

Issue: Group III Written Notice with Termination (verbal abuse of client); Hearing Date: 05/10/16; Decision Issued: 05/11/16; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10787; Outcome: Full Relief; **Attorney's Fee Addendum issued 05/31/16 awarding \$2,015.00.**



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10787

Hearing Date: May 10, 2016

Decision Issued: May 11, 2016

PROCEDURAL HISTORY

On February 29, 2016, Grievant was issued a Group III Written Notice of disciplinary action with removal for engaging in language towards a patient that was deemed to be unprofessional and non-therapeutic thereby violating DI 201, Abuse and Neglect.

On March 1, 2016, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On March 21, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 10, 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 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 Direct Service Associate II at one of its facilities. Grievant's duties included interacting with Facility Residents.

Following the Agency's issuance of a Group III Written Notice, Grievant filed a grievance alleging wrongful termination. Regarding the Agency's witnesses, Grievant claimed, "Statements given by these individuals are false & deliberate." Grievant asked for a "review of the video cameras in the dayroom" because the cameras would "prove that at no time did I have any contact or communication with the patient that I'm being accused." She added, "I never called the pt. names." The Agency's two primary witnesses were Ms. J and Mr. C. Grievant claimed the video would "show [Ms. J] was just sitting & watching ..." and that Mr. C "was not present in the dayroom when the incident occurred."

On March 25, 2016, the Hearing Officer conducted a prehearing telephone conference call with the Agency's Representative and the Grievant's Counsel. During the prehearing conference call, the Hearing Officer instructed the parties to send the Hearing Officer a copy of their proposed exhibits and provide the opposing party a copy of those exhibits. The Hearing Officer advised the parties they could request that the Hearing Officer issue orders compelling witnesses to appear at the hearing.

On March 29, 2016, Grievant's Counsel asked the Hearing Officer to issue orders compelling the attendance of Ms. L, Ms. B, Ms. M, and Ms. W. On March 30, 2016, the Hearing Officer issued orders compelling the attendance of these employees.

On March 29, 2016, Grievant's Counsel asked the Hearing Officer to issue an order compelling the Agency to produce a copy of a video recording of the incident. On March 30, 2016, the Hearing Officer issued an Order for the Agency to produce:

A true copy of any CD and/or DVD video recording from the surveillance camera of the Evening Shift from the date of February 9, 2016 depicting the Common Area/Day Room of Unit 5C, and everyone in said Common Area/Day Room during all of said Evening Shift.

The Agency's Representative received the order requiring production of the video. The Agency did not produce a copy of the video of the incident to Grievant's Counsel prior to the hearing. The Agency did not contact Grievant's Counsel and notify him that the video would not be produced. The Agency did not contact the Hearing Officer to explain that the video would not be produced to Grievant's Counsel prior to the hearing. The Agency did not seek a protective order from the Hearing Officer.

The Agency's Representative received a copy of the witness orders. The Agency did not notify Ms. L, Ms. B, Ms. M, and Ms. W that they had been compelled to attend the hearing. They did not appear at the hearing.

Four workdays in advance of the hearing, the Agency presented the Hearing Officer with a copy of its proposed exhibits for the hearing. Included in those exhibits was a copy of the video of the incident. The Agency provided Grievant's Attorney with a copy of its exhibits but did not include a copy of the video.

During the hearing, Grievant's Counsel objected to the admission of the video and argued the Agency violated Grievant's procedural due process right. Neither party sought a continuance of the hearing.

CONCLUSIONS OF POLICY

When an employee files a grievance, he or she is entitled to properly prepare any defenses he or she may have to an agency's disciplinary action. If an agency acts to deny an employee's right to defend him or herself, the agency's disciplinary action cannot be upheld.¹

Section 5.8 of the Grievance Procedure Manual provides:

¹ When an agency fails to provide procedural due process to an employee during the pre-hearing process, the hearing process typically cures that defect. In this case the Agency has denied Grievant procedural due process as part of the hearing process.

The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline.

Several procedures are established to enable an employee to fully and fairly present his or her defenses to an agency's disciplinary action.

Section 5.7 of the Grievance Procedure Manual provides:

A hearing officer's authority derives from Va. Code §§ 2.2-3000 et seq., this Manual, and the Rules for Conducting Grievance Hearings. Hearing officers have the authority to: *** 3. Issue orders for the appearance of witnesses at hearing and the production of documents.

