

Issue: Group III Written Notice with Termination (client abuse); Hearing Date: 03/23/17; Decision Issued: 03/24/17; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10964; 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: 10964**

Hearing Date: March 23, 2017  
Decision Issued: March 24, 2017

**PROCEDURAL HISTORY**

On January 5, 2017, Grievant was issued a Group III Written Notice of disciplinary action with removal for client abuse.

On January 24, 2017, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On February 13, 2017, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 23, 2017, 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 a Security Officer Team Leader at one of its facilities. Grievant had prior active disciplinary action. On December 14, 2016, Grievant received a Group II Written Notice for failure to follow established protocols and techniques as trained in Therapeutic Options of Virginia (TOVA).

When a patient was disruptive, Facility staff placed the patient in a Secured Unit. While standing at the doorway of the Secured Unit, patients were "patted down" and required to remove their shoes. If a patient refused to take off his shoes prior to entering the Secured Unit, then the patient was to be held in the Secured Unit in a one-to-one relationship until the patient complied. A patient's shoes were not to be removed from the patient without following TOVA procedures.

The Patient resided at the Facility. He is deaf. He had been disruptive in the past and on at least three other occasions placed in the Secured Unit.

On November 1, 2016, the Patient was disruptive. One employee held the Patient's left arm while another employee held the Patient's right arm and they escorted the Patient through a hallway to the Secured Unit. Several other patients followed the two employees holding the Patient. Grievant followed behind those employees.

When the Patient was at the doorway to the Secured Unit, he was instructed to remove his shoes. The Patient was standing while he was being held by two

employees. Employees were in front of the Patient inside the Secured Unit and employees were behind him outside of the Secured Unit. Grievant heard that the Patient was refusing to remove his shoes. Without being asked to do so, Grievant brushed pass the Unit Manager and placed himself directly behind the Patient. Grievant bent down and grabbed the Patient's left lower leg and pulled it upwards. This caused the Patient's legs to move backwards and the top of his body to move forwards. The Patient was surprised that his leg was grabbed and pulled upwards. He reacted to reject Grievant's grasp. The Patient lost his balance and the two employees holding him upwards could not keep him up. The employees fell to the ground while holding the Patient as the Patient struggled to be released. Once the group fell to the floor, staff held the Patient down on the ground until the struggle deescalated.

### **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.

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<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 he 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.

Client abuse is a Group III offense.<sup>2</sup> Grievant was permitted to restrain the Patient in accordance with TOVA. He attempted to remove the Patient's shoes using a method that was unnecessary as well as not permitted under TOVA. The Patient should have been placed in a one-to-one relationship with another employee until the Patient removed his shoes voluntarily. Instead, Grievant grabbed the Patient's leg and pulled it upwards causing the Patient to fall over as well as a group of employees to fall to the ground with the Patient. Grievant endangered the Patient's safety as well as the safety of his co-workers. Grievant engaged in client abuse thereby justifying the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, the Agency's decision to remove Grievant is upheld.

Grievant argued that the Patient was disruptive and that on occasion the requirements of TOVA were not followed at the Facility. No credible evidence was presented to show that Facility staff regularly disregarded TOVA or that the Patient was so disruptive that TOVA techniques could not be applied.

Grievant argued that the Agency did not have to remove him from employment and that his supervisor acted out of an improper motive. The evidence showed that Grievant engaged in client abuse and that he had a prior written notice for a similar offense that was mitigated. The Agency chose not to mitigate Grievant's removal in this instance and the Agency's decision is supported by the evidence presented during the hearing.

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>3</sup> 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-

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<sup>2</sup> See, Attachment A, DHRM Policy 1.60.

<sup>3</sup> Va. Code § 2.2-3005.

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>4</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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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