

Issue: Group III Written Notice with Termination (verbal abuse of client); Hearing Date: 12/21/15; Decision Issued: 01/05/16; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10713; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10713

Hearing Date: December 21, 2015

Decision Issued: January 5, 2016

PROCEDURAL HISTORY

On October 1, 2015, Grievant was issued a Group III Written Notice of disciplinary action with removal for client abuse.

On October 8, 2015, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On November 2, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 21, 2015, 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 an SSTT at one of its facilities. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant received Therapeutic Options of Virginia training informing her how to respond to a Resident's inappropriate behavior and how to re-direct a Resident who was misbehaving.

The Resident lived at the Facility in order to receive treatment for a mental health illness. He was sometimes aggressive and disrespectful to staff.

Ms. F worked as an SSTT at the Facility. She was responsible for providing oversight of the Facility's residents including the Resident. On August 6, 2015, Ms. F was speaking with the Resident when the conversation became confrontational. The Resident was using inappropriate language towards Ms. F. Grievant entered the room to bring Ms. F a bottle of water because Grievant knew Ms. F was not feeling well. Grievant observed the confrontation between Ms. F and the Resident. The Resident began calling Grievant offensive names. The Resident threatened Grievant and Ms. F and then turned to walk towards his room. As the Resident began walking away, Grievant used Ms. F's radio to call the Unit Manager for assistance. The Resident heard Grievant call for assistance and said, "y'all bi-tches talking about my mamma; I am going to go put my shoes on cause I'm going to kill y'all bi-ches today. Grievant said, "yea, yea, yea, sure but you need to get out [of] our face with this BS." "BS"

referred to bull sh-t. The Resident went to his room and took off his shirt and put on his shoes. The Resident walked back to Grievant and Ms. F and continued to make offense statements to them. Ms. F started to back away from the Resident. The Emergency Response Team entered the Unit and the Resident called Grievant and Ms. F names and said that he was going to “f—k y’all bi-ches up.”

The Resident filed a complaint against Grievant and an investigation began.

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 defines¹ 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

¹ See Va. Code § 37.2-100 and 12 VAC 35-115-30.

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.

Facility's Policy 503 identifies appropriate and inappropriate interactions between employees and residents. Inappropriate interactions include, "[u]sing profanity, vulgarity, and/or abusive language with anyone at any time while working" and/or "[u]sing words, tone, body language, or any other action done deliberately or repeatedly to provoke, entice, and upset a resident." An employee violating Policy 503 may receive disciplinary action "up to and including termination of employment."

On August 6, 2015, Grievant used language that could have demeaned or humiliated the Resident. Grievant referred to the Resident's behavior as being in her "face" and his statements as "BS" meaning that his words and opinion were bull sh-t. The Resident's actions and words were inappropriate. Grievant should have responded to the Resident by describing his words and actions as inappropriate and attempting to redirect the Resident to another activity or location. Confronting the Resident by describing his words as "BS" was not a therapeutic interaction. Grievant increased the risk that a volatile Resident may have become more volatile. The Agency has presented sufficient evidence 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. Accordingly, Grievant's removal must be upheld.

Grievant argued that the Resident was not present when she and Ms. F said for the Resident to get out of their faces with this BS. Inadequate evidence was presented to support this assertion. If the Resident was not present when the comments were made, there would not have been any reason for Grievant to make the comments. Grievant's statement is an instruction that referred to "you". The Resident was the "you" who was being instructed. It is not logical to conclude that Grievant would give an instruction to someone who was not standing near her or able to hear her.

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"² 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

² Va. Code § 2.2-3005.

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 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

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 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to 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.³

[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

³ Agencies must request and receive prior approval from EDR before filing a notice of appeal.