Section III(E) of the Rules for Conducting Grievance Hearings provides:

Witness Orders: Orders should be issued in the name of the hearing officer and sent by the hearing officer to the appropriate individual(s), with a copy to each party. **The agency shall make available for hearing any employee ordered by the hearing officer to appear as a witness.** An order for an agency employee to testify as a witness should be sent to the agency's advocate, not the individual employee. The agency shall then provide a copy of the order to the employee and require his/her attendance at hearing. The hearing officer can ask the agency to schedule requested employee witnesses to a shift compatible with the date, time, and location of the hearing. If this unduly burdens the business of the agency, the hearing can be continued to another day, witnesses can testify by phone, or the hearing may be moved to a location at the work site. (Emphasis added).

The Agency's failure to provide a copy of the video to Grievant's Counsel and orders to four witnesses appears to have resulted from the inexperience of the Agency's Representative and not from a malicious intent.

The Agency's failure to provide Grievant with a copy of the video of the incident was contrary to the Grievance Procedure Manual, Rules for Conducting Grievance Hearings, and the Hearing Officer's order. Grievant intended to present material defenses to the Agency's disciplinary action based on the video. The Agency's failure to produce the video prevented Grievant from presenting her defenses thereby denying her right of procedural due process.

The Agency's failure to notify the four witnesses that they were compelled to appear at the hearing was contrary to the Grievance Procedure Manual, Rules for Conducting Grievance Hearings, and the Hearing Officer's order. Ms. L was an eye witness to part of the incident and material to Grievant's defense. Ms. W was working

approximately five feet away from the incident and may have been an eye witness to the conflict. The testimony of these two witnesses was likely material to Grievant's defenses to the Agency's disciplinary action. The Agency's failure to notify these two witnesses that they were compelled to appear at the hearing denied Grievant's right of procedural due process.

Section III(E) of the Rules for Conducting Grievance Hearings provides:

Sanctions: The hearing officer has the authority to take necessary and appropriate action, including the authority to order sanctions against a party for the misconduct of the party or the party's advocate (for example, failure to comply with an order, discussing testimony with witnesses during the hearing, undue disruption of the hearing) during the hearing process to the extent such misconduct materially prejudices the opposing party's case at hearing or otherwise undermines or disrupts the integrity of the pre-hearing or hearing process. Permissible sanctions might include, for example, 1) Ordering the exclusion of related evidence or arguments; 2) Drawing an adverse inference (see § V(B)); 3) Disqualifying an advocate from continued representation of a party; 4) Ejection from the hearing. The hearing officer does not have the authority to order monetary penalties as sanctions. In considering any order of sanctions, the hearing officer should take into account, as appropriate, 1) whether a party is pro se or represented by an attorney or other experienced representative, and 2) the seriousness of the conduct, such as, for instance, whether the conduct was in bad faith rather than a simple mistake. The severity of any order of sanctions must be commensurate with the conduct necessitating the sanction. The ordered sanction and supporting reasons must be included in the hearing decision.

The Agency's failure to comply with the Hearing Officer's orders justifies sanctioning the Agency. Grievant was unable to fully prepare for and present her defenses during the hearing. The appropriate sanction in this case is to exclude the Agency's exhibits, testimony, and argument thereby rendering it unable to meet its burden of proof. The Agency's disciplinary action must be reversed.

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 Director'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 at the same facility prior to removal, or if the position is filled, to an equivalent position at the same facility. 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:

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.²

[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

² Agencies must request and receive prior approval from EDR before filing a notice of appeal.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

DIVISION OF HEARINGS

ADDENDUM TO DECISION OF HEARING OFFICER

In re:

Case No: 10787-A

Addendum Issued: May 31, 2016

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.³ 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.⁴

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 Counsel submitted a petition showing he devoted 15.5 hours to representing Grievant and seeking reimbursement for those hours. Based on a rate of \$131 per hour, Grievant is entitled to reimbursement in the amount of \$2,015.00.

AWARD

Grievant is awarded attorneys' fees in the amount of \$2,015.00.

³ Va. Code § 2.2-3005.1(A).

⁴ § 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

Carl Wilson Schmidt, Esq.
Hearing Officer