

Issue: Group III Written Notice with Termination (client abuse); Hearing Date: 02/16/18; Decision Issued: 02/20/18; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 11150; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11150

Hearing Date: February 16, 2018
Decision Issued: February 20, 2018

PROCEDURAL HISTORY

On December 13, 2017, Grievant was issued a Group III Written Notice of disciplinary action with removal for client abuse.

Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On January 4, 2018, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On February 16, 2018, 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. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. 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 Psychiatric Nursing Assistant at one of its facilities. He began working for the Agency in 2016. Grievant had prior active disciplinary action. He received a Group III Written Notice on May 10, 2017 for using excessive force.

The Patient was a 17 year old male with a diagnosis of Adjustment Disorder with mixed disturbance of emotions and conduct. He was admitted to the Facility involuntarily by local police on November 22, 2017. He mistakenly believed his admittance only would be for a few hours.

The Facility had hallway 1 (vertical) and hallway 2 (horizontal) connected in the pattern of an "L". The Patient was standing at the point where the two hallways connected. Grievant entered at the top of hallway 1 and began walking towards the patient. Grievant intended to turn to his left and continue walking down hallway 2. The Patient observed Grievant walking down the hallway and said "I want to use the f—king phone!" The Patient was holding a ball in his right hand slightly behind his back. His left arm was hanging down to his side. Grievant did not respond to the Patient. As Grievant approached the Patient, Grievant moved to his left and to the Patient's right side. Grievant's right arm may have brushed against the Patient's right arm as Grievant passed the Patient.

After the Patient passed Grievant, Grievant turned to his right and positioned himself behind the Patient. Grievant grabbed both of the Patient's arms using a technique he learned during his Therapeutic Options of Virginia training. He attempted to restrain the Patient until other staff could provide assistance. The Patient resisted. Grievant and the Patient struggled and the Patient was pushed up against a wall. Once other staff arrived, the Patient was placed in a seclusion room.

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 defines¹ 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 he or 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

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

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.

The Patient did not engage in behavior that would have authorized Grievant to restrain the Patient. Nevertheless, Grievant grabbed both of the Patient's arms in order to restrain his movement. By restraining the Patient without the authority to do so, 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 must be upheld.

Grievant asserted that he was justified in restraining the Patient. Grievant argued that as he passed the Patient, the Patient dipped his right shoulder forward and jabbed the top of his shoulder into the right front side towards the middle of Grievant's chest. Grievant presented a picture of his chest with red marks were the Patient supposedly hit him. Grievant testified the hit was painful.

The Agency's video of the incident shows that Grievant's right arm and the Patient's right arm may have brushed against each other as Grievant passed the Patient. The video does not show the Patient having contact with Grievant's chest. The video does not show the Patient dipping forward quickly and with sufficient force to cause the front of the Patient's right shoulder hit Grievant's chest. The video contradicts Grievant's defense.

Grievant argued that the video did not show everything that happened. Although Grievant's assertion is correct, the video is of sufficient quality that if the Patient had dipped his shoulder to hit Grievant, the video would have reflected the hit.

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"² 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.

² Va. Code § 2.2-3005.

Grievant argued that he was discriminated against based on his race. Grievant argued that the Agency did not remove from employment other staff of different races who engaged in similar behavior. Grievant did not provide sufficient details regarding the identity of the employees, how the employees were treated by the Agency for the Hearing Officer to conclude Grievant was discriminated against because of his race. The Agency took disciplinary action because of his behavior.

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 request an administrative review by EEDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EEDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Equal Employment and 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 must also provide a copy of your appeal to the other party 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.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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.^[1]

^[1] Agencies must request and receive prior approval from EEDR 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 EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer