

Issue: Group III Written Notice with Termination (client abuse); Hearing Date: 05/19/16; Decision Issued: 05/25/16; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10805; Outcome: No Relief – Agency Upheld; **Administrative Review**: EDR Ruling Request received 06/06/16; EDR Ruling No. 2016-4368 issued 06/22/16; Outcome: AHO's decision affirmed; **Administrative Review**: DHRM Ruling Request received 06/07/16; DHRM Ruling issued 06/29/16; Outcome: Request denied. No policy violation identified.



# **COMMONWEALTH of VIRGINIA**

*Department of Human Resource Management*

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

## **DECISION OF HEARING OFFICER**

In re:

**Case Number: 10805**

Hearing Date: May 19, 2016

Decision Issued: May 25, 2016

### **PROCEDURAL HISTORY**

On March 31, 2016, Grievant was issued a Group III Written Notice of disciplinary action for client abuse.

On April 7, 2016, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On April 26, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 19, 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 employed Grievant as a DSP II at one of its facilities. She had been employed for nearly 13 years prior to her removal. Grievant had prior active disciplinary action. On October 10, 2014, Grievant received a Group I Written Notice for unsatisfactory attendance.

The Individual resides at the Facility. She is a 41 year old female who has a severe intellectual disability. She is unable to speak, sign, gesture, or otherwise communicate.

On March 12, 2016, Grievant was working on the Unit providing services to individuals living on the Unit. Ms. R was responsible for providing services to several individuals including the Individual. The Individual wanted a snack prior to the customary time individuals living on the Unit received their snacks. At approximately 7:15 p.m., Ms. R complied with the Individual's request and gave the Individual a snack of peanut butter on graham crackers and several saltine crackers. The Individual received this snack prior to the regular time she otherwise would have received her snack.

At approximately 7:35 p.m., Ms. R was working with an individual in the bathroom. Grievant was in the dining room approximately 53 feet away from the bathroom. Four individuals and the Individual were in the dining room with Grievant. Grievant observed the Individual open the refrigerator in order to obtain a snack. Grievant stepped out of the dining room and asked Ms. R if the Individual had already

had a snack that day. Ms. R said, "I already fed her". Grievant re-entered the dining room. A few seconds later, Grievant used her right hand with an open palm to smack the Individual across the left side of her face. The hit left an imprint of Grievant's hand on the left side of the Individual's face across her left cheek and neck. The Individual screamed and left the dining room. The Individual was upset and crying as she moved towards Ms. R. The Individual held her hands up and extended away from her chest as she approached Ms. R. Ms. R stopped the Individual and looked at her hands but observed nothing of concern. Ms. R looked at the Individual's face and observed a red hand print on the left side of the Individual's face. The print was from someone's right hand. Ms. R took the Individual to two other employees who also observed the hand print.

### **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
- 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.

---

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

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.

“Assault or battery” is client abuse under the Agency's policy. On March 16, 2016, Grievant used her right hand to slap the left side of the Individual's face. The hit was with sufficient force to leave an imprint of Grievant's right hand on the Individual's face. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for client abuse. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, the Agency's decision to remove Grievant must be upheld.

Grievant argued that she did not strike the Individual but rather the Individual hit herself in her face. Grievant's argument is not persuasive for several reasons. First, the evidence showed that the person hitting the Individual left an imprint of a right hand on the Individual's face. The imprint showed that fingers of the hand were pointed back and toward the Individual's ear. Ms. R was clear that the imprint reflected a hit from a right hand. If the Individual had hit herself, she most likely would have done so with her left hand. The imprint would have reflected a left hand and not a right hand if the Individual had hit herself. Second, the Individual is right handed. If she had hit herself with sufficient force to leave an imprint, she most likely would have done so to the right side of her face, not the left side. Third, Grievant informed the Investigator that she is right handed. A right handed person would be more likely to hit someone using her right hand. Fourth, shortly after the incident was reported to Agency managers, the Supervisor spoke with Grievant. Without being asked or prompted by the Supervisor, Grievant told the Supervisor that “people were trying to get rid of me” and that, “no one saw me hit [the Individual].” The latter comment suggests Grievant knew she would be blamed for the incident without having been informed she was responsible for hitting the Individual.

Grievant argued that Ms. R was “out to get me fired.” Ms. R's testimony was credible and does not appear to have been motivated by a desire to remove Grievant from employment.

*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>2</sup> Under the *Rules for Conducting Grievance Hearings*, “[a] hearing officer must give deference to the agency's consideration and assessment of any

---

<sup>2</sup> Va. Code § 2.2-3005.

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 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 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>3</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*

---

Carl Wilson Schmidt, Esq.  
Hearing Officer

---

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