a table in front of the clients. Client A grabbed Grievant’s drink and drank it. Another employee grabbed the drink and told Grievant that Client A had drunk it. Grievant approached Client A and said, “dammit [Client A] you know f—king better! I outta slap the s—t out of you.” After lunch, Client T reached for Grievant’s drink and Grievant slapped Client T’s hand and told her to put the drink back.

As the group was getting ready to leave the picnic area to return to the Facility, Grievant noticed that Client A was seated in the first seat behind the driver. Grievant unbuckled Client A and told her to get up because that is not where she sits. Grievant grabbed her by the arm. Grievant said “dammit [Client A] you know how to f—king sit down so sit the f—k down.” Grievant pushed Client A into Ms. C’s seat. Grievant said “it’s too damn hot for this s—t.”

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 defines² 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

² See, Va. Code § 37.1-1 and 12 VAC 35-115-30.

- 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 engaged in client abuse. On June 10, 2011, Grievant attempted to demean and humiliate a client by having a client say curse words, cursing in front of several clients, and cursing at a client. Grievant engaged in battery when she slapped a client's hand. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice of disciplinary action 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.

The Agency alleged the Grievant engaged in client neglect because she failed to ensure that the Client was covered with sunscreen prior to leaving the Facility and taken to the toilet when necessary. The Agency's witnesses admitted they did not observe the Client for periods of time during which the Client could have been taken to the toilet and had sunscreen applied.

Grievant denied the allegations against her. She did not present any evidence that would support her defenses. The Agency's witnesses were credible.

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...."³ 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

³ Va. Code § 2.2-3005.

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:

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

[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

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