

Issue: Group III Written Notice with Termination (client abuse); Hearing Date: 01/29/16; Decision Issued: 02/03/16; Agency: DBHDS; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 10747; Outcome: No Relief – Agency Upheld.

**COMMONWEALTH of VIRGINIA**  
**Department of Human Resource Management**  
**Office of Employment Dispute Resolution**

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In the matter of: Case No. 10747

Hearing Date:           January 29, 2016  
Decision Issued:       February 3, 2016

PROCEDURAL HISTORY

Grievant was a direct service associate (“DSA”) for the Department of Behavioral Health and Development Services (“the Agency”). On November 17, 2015, the Grievant was issued a Group III Written Notice, for abuse or neglect of client under Departmental Instruction # 201. The offense date was October 29, 2015. Agency Exh. # 2.

Grievant timely filed a grievance to challenge the Agency’s disciplinary action, and the grievance qualified for a hearing. On December 29, 2015, the Office of Employment Dispute Resolution, Department of Human Resource Management (“EDR”), appointed the Hearing Officer. During the pre-hearing conference, the grievance hearing was scheduled for January 29, 2016, the first date available for the parties, on which date the grievance hearing was held, at the Agency’s facility.

The Agency submitted documents for exhibits that were accepted into the grievance record, without objection, and they will be referred to as Agency’s exhibits. The Grievant submitted no additional documents. The hearing officer has carefully considered all evidence presented.

APPEARANCES

Grievant  
Advocate for Grievant  
Advocate for Agency  
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?

Through her grievance filings, the Grievant requested rescission of the Group III Written Notice and reinstatement.

### BURDEN OF PROOF

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as claims of retaliation and discrimination, the employee must present his evidence first and must prove his claim by a preponderance of the evidence. *In this disciplinary action, the burden of proof is on the Agency.* 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.

### APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . .  
To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

The Agency relied on the Standards of Conduct, promulgated by the Department of Human Resource Management, Policy 1.60, which defines Group III Offenses to include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination. The purpose of the policy is stated:

The purpose of this policy is to set forth the Commonwealth's Standards of Conduct and the disciplinary process that agencies must utilize to address unacceptable

behavior, conduct, and related employment problems in the workplace, or outside the workplace when conduct impacts an employee's ability to do his/her job and/or influences the agency's overall effectiveness.

Va. Code § 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code § 2.2-3005.1 provides that the hearing officer may order appropriate remedies including alteration of the Agency's disciplinary action. Implicit in the hearing officer's statutory authority is the ability to determine independently whether the employee's alleged conduct, if otherwise properly before the hearing officer, justified the discipline. The Court of Appeals of Virginia in *Tatum v. Dept. of Agr. & Consumer Serv.*, 41 Va. App. 110, 123, 582 S.E. 2d 452, 458 (2003) (quoting Rules for Conducting Grievance Hearings, VI(B)), held in part as follows:

While the hearing officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy... "the hearing officer reviews the facts *de novo*...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action."

#### The Offense

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

The Agency employs the Grievant as a DSA, with three years tenure. Prior to the present discipline, the Grievant had an active Group II Written Notice. Agency Exh. 9.

The current Written Notice charged the Grievant with pushing an individual client, causing her to fall to the floor, sustaining injury. A co-worker testified that she, while assisting another client, observed the Grievant push the Client in the hallway toward the bathroom, causing the Client to fall. She testified that she passed the Grievant and the Client in the hallway after this happened, and she continued taking her client to the day hall. The co-worker did not assist the Grievant with the Client because the Grievant caused the Client's fall.

A nurse, aware of a reported incident with the Client, and hearing that the Client was not ambulating as usual and presenting as stiff and unsteady, asked the co-worker if she was aware of anything about the Client during the prior shift. The nurse's questions led the co-worker to tell her about the incident. The co-worker was upset and crying about it. A shift supervisor overheard the co-worker telling the Nurse about the incident, also observing that the co-worker was upset and crying.

