

Issue: Group III Written Notice with Suspension (client abuse); Hearing Date: 01/28/16; Decision Issued: 02/17/16; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10708; Outcome: No Relief – Agency Upheld; **Administrative Review**: EDR Ruling Request received 03/02/16; EDR Ruling No. 2016-4316 issued 03/22/16; Outcome: AHO's decision affirmed; **Administrative Review**: DHRM Ruling Request received 03/02/16; DHRM Ruling issued 03/29/16; Outcome: AHO's decision affirmed; **Judicial Review**: Appealed to Fairfax County Circuit Court (04/28/16); Outcome: AHO's decision affirmed (09/09/16) [CL-2016-6227]; Appealed to Court of Appeals (10/11/16); Outcome: Appeal Dismissed; Filing Fee Not Paid.



# **COMMONWEALTH of VIRGINIA**

*Department of Human Resource Management*

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

## **DECISION OF HEARING OFFICER**

In re:

**Case Number: 10708**

Hearing Date: January 28, 2016  
Decision Issued: February 17, 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 August 6, 2015, 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 November 23, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 28, 2016, a hearing was held at the Agency's office.

### **APPEARANCES**

Grievant  
Grievant's Representative  
Agency's 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 employs Grievant as a Direct Service Associate II at one of its facilities. She had been employed by the Agency for approximately 13 years. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant received training regarding the Agency's client abuse policy, DI 201. This training included teaching employees not to yell in front of residents.

On June 18, 2015, the Resident was awaiting a meeting with staff from a private organization. The Resident was in a room with Grievant. 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.

Grievant 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. Ms. S walked into the room and observed Grievant and the Resident. Ms. S wanted to move the Resident to another room to be introduced to the staff from the private organization. Ms. S wanted to make sure that the Resident's clothing had been changed and that she was dry. Ms. S was in a hurry. Ms. S believed the Resident should already have been moved to another room to meet with the staff of the private organization. Ms. S asked Grievant if the Resident was dry. Grievant did not answer but asked Ms. S about the need for a chest strap. Ms. S interrupted Grievant and said "that is not important now." Ms. S asked if the Resident was dry and

expressed frustration that Grievant would not answer. Ms. S said “they” were waiting for the Resident, referring to the private organization. Their voices became loud and angry. Ms. S grasped the Resident’s wheelchair and began moving her away from Grievant. Grievant continued to explain how she had changed the Resident without delay and how she considered it to be unprofessional that Ms. S did not let Grievant ask a question and how they needed to respect each other. Grievant said she did not appreciate being cut off. Ms. S said, “You are rude!” Grievant was shocked by Ms. S’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!” Ms. S again said, “You are rude!” Ms. S turned and said in a loud voice and in a commanding way, “We will talk about this later!” Grievant said, “Not after you called me rude.” Ms. S and the Resident left the room.

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

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.

## **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>1</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

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<sup>1</sup> See, Va. Code § 37.2-100 and 12 VAC 35-115-30.

- 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.

### Group III Written Notice

"[A]buse or neglect of clients" is a Group III offense.<sup>2</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 even though it does not appear that Grievant's conflict with Ms. S actually affected the Resident.<sup>3</sup> 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, she cannot tolerate loud conversations because of her history of having migraine headaches, 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

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<sup>2</sup> See, Attachment A, DHRM Policy 1.60.

<sup>3</sup> Whether the Resident received a psychological evaluation is irrelevant because it is not necessary for the Agency to show actual harm to the Resident.

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 she was advocating for the Resident by questioning whether the Resident needed a chest strap. 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. Grievant's advocacy involved a loud argument in which Grievant participated.

*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 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 action.

## 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**.

## 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

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<sup>4</sup> Va. Code § 2.2-3005.

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.