

Issue: Group III Written Notice with Termination (patient neglect/abuse); Hearing Date: 02/06/13; Decision Issued: 02/22/13; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10012; Outcome: Partial Relief; **Administrative Review: EDR Ruling Request received 03/08/13; EDR Ruling No. 2013-3554 issued 04/22/13; Outcome: Remanded to AHO; Remand Decision issued 05/10/13; Outcome: Original decision affirmed; EDR Ruling Request on Remand Decision received 05/23/13; EDR Ruling No. 2013-3623 issued 06/17/13; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request on original hearing decision received 03/08/13, and on Remand Decision received 05/23/13; DHRM Ruling issued 07/03/13; Outcome: AHO's decision affirmed; Judicial Review: Appealed to Amherst County Circuit Court (07/12/13); Outcome: AHO's decision affirmed (08/22/13).**



# ***COMMONWEALTH of VIRGINIA***

## ***Department of Human Resource Management***

### **OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

#### **DECISION OF HEARING OFFICER**

In re:

**Case Number: 10012**

Hearing Date: February 6, 2013  
Decision Issued: February 22, 2013

#### **PROCEDURAL HISTORY**

On December 4, 2012, Grievant was issued a Group III Written Notice of disciplinary action with removal for violation of Departmental Instruction 201.

On December 16, 2012, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On January 14, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 6, 2013, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
Grievant's Counsel  
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 DSA II at one of its facilities. He had been employed by the Agency for approximately two years.

Grievant had prior active disciplinary action. On July 10, 2012, he received a Group II Written Notice for refusal to work emergency overtime. On October 3, 2012, he received a Group II Written Notice for refusal to work emergency overtime.

The Client is a 61 year old male with severe mental disabilities. He functions in a "moderate range of mental retardation/intellectual disability."<sup>1</sup> The Client has a history of self-injurious behavior as well as aggressive and other socially inappropriate behaviors.

In July 2012, the Agency added a new strategy to decrease falls by requiring "Increased supervision during bathing (2 staff: 1 individual)".<sup>2</sup> Grievant was advised of the requirement but on several occasions he failed to comply with the requirement because he believed it was easier to have one person in the shower room with the Client rather than having two staff which could trigger adverse behavior by the Client. The Supervisor observed Grievant not taking a second person with him to shower the Client. She instructed Grievant to take a second person with him every time he showered any client.

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<sup>1</sup> Agency Exhibit 1.

<sup>2</sup> Agency Exhibit 14.

On November 10, 2012, Grievant went to the Client's room and noticed the Client was displaying self-injurious behavior of scratching and hitting his head. Grievant redirected the Client to the Day Hall and the Client calmed down and fell asleep in his wheelchair. At approximately 7 p.m., Grievant took the Client to the shower room. Grievant did not obtain a second employee to assist him with showering the Client. When the Client was moving from his wheelchair to the shower chair, the Client grasped the safety bar using only his right hand. The Client typically used both arms to grab the safety bar. The Client showered without displaying self-injurious behavior. Grievant began drying the Client at the completion of the shower. The Client began hitting his arms against the shower chair. The Client kicked his legs which caused an injury to his toe. Grievant attempted to redirect the Client while the Client was engaging in self-injurious behavior.

The Agency later determined that the Client had a laceration to his fifth left toe and bruising to his left hand and arm. X-rays were taken and he was discovered to have a fracture of the ulna of his left arm. The Client received four sutures to the injured toe.

### **CONCLUSIONS OF POLICY**

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action."<sup>3</sup> Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

Failure to follow a supervisor's instructions is a Group II offense.<sup>4</sup> Grievant was aware of the Agency's policy that two staff assist a client with bathing. When he failed to comply with the policy, the Supervisor instructed him to make sure he bathed clients with a second staff present. On November 10, 2012, Grievant bathed the Client without a second employee present. He failed to comply with the Supervisor's instruction thereby justifying the issuance of a Group II Written Notice. The Group III Written Notice must be reduced to a Group II Written Notice.

Upon the accumulation of two or more Group II Written Notices, an employee may be removed from employment. In this case, Grievant has accumulated three Group II Written Notices. Accordingly, his removal must be upheld.

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<sup>3</sup> The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

<sup>4</sup> See, Attachment A, DHRM Policy 1.60.

Grievant argued that the requirement of having two staff present when clients were bathed was not a part of the Client's treatment plan and, thus, not required. In addition, staffing limitations sometimes prevented employees from complying with the two staff requirement. These arguments fail. Grievant was obligated to comply with the Agency's policies and supervisory instructions regardless of whether the two staff requirement was included in the Client's treatment plan. Insufficient evidence was presented to show that staffing limitations prevented Grievant from obtaining a second employee to assist with bathing the Client.

