

Issue: Group III Written Notice with Termination (client abuse); Hearing Date: 05/24/16; Decision Issued: 05/25/16; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10795; 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: 10795

Hearing Date: May 24, 2016

Decision Issued: May 25, 2016

PROCEDURAL HISTORY

On March 9, 2016, Grievant was issued a Group III Written Notice of disciplinary action with removal for client abuse.

On March 14, 2016, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On April 5, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 24, 2016, a hearing was held at the Agency's office.

APPEARANCES

Grievant
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 Nursing Supervisor at one of its facilities. Grievant had prior active disciplinary action. On February 24, 2016, Grievant received a Group I Written Notice.

On January 27, 2016, the Resident inappropriately touched several female staff members at the Facility in the Housing Unit. He was restrained in a chair with wheels at 10:55 p.m. Agency staff rolled the Resident in the chair from the Housing Unit to the Behavioral Unit.

The Resident was placed in restraints in accordance with an order from the Doctor. At approximately 11:52 p.m., the Doctor ordered that the Resident be injected with sedatives. The Restraint/Seclusion Monitoring Form showed that the Resident should be released from restraints when, "Resident in control of his actions, no physical aggression."¹

Grievant began her shift on January 27, 2016 at approximately 11 p.m. At approximately 12:10 a.m. on January 28, 2016, Grievant observed that the "Resident was calm at present."

At 12:26 a.m., Grievant observed the Resident and concluded, "Resident appears to be drowsy and closing eyes frequently. No distress noted."

¹ Agency Exhibit 4.

At 12:50 a.m. on January 28, 2016, the Resident was released from the restraints to use the restroom. He was returned to the chair without objection. Grievant did not prevent the Resident from being restrained again.

Grievant authorized release of the Resident from the chair at approximately 1 a.m. The Resident was removed from restraints by Agency staff.

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 defines² 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

² 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.

On January 27, 2016, the Resident was placed in restraints. He was to be removed when he no longer displayed physical aggression. Grievant observed that the Resident was calm at 12:10 a.m. on January 28, 2016. She did not release the Resident from restraints at that time. Grievant observed that the Resident was calm at 12:26 a.m. She did not remove the Resident from restraints at that time. Grievant observed the Resident being removed from restraints to use the restroom. She observed him calm but did not stop him from being returned to restraints. The Resident should have been removed from restraints at approximately 12:10 a.m. and certainly by 12:26 a.m. Grievant allowed the Resident to remain in restraints longer than appropriate thereby engaging in client abuse. 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 she was unaware of the Doctor's order regarding when to release the Resident from restraints and, thus, she delayed removing the restraints. Grievant did not testify during the hearing or otherwise present credible evidence showing when she became aware of the Doctor's order indicating when the Resident should be released from restraints. The Agency's practice was to release residents from restraints when they became calm. Grievant received training regarding the Agency's expectations.

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"³ 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

³ *Va. Code § 2.2-3005.*

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.⁴

⁴ Agencies must request and receive prior approval from EDR before filing a notice of appeal.

[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