The Agency's investigator conducted an investigation, and his report is presented as Agency's Exh. 3. The investigator established that the Client was 74 years of age, but had a functional level below two years. The Client could not communicate. There are pictures of

bruises on the Client's left elbow and left leg. Agency Exh. 6. The investigator concluded the Grievant was abusive in the Client's care.

The Grievant's shift supervisor testified on her behalf. The shift supervisor testified that the Grievant reported to her that the Client had lost her balance and went down to the floor. A second coworker testified to the Grievant's competence and good care to clients.

The Grievant testified that she did not push the client, but the client purposely sat down on the floor. The facility event report, in the Grievant's handwriting, described the event as follows:

While[] assisting [the Client] to ambulate to restroom she had her eyes closed and she sat down in the floor in the hall way on building. Nurse notified.

Agency Exh. 5. The Grievant testified that the Client was known to sit down like this at inappropriate times. However, this account varies from that which was described by Grievant's witness, the shift supervisor (Grievant told her that the Client lost her balance).

As previously stated, the Agency's burden is to show upon a preponderance of evidence that the discipline of the Grievant was warranted and appropriate under the circumstances. The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).

The grievance hearing is a *de novo* review of the evidence presented at the hearing, as stated above. The Agency has the burden to prove that the Grievant is guilty of the conduct charged in the written notice. I find that, based on a preponderance of the evidence presented, the conduct as described in the Written Notice occurred, and that the offense is properly considered Group III, as it is specified by the Standards of Conduct to be the most serious offense. There is one eyewitness to the incident, other than the Grievant, and the eyewitness' account is credible and corroborated by the physical evidence of the bruising of the client. There is no other explanation for the Client's bruising. Such decision falls within the discretion of the Agency so long as the discipline does not exceed the bounds of reasonableness.

#### Mitigation

The agency has proved (i) the employee engaged in the behavior described in the written notice, (ii) the behavior constituted misconduct, and (iii) the discipline was consistent with law and policy. Thus, the discipline must be upheld absent evidence that the discipline exceeded the limits of reasonableness. *Rules for Conducting Grievance Hearings* ("Hearing Rules") § VI.B.1.

Under Virginia Code § 2.2-3005, the hearing officer has the duty to "receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Office of Employment Dispute Resolution." 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.

Regarding the level of discipline and termination, the Agency had leeway to impose discipline along the permitted continuum, but the Agency relies on the active Group II Written notice as weight against mitigation. While the Hearing Officer may have reached a different level of discipline, he may not substitute his judgment for that of the Agency when the Agency's discipline falls within the limits of reasonableness.

As with all mitigating factors, the Grievant has the burden to raise and establish any mitigating factors. *See e.g.*, EDR Rulings 2010-2473; 2010-2368; 2009-2157, 2009-2174. *See also Bigham v. Dept. of Veterans Affairs*, No. AT-0752-09-0671-I-1, 2009 MSPB LEXIS 5986, at \*18 (Sept. 14, 2009) citing to *Kissner v. Office of Personnel Management*, 792 F.2d 133, 134-35 (Fed. Cir. 1986). (Once an agency has presented a prima facie case of proper penalty, the burden of going forward with evidence of mitigating factors shifts to the employee).

The hearing officer accepts, recognizes, and upholds the Agency's important role in serving its population and ensuring its clients care. Although the Grievant denied the charge, she did not present any evidence of disparate treatment or other mitigating factors.

There is no requirement for an Agency to exhaust all possible lesser sanctions or, alternatively, to show that the chosen discipline was its only option. While the Agency could have justified or exercised lesser discipline, I find no mitigating circumstances that render the Agency's action of a Group III Written Notice outside the bounds of reasonableness. Accordingly, I find that the Agency's action of imposing a Group III Written Notice for the offense is within the limits of reasonableness. The Hearing Officer, thus, lacks authority to reduce or rescind the disciplinary action.

### DECISION

For the reasons stated herein, I uphold the Agency's Group III Written Notice, with termination, issued on November 17, 2015.

### 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>1</sup>

I hereby certify that a copy of this decision was sent to the parties and their advocates shown on the attached list.



Cecil H. Creasey, Jr.  
Hearing Officer

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<sup>1</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.