The Agency argued that Grievant engaged in client abuse/neglect because he failed to provide a safe environment for the Client. This conclusion certainly is possible. However, there is insufficient evidence for the Hearing Officer to conclude that having a second person in the shower room would have prevented the Client from injuring himself. There is no reason to believe that the Client was unsafe while in Grievant's care. The Client engaged in self-injurious behavior at times unpredictable to staff. The Client kicked a chair and hit his arm. It is unclear how having a second person in the room would have stopped the Client from kicking a chair and hitting his arm. Employees were expected to provide the Client as much freedom of movement as possible and there is no reason to believe that a second employee would have held the Client in a manner that would have prevented him from hurting himself. The purpose of having two staff present during bathing was to prevent clients from falling. The Client's injuries did not result from falling.

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>5</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-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 further 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 is **reduced** to a Group II Written Notice. Grievant's removal is **upheld** based on the accumulation of disciplinary action.

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<sup>5</sup> Va. Code § 2.2-3005.

## 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>6</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].

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<sup>6</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.

*S/Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer



**COMMONWEALTH of VIRGINIA**  
**Department of Employment Dispute Resolution**

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case No: 10012-R**

Reconsideration Decision Issued: May 10, 2013

**RECONSIDERATION DECISION**

On April 22, 2013, the Office of Employment Dispute Resolution issued Ruling No. 2013-3554 remanding this matter to the Hearing Officer and stating:

While we do not necessarily agree that the grievant was denied due process in this instance, we find that the hearing decision lacks supporting detail that would allow EDR to render a determination regarding this issue. Failure to follow a supervisor's instructions, presumably regarding how to provide a safe environment for residents, may be sufficiently related to the information provided to the grievant about the alleged behavior in this instance such that no violation of the grievant's right to due process occurred. However, the agency, which bears the burden of proof at hearing, must provide notice of charges and supporting facts stated in a sufficiently clear manner to allow for a full and fair defense of the charges. As the decision does not specifically address this issue, EDR directs the hearing officer to provide further explanation of his factual findings with respect to the charges for which the grievant was on notice and the charges fairly considered by the hearing officer in making his determination. Accordingly, we remand the hearing decision for an explanation and/or reconsideration of the grievant's failure to follow a supervisor's instructions and that offense's relation to the charges set forth on the Written Notice and all documentation provided to the grievant as part of pre-disciplinary due process.

The Agency alleged that Grievant failed to provide a safe environment for the Client because he failed to have another person with him when he showered the Client. This allegation is no different than the allegation that Grievant failed to comply with the Agency's policy requiring two employees to shower a client. In other words, the environment was unsafe because Grievant failed to comply with the Agency's policy



requiring two staff to shower clients. The Agency established that Grievant failed to comply with the Agency's policy thereby justifying the issuance of a Group II Written Notice. The Agency did not establish that Grievant engaged in client abuse because the client likely would have suffered the same injuries regardless of whether a second person was present.

### **APPEAL RIGHTS**

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by DHRM, the hearing officer has issued a revised decision.

#### Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

*/s/ Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

POLICY RULING OF THE DEPARTMENT OF  
HUMAN RESOURCE MANAGEMENT

In the Matter of the Department of Behavioral Health  
and Developmental Services

The grievant has requested an administrative review of the hearing officer's decision in Case No. 10012. For the reason stated below, we will not interfere with the application of this decision. The agency head of the Department of Human Resource Management (DHRM), Ms. Sara R. Wilson, has directed that I conduct this administrative review.

The hearing officer listed the relevant facts of this case as follows:

On December 4, 2012, Grievant was issued a Group III Written Notice of disciplinary action with removal for violation of Departmental Instruction 201.

*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 DSA II at one of its facilities. He had been employed by the Agency for approximately two years.

Grievant had prior active disciplinary action. On July 10, 2012, he received a Group II Written Notice for refusal to work emergency overtime. On October 3, 2012, he received a Group II Written Notice for refusal to work emergency overtime.

The Client is a 61-year old male with severe mental disabilities. He functions in a "moderate range of mental retardation/intellectual disability..". The Client has a history of self-injurious behavior as well as aggressive and other socially inappropriate behaviors.

In July 2012, the Agency added a new strategy to decrease falls by requiring "Increased supervision during bathing (2 staff: 1 individual)". Grievant was advised of the requirement but on several occasions he failed to comply with the requirement because he believed it was easier to have one person in the shower room with the Client rather than having two staff which could trigger adverse behavior by the Client. The Supervisor observed Grievant not taking a second person with him to shower the Client. She instructed Grievant to take a second person with him every time he showered any client.

On November 10, 2012, Grievant went to the Client's room and noticed displaying self-injurious behavior of scratching and hitting his head. Grievant redirected the Client to the Day Hall and the Client calmed down and fell asleep in his wheelchair. At approximately 7 p.m., Grievant took the Client to the shower room. Grievant did not obtain a second employee to assist him with showering the Client. When the Client was moving from his wheelchair to the shower chair, the Client grasped the safety bar using only his right hand. The Client typically used both arms to grab the safety bar. The Client showered without displaying self-injurious behavior. Grievant began drying the Client at the completion of the shower. The Client began hitting his arms against the shower chair. The Client kicked his legs which caused an injury to his toe. Grievant attempted to redirect the Client while the Client was engaging in self-injurious behavior.

The Agency later determined that the Client had a laceration to his fifth left toe and bruising to his left hand and arm. X-rays were taken and he was discovered to have a fracture of the ulna of his left arm. The Client received four sutures to the injured toe.

#### *CONCLUSIONS OF POLICY*

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action." Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

Failure to follow a supervisor's instructions is a Group II offense. Grievant was aware of the Agency's policy that two staff assist a client with bathing. When he failed to comply with the policy, the Supervisor instructed him to make sure he bathed clients with a second staff present. On November 10, 2012, Grievant bathed the Client without a second employee present. He failed to comply with the Supervisor's instruction thereby justifying the issuance of a Group II Written Notice. The Group III Written Notice must be reduced to a Group II Written Notice.

Upon the accumulation of two or more Group II Written Notices, an employee may be removed from employment. In this case, Grievant has accumulated three Group II Written Notices. Accordingly, his removal must be upheld.

Grievant argued that the requirement of having two staff present when clients were bathed was not a part of the Client's treatment plan and, thus, not required. In addition, staffing limitations sometimes prevented employees from complying with the

two staff requirement. These arguments fail. Grievant was obligated to comply with the Agency's policies and supervisory instructions regardless of whether the two staff requirement was included in the Client's treatment plan. Insufficient evidence was presented to show that staffing limitations prevented Grievant from obtaining a second employee to assist with bathing the Client.

The Agency argued that Grievant engaged in client abuse/neglect because he failed to provide a safe environment for the Client. This conclusion certainly is possible. However, there is insufficient evidence for the Hearing Officer to conclude that having a second person in the shower room would have prevented the Client from injuring himself. There is no reason to believe that the Client was unsafe while in Grievant's care. The Client engaged in self-injurious behavior at times unpredictable to staff. The Client kicked a chair and hit his arm. It is unclear how having a second person in the room would have stopped the Client from kicking a chair and hitting his arm. Employees were expected to provide the Client as much freedom of movement as possible and there is no reason to believe that a second employee would have held the Client in a manner that would have prevented him from hurting himself. The purpose of having two staff present during bathing was to prevent clients from falling. The Client's injuries did not result from falling.

*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 ...." 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 further the disciplinary action.

#### DECISION

Based on his assessment of the evidence, the hearing officer reduced the Agency's issuance to the Grievant of a Group III Written Notice

of disciplinary action to a Group II Written Notice. The Grievant's removal was upheld based on the accumulation of disciplinary action.

## DISCUSSION

Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. By statute, the DHRM has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by DHRM or the agency in which the grievance is filed. The challenge must cite a particular mandate or provision in policy. This Department's authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

In each instance where a request is made to this Agency for an administrative review, the party making the request must identify with which human management resource policy, either state or agency, the hearing decision is inconsistent or is misinterpreted. In the instant case, the grievant was charged with "Violation of Departmental Instruction #201, *Reporting and Investigating Abuse and Neglect of Clients*. A facility investigation substantiated that on 11/16/12, you failed to provide a safe environment for an individual (SR), which resulted in a fracture of his left arm."

In his request for administrative review, the grievant states, "The findings by the Hearing Officer impose discipline for conduct separate and apart from the Written Notice for failing to comply with the supervisor's instruction, not abuse and neglect, the allegations qualified by the Agency." The grievant points out that there is nothing in the records or transcript of the hearing that supports that the grievant failed to follow instructions on November 12, 2012, or was given a Written Notice qualifying such an allegation for such conduct on November 12, 2012.

Based on questions raised by the Director of the Office of Employment Dispute Resolution (EDR), the decision was remanded to the hearing officer for clarification. Such a decision was issued by the hearing officer who clarified how he determined that the grievant's failure to follow instructions was related to the resulting injuries to the Client. The grievant appealed the hearing officer's second remand decision. In a ruling dated June 17, 2013, the Director of EDR accepted the hearing officer's explanation regarding the relationship between the original allegations and the final outcome of the hearing officer's decision. In his second administrative ruling, the Director of EDR stated, in part, "Upon remand, EDR directed the hearing officer to provide further explanation of his factual findings with respect to the charges for which the grievant was on notice and the charges fairly considered by the hearing officer in making his determination. The hearing officer has done so, concluding that failing to comply with agency policy is substantially related to the allegation on the Written Notice, namely, failure to provide a safe environment for the resident. Thus, the inclusion of this language can be considered part of the original charge and no due process violation has occurred as a matter of the grievance procedure."

Given that this Agency has found no violation of human resource management policy, we have no authority to interfere with the application of this decision.

Ernest G. Spratley  
Assistant Director  
Office of Equal Employment Services