

Issues: Group III with Suspension (client abuse), Group I (unprofessional behavior), and Termination (due to accumulation); Hearing Date: 01/14/16; Decision Issued: 02/03/16; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10696, 10707; Outcome: No Relief – Agency Upheld; **Judicial Review: Appealed to Fairfax County Circuit Court (03/08/16); Outcome: AHO's decision affirmed (06/20/16) [CL-2016-0003806].**



# ***COMMONWEALTH of VIRGINIA***

***Department of Human Resource Management***

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

## **DECISION OF HEARING OFFICER**

In re:

**Case Number: 10696 / 10707**

Hearing Date: January 14, 2016

Decision Issued: February 3, 2016

### **PROCEDURAL HISTORY**

On July 7, 2015, Grievant was issued a Group III Written Notice of disciplinary action with a five workday suspension for client abuse. On September 24, 2015, Grievant was issued a Group I Written Notice for unprofessional conduct and disruptive behavior. She was removed from employment based on the accumulation of disciplinary action.

Grievant timely filed grievances to challenge the Agency's actions. On October 20, 2015, the Office of Employment Dispute Resolution issued Ruling No. 2016-4246, 2016-4247 consolidating the two grievances for single hearing. The matter proceeded to hearing. On November 2, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 14, 2016, a hearing was held at the Agency's office.

### **APPEARANCES**

Grievant  
Grievant's Counsel  
Agency's Representative  
Witnesses

## **ISSUES**

1. Whether Grievant engaged in the behavior described in the Written Notices?
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 Physical Therapist Assistant at one of its facilities. She received training regarding the Agency's client abuse policy, DI 201. She had been employed by the Agency for over nine years.

On June 18, 2015, the Resident was awaiting a meeting with staff from a private organization. The Resident was in a room with Ms. S. Also in the room were Ms. V and another resident who was located behind a partition. Ms. V was assisting the other resident behind the partition but could hear what was being said in the room.

Ms. S read the Resident's Physical Management Guidelines to determine if the Resident should have a chest strap across her to ensure her safety as she was moved in her wheelchair. Grievant walked into the room and observed Ms. S and the Resident. Grievant wanted to move the Resident to another room to be introduced to the staff from the private organization. Grievant wanted to make sure that the Resident's clothing had been changed and that she was dry. Grievant was in a hurry. Grievant believed the Resident should already have been moved to another room to meet with

the staff of the private organization. Grievant asked Ms. S if the Resident was dry. Ms. S did not answer but asked Grievant about the need for a chest strap. Grievant interrupted Ms. S and said “that is not important now.” Grievant asked if the Resident was dry and expressed frustration that Ms. S would not answer. Grievant said “they” were waiting for the Resident, referring to the private organization. Their voices became loud and angry. Grievant grasped the Resident’s wheelchair and began moving her away from Ms. S. Ms. S continued to explain how she had changed the Resident without delay and how she considered it to be unprofessional that Grievant did not let Ms. S ask a question and how they needed to respect each other. Ms. S said she did not appreciate being cut off. Grievant said, “You are rude!” Ms. S was shocked by Grievant’s comment and said “You just cut me off and didn’t let me finish my question and you’re calling me rude? That is not professional!” Grievant again said, “You are rude!” As Grievant turned and said in a loud voice and in a commanding way, “We will talk about this later!” Ms. S said, “Not after you called me rude.” Grievant and the Resident left the room.

Ms. V spoke with Ms. S and asked if everything was “ok”. Ms. S looked “upset” to Ms. V. Ms. S said that she was offended because Grievant was being rude to her and Grievant pointed her finger at Ms. S.

Ms. V was standing approximately five to ten feet away from Grievant and Ms. S. She perceived their conversation as angry and aggressive and involved yelling. Ms. V would not have wanted anyone to speak to her that way because she would have perceived it as belittling.

The Resident met with the staff of the private organization and displayed her normal temperament. She did not appear to be affected by the argument between Grievant and Ms. S.

Ms. S and Grievant complained to their respective supervisors regarding the other’s unprofessional behavior.

On August 17, 2015, an Individual experienced a seizure. Employees with the Individual called for assistance. Mr. F, a Registered Nurse, responded to the call. He observed the Individual seated in a wheelchair with her face down and eyes closed. Mr. F asked the two staff how long were the seizures and what medication was given before the seizures. The two staff said the seizure lasted two minutes. Mr. F began checking the Individual’s oxygen levels. Mr. F heard Grievant say that the seizure lasted five minutes.<sup>1</sup> Mr. F again asked the two staff the length of the seizure. They replied two minutes. Mr. F began looking at the Individuals’ medical management record to determine the proper protocol. Grievant wanted Mr. F to give medication to the Individual immediately. She extended a finger on her hand and pushed the tip of her

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<sup>1</sup> Grievant testified that she was telling Mr. F that the Individual had been non-responsive for five minutes and was not answering the question about the length of the seizure. She indicated that Mr. F misunderstood her statement to him.

finger into Mr. F's lower left buttocks towards the center of his bottom to poke him. Grievant was attempting to compel Mr. F to give the medication to the Individual immediately. Mr. F responded, "Negative, not yet." He continued to check the Individual. Mr. F considered Grievant's poke to be unprofessional and inappropriate.

## 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:

This means any act or failure to act by an employee or other person responsible for the care of an individual in a Department facility 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 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.

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<sup>2</sup> See, Va. Code § 37.2-100 and 12 VAC 35-115-30.

### Group III Written Notice

“[A]buse or neglect of clients” is a Group III offense.<sup>3</sup> On June 18, 2015, Grievant engaged in a loud argument with Ms. S. Her tone of voice and demeanor reflected anger and frustration towards Ms. S. Grievant was standing within a few feet of the Resident who could observe the conflict. The interaction was of the type that could have upset a resident at the Facility. The Agency has presented sufficient evidence of verbal abuse by Grievant to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee or suspend an employee for up to 30 work days in lieu of removal. Accordingly, the Agency’s five workday suspension must be upheld.

Grievant argued that the argument with Ms. S was not loud, was very brief, and did not affect the Resident. The evidence showed that Grievant and Ms. S had an angry and loud argument in front of a Resident. The argument was of the type that a resident at the Facility could have been adversely psychologically affected by the argument and yelling. It is not necessary for the Agency to show that the Resident was actually affected by the confrontation.

Grievant argued that her behavior was not directed at the Resident and, thus, did not constitute client abuse. Client abuse may occur when an employee engages in behavior that is witnessed by a resident regardless of whether it is directed at the resident.

### Group I Written Notice

“Disruptive behavior” is a Group I offense. Poking someone in the lower part of his buttock is not professional or appropriate in the workplace. Grievant distracted Mr. F from performing his duties while treating the Individual. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice. Upon the accumulation of a Group III Written Notice and a Group I Written Notice, an agency may remove an employee. Accordingly, Grievant’s removal must be upheld based on the accumulation of disciplinary action.

Grievant argued that she poked Mr. F on his hip and not his buttock. Mr. F’s testimony was clear that Grievant poked him in the lower part of his left buttock toward the middle, not the side of his body.

*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 Human Resource Management ....”<sup>4</sup> Under the *Rules for Conducting Grievance Hearings*, “[a] hearing

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<sup>3</sup> See, Attachment A, DHRM Policy 1.60.

<sup>4</sup> Va. Code § 2.2-3005.

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 disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary actions.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with a five workday suspension is **upheld**. The Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action is **upheld**. Grievant's removal based on the accumulation of disciplinary action 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 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 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.