

Issue: Group III Written Notice with Termination (verbal abuse of patient); Hearing Date: 12/05/12; Decision Issued: 12/07/12; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 9960; Outcome: Full Relief; **Attorney's Fee Addendum issued 01/07/13 in the amount of \$3,969.30.**



# ***COMMONWEALTH of VIRGINIA***

## ***Department of Human Resource Management***

### **OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

#### **DECISION OF HEARING OFFICER**

In re:

**Case Number: 9960**

Hearing Date: December 5, 2012

Decision Issued: December 7, 2012

#### **PROCEDURAL HISTORY**

On September 10, 2012, Grievant was issued a Group III Written Notice of disciplinary action with removal for verbal abuse.

On October 4, 2012, Grievant timely filed a grievance to challenge the Agency's action. The grievance proceeded directly to hearing. On November 7, 2012, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 5, 2012, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
Grievant's Counsel  
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 Licensed Practical Nurse at one of its facilities. She had been employed by the Agency for over 25 years prior to her removal effective September 10, 2012. No evidence of prior active disciplinary action was introduced during the hearing. Grievant received an overall rating of "Contributor" on her most recent annual performance evaluation.

Ms. T was a patient at the Facility. She was admitted involuntarily to the Facility because of her mental health diagnosis requiring treatment. She had been known to make statements about staff and other patients that were not true. If her needs were not met immediately, she would often "strike out" at others or make statements that were untrue about others.

Ms. T would leave the hospital building and attend program activities in the administration building basement along with other patients. Grievant and the Nurse had discussed Ms. T's preference for bringing her tote bag with her when she went to the administration building for program activities. The Nurse told Grievant that it was unnecessary for Ms. T to take her bag with her to the administration building because she did not use the bag as part of her program activities.

In August 2012, Grievant, Ms. F, and Ms. To were transporting several patients from the hospital building to the administration building so that the patients could participate in an activities program for approximately 1.5 hours. Ms. T carried her bag

with a book inside onto the bus after she walked out of the hospital building. Ms. F drove the bus to the administration building and the patients exited the bus. Ms. T took her bag with her into the administration building. After the program, Ms. T took her bag and began entering the bus. Ms. T asked if “somebody could hold my bag.” Grievant said she would not hold the bag. Ms. T took the bag and held it while Ms. T entered the bus. Grievant said, “she needs to leave that mess (or stuff) at the hospital. She doesn’t need to drag that ... why does she bring it anyway.”

On August 14, 2012, Ms. T gave the Patient Advocate a written complaint stating “[Grievant] Rough handling & nasty to me, very disrespectful. Her verbal abuse is [really] demeaning and [intimidating] to me.”<sup>1</sup> Ms. T dated the form July 9, 2012. It is not known why she used that date.

### **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>2</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

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<sup>1</sup> Agency Exhibit 4.

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

- 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.

The Agency argued that Grievant engaged in verbal abuse because she used "language that demeans, threatens, intimidates or humiliates the person." The Agency has not met its burden of proof.

It is clear that Ms. T believed that Grievant used language that was demeaning and humiliating to her. Ms. T's hearsay statements are not sufficient to meet the Agency's burden of proof because Ms. T had a reputation for making untruthful statements. In addition, it is not clear how accurately Ms. T perceived the behavior of others given her mental health was of such concern that she had to be involuntarily institutionalized. Furthermore, the perception of a patient is not in itself sufficient to establish a violation of DI 201.<sup>3</sup> An objective standard must also be applied.

Grievant's refusal to hold Ms. T's bag was not verbal abuse. Her failure to do so is not sufficiently material to establish neglect or physical abuse.

Grievant neither knew nor should have known that her statements to Ms. T would result in Ms. T's feelings of humiliation. Grievant was communicating what she understood to be the result of her conversation with the Nurse about whether Ms. T should be permitted to bring a bag with her to the program activities. The Nurse was part of Ms. T's treatment team and Grievant valued and respected the Nurse's opinion. It is unclear whether Grievant was speaking to Ms. T and Ms. T overheard her, or was speaking directly to Ms. T. Possibly, it would have been wiser for Grievant to have delayed her comments to another time, but Grievant's comments were not sufficiently material to conclude that Grievant engaged in verbal abuse. Grievant did not curse or argue when she spoke about Ms. T's carrying bag. Ms. F testified that Grievant's tone was unprofessional but insufficient details were presented regarding how that tone was offensive. Ms. F also testified that Grievant's behavior did not rise to the level of verbal abuse.

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<sup>3</sup> If a violation of DI 201 depended solely on the perception of a patient, then presumably any comment regardless of how harmless made by an employee could place that employee at risk of being removed for client abuse.

The Agency argued that Grievant engaged in a pattern of verbal abuse.<sup>4</sup> The Agency presented the testimony of one witness who said Grievant told a patient who went to the bathroom a lot, “I can’t believe you have to go to the bathroom again.” The witness also testified that she did not believe Grievant’s actions constituted verbal abuse such that she should have reported Grievant’s behavior to the Facility Director. This witness had reported Grievant to the Agency based on a conversation she and Grievant had but not relating to patients or patient care. Had this witness believed that Grievant engaged in verbal abuse, surely the witness would have reported Grievant. The Agency has not presented sufficient details regarding the dates, times, and patients involved to establish that Grievant engaged in a pattern of verbal abuse.

The Virginia General Assembly enacted *Va. Code § 2.2-3005.1(A)* providing, “In grievances challenging discharge, if the hearing officer finds that the employee has substantially prevailed on the merits of the grievance, the employee shall be entitled to recover reasonable attorneys’ fees, unless special circumstances would make an award unjust.” Grievant has substantially prevailed on the merits of the grievance because he is to be reinstated. There are no special circumstances making an award of attorney’s fees unjust. Accordingly, Grievant’s attorney is advised to submit an attorneys’ fee petition to the Hearing Officer within 15 days of this Decision. The petition should be in accordance with the EDR’s *Rules for Conducting Grievance Hearings*.

## 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 **rescinded**. The Agency is ordered to reinstate Grievant to Grievant’s same position prior to removal, or if the position is filled, to an equivalent position. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal and credit for leave and seniority that the employee did not otherwise accrue.

## 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 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:

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<sup>4</sup> Grievant presented evidence that most employees she worked with had never observed her engaging in behavior that could be construed as verbal abuse.

Director  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR 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:

Office of Employment Dispute Resolution  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto:EDR@dhrm.virginia.gov), or by fax to (804) 786-1606.

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 provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative 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>5</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>5</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.



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

**DIVISION OF HEARINGS**

**ADDENDUM TO DECISION OF HEARING OFFICER**

In re:

**Case No: 9960-A**

Addendum Issued: January 7, 2013

**DISCUSSION**

The grievance statute provides that for those issues qualified for a hearing, the Hearing Officer may order relief including reasonable attorneys' fees in grievances challenging discharge if the Hearing Officer finds that the employee "substantially prevailed" on the merits of the grievance, unless special circumstances would make an award unjust.<sup>6</sup> For an employee to "substantially prevail" in a discharge grievance, the Hearing Officer's decision must contain an order that the agency reinstate the employee to his or her former (or an objectively similar) position.<sup>7</sup>

To determine whether attorney's fees are reasonable, the Hearing Officer considers the time and effort expended by the attorney, the nature of the services rendered, the complexity of the services, the value of the services to the client, the results obtained, whether the fees incurred were consistent with those generally charged for similar services, and whether the services were necessary and appropriate.

Grievant's attorneys devoted 30.30 hours to representing Grievant as part of her grievance hearing. At an hourly rate of \$131, Grievant is entitled to reimbursement of attorney's fees in the amount of \$3,969.30.

**AWARD**

Grievant is awarded attorneys' fees in the amount of \$3,969.30.

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<sup>6</sup> Va. Code § 2.2-3005.1(A).

<sup>7</sup> § 7.2(e) Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004. § VI(D) *EDR Rules for Conducting Grievance Hearings*, effective August 30, 2004.



## APPEAL RIGHTS

If neither party petitions the DHRM Director for a ruling on the propriety of the fees addendum within 10 calendar days of its issuance, the hearing decision and its fees addendum may be appealed to the Circuit Court as a final hearing decision. Once the DHRM Director issues a ruling on the propriety of the fees addendum, and if ordered by DHRM, the hearing officer has issued a revised fees addendum, the original hearing decision becomes “final” as described in §VII(B) of the *Rules* and may be appealed to the Circuit Court in accordance with §VII(C) of the *Rules* and §7.3(a) of the *Grievance Procedure Manual*. The fees addendum shall be considered part of the final decision. Final hearing decisions are not enforceable until the conclusion of any judicial appeals.

*S/Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer