

Issue: Group I Written Notice (unsatisfactory job performance); Hearing Date: 05/17/12; Decision Issued: 06/01/12; Agency: DBHDS; AHO: Sondra K. Alan, Esq.; Case No. 9804; Outcome: No Relief – Agency Upheld.

DECISION OF HEARING OFFICER
IN RE: CASE NO. 9804
HEARING DATE: May 17, 2012
DECISION ISSUED: June 1, 2012

PROCEDURAL HISTORY

On March 5, 2012, Grievant was issued a Group II Written Notice of disciplinary action for violation of Policy 10 Resident Abuse, Policy 106 Standards of Conduct, and DI 201 (RTS) 03 Reporting and Investigating Abuse and Neglect of Clients.

On March 5, 2012, Grievant timely filed a grievance to challenge the Agency's action. On March 12, 2012, the First, and Second Resolution Steps were returned. On March 19, 2012, the Third Resolution Step was returned which was not satisfactory to the Grievant and thus a hearing was requested. Qualification for a Hearing was received on March 27, 2012 and returned on March 31, 2012. The matter was qualified for hearing and Hearing Officer was appointed April 24, 2012. A pretrial conference was scheduled May 2, 2012 and the matter was heard May 17, 2012.

APPEARANCES

Agency Representative
3 Agency Witnesses
Grievant

ISSUES

1. Did Grievant engaged in the behavior described in the Written Notice?
2. Did the behavior constituted misconduct?
3. Was the Agency's discipline consistent with law?
4. Did the Agency consider mitigation?

BURDEN OF PROOF

In disciplinary actions, the burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary actions against the Grievant were 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 is to be proved is more probable than not. GPM § 9. It is incumbent on Grievant to show that the relief sought by Grievant is applicable to Grievant's case. GPM § 5.9(a). Also, Grievant has the burden of proving any affirmative defenses raised by Grievant. GPM §4.1(b).

FINDING OF FACTS

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

On the morning of February 11, 2012 a client at agency's facility who was known to be aggressive, left his assigned space and was restrained by his "one-on-one" caregiver. This caregiver was an employee of the Agency. The caregiver pushed the client onto a couch. There was no controversy that the push was an unacceptable maneuver on the part of the caregiver.

The Grievant in this case, another caregiver employee of the Agency, was viewed in the facility video camera as observing the incident.¹ Agency policies require all employees of the Agency to make immediate report of any alleged abuse of a client.² Grievant does not deny knowledge of these policies.³ Grievant also does not deny that she did not make any immediate report.

¹ Agency Exhibit A

² Agency Exhibit I

³ Agency Exhibit C

Grievant contends that she did not see the incident and therefore was under no duty to report it. Grievant further testified that she remained in the room where the incident occurred for the purpose of speaking with another client.

APPLICABLE LAW

The Department of Human Resource Management ("DHRM") relies on Operating Instruction 10, revised January 13, 2009, Standards of Conduct, effective April 16, 2008, revised June 1, 2011, and Examples of Offenses Grouped by Level, Policy 1.60, effective April 16, 2008.⁴

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 require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."⁵

The Agency argued that Grievant should have called the facility director to report the witnessed abuse. The Agency relied upon its policy and procedure which states, in part:

1. 5. (A)(1) immediately report any incident or allegation that could constitute abuse or neglect to the facility director.⁶
2. Failure to follow supervisor's instructions or comply with written policy.⁷

⁴ Agency Exhibit I

⁵ Agency Exhibit I. The Department of Human Resource Management ("DHRM") *Policies and Procedures Manual*

⁶ Agency Exhibit I. Behavioral Health and Developmental Services. Instructions 10. Revised January 13, 2009.

⁷ Agency Exhibit I. Standards of Conduct. Policy 1.60. Attachment A: Examples of Offenses Grouped by Level. Revised June 1, 2011.

3. Any workforce member who has any knowledge or reason to believe that an individual residing in a state facility may have been abused or neglected, or both, shall immediately report this information directly to the facility director, or designee, as appropriate.⁸

OPINION

The video evidence at time stamp 2/11/2012 7:37:57⁹ clearly shows Grievant looking toward the client being shoved by another caregiver. Further, Grievant's protest that she did not see the action has little weight when she further testified that she remained in the room where the incident occurred for the purpose of a conversation with another client. She stated she was speaking to a client who was sitting in the chair beside the disruptive client that had been restrained. In watching the video it is clear that the client seated by the disruptive client was not conversing with Grievant as claimed by Grievant.

Policy codes 10, 106, and DI 201(RTS)03 were not followed by Grievant.

The Agency did consider Grievant's satisfactory past performance and for this reason, mitigated the discipline from a Group II to a Group I action.¹⁰

DECISION

For the above stated reasons the Agency's decision is **upheld**.

⁸ Agency Exhibit I. Departmental Instruction 201 (RTS)03, Reporting and Investigating Abuse and Neglect of Individuals Receiving Services in Department Facilities. 201-6 Procedures – Reporting. Reporting abuse and neglect.

⁹ Agency Exhibit A

¹⁰ Agency Exhibit F

APPEAL RIGHTS

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject to administrative and judicial review.¹¹ Once the administrative review phase has concluded, the hearing becomes final and is subject to judicial review.

Administrative Review: This decision is subject to three (3) types of administrative review, depending upon the nature of the alleged defect of the decision:

1. A request to reconsider a decision or reopen a hearing is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions are the basis for such a request.
2. A challenge that the hearing decision is inconsistent with state policy or Agency policy is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or Agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to:

Director, Department of Human Resources Management
101 N. 14th Street, 12th Floor
Richmond, VA 23219

3. A challenge that the hearing decision does not comply with grievance procedure is made to the Director of the EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to:

Director, Department of Employment Dispute Resolution
600 East Main Street, Suite 301
Richmond, VA 23219

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar days** of the

¹¹ 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.

original hearing decision. (Note: the 15-day period, in which the appeal must occur, begins with issuance of the decision, not receipt of the decision. However, the date the decision is rendered does not count as one of the 15 days following the issuance of the decision). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of 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 grievance arose.¹² You must give a copy of your notice of appeal to the Director of the Department of Employment Dispute Resolution. The Agency shall request and receive prior approval of the Director before filing a notice of appeal.

Sondra K. Alan, Hearing Officer

¹² An appeal to Circuit Court may be only on the basis that the decision was contradictory to law, and must identify the specific Constitutional provision, statute, regulation or judicial hearing that the Hearing Decision purportedly contradicts. Virginia Department of State Police v. Barton, 39 Va. App. 439, 573 S.E. 2d 319 (2002).