Issue: Group III Written Notice with Termination (client abuse); Hearing Date: 03/21/19; Decision Issued: 03/22/19; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 11320; 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: 11320

Hearing Date: March 21, 2019
Decision Issued: March 22, 2019

PROCEDURAL HISTORY

On February 1, 2019, Grievant was issued a Group III Written Notice of disciplinary action with removal for client abuse.

On February 3, 2019, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On February 12, 2019, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On March 21, 2019, 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 Direct Service Associate II at one of its facilities. Grievant received abuse and neglect policy training in 2017. No evidence of prior active disciplinary action was introduced during the hearing.

The Patient was a 14 year old male who had suffered trauma in is home. His diagnosis included Borderline Intellectual Disability, Attention-deficient/hyperactivity disorder and Post Traumatic Stress Disorder. He was sometimes combative with staff and other patients.

On January 18, 2019, several staff were escorting the Patient from one part of the Facility to "the pod" where he could calm down. He had been disruptive by giving the middle finger to teachers, refusing redirection, and attempting to punch and kick staff. He was not cooperating with staff as they escorted him down a hallway towards a double door. Two security officers were present. The Patient attempted to hold on to one of the double doors that was locked in place. Upon opening the other door, Grievant pulled the Patient into the pod. The Patient began to "throw a punch" at Grievant. Grievant positioned herself to avoid the Patient's punch and stop the attack. She pressed him against the wall while attempting to hold his arms away from her. Grievant told the Patient, "you picked the wrong mother f—ker to mess with!" The Patient continued to try to hit Grievant and began trying to bite Grievant. Other staff were doing little to help Grievant. Grievant called for assistance from other staff once the Patient began trying to bite her. Grievant told the Patient, "go ahead and f—king bite me, I want at least three weeks off." Other staff began to assist Grievant and the Patient was placed in the Emergency Restraint Chair.

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[1] 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:
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> - 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 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 Agency alleged Grievant engaged in client abuse by using excessive force to pull the Patient through the double door and position the Patient against the wall. The video evidence is not sufficient to show that Grievant engaged in physical abuse of the Patient. This conclusion was confirmed by the Acting Facility Director who testified

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

there was insufficient evidence to conclude Grievant engaged in physical abuse of the Patient. If the Hearing Officer assumes for the sake of argument that Grievant engaged in physical abuse, the video clearly shows other employees rendering very little assistance to Grievant in handling the Patient except when Grievant specifically called for assistance.

The Agency alleged Grievant engaged in verbal abuse of the Patient. This allegation is substantiated. Grievant used threatening and intimidating language when she said, "you picked the wrong mother f—ker to mess with!" Grievant used demeaning language when she said "go ahead and f—king bit me, I want at least three weeks off." The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for verbal 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 asserted that she did not remember cussing at the Patient or otherwise speaking inappropriately to him. The Agency presented several credible witnesses who heard Grievant speak inappropriately to the Patient.[2] The Agency met its burden of proof.

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

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**.

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[2] Grievant alleged some of the Agency's witnesses were biased against her. The Agency's witnesses were credible.

[3] Va. Code § 2.2-3005.

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]

[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

[1] Agencies must request and receive prior approval from EEDR before filing a notice of appeal.