

Issue: Group III Written Notice with Termination (client abuse); Hearing Date: 01/09/14; Decision Issued: 01/14/14; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10226; 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: 10226

Hearing Date: January 9, 2014
Decision Issued: January 14, 2014

PROCEDURAL HISTORY

On November 1, 2013, Grievant was issued a Group III Written Notice of disciplinary action with removal for psychological abuse of the client.

On November 4, 2013, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On December 2, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 9, 2014, 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 Direct Service Associate II at one of its facilities. Grievant had prior active disciplinary action. On December 5, 2011, Grievant received a Group I Written Notice for use of obscene or abusive language and disruptive behavior displayed within the patient area. On February 22, 2013, Grievant received a Group II Written Notice for failure to follow instructions and/or policy.

The Client was admitted to the Facility on an involuntary status for a second admission in 2001. She is blind in both eyes. Her Axis I diagnoses are Schizophrenia-Paranoid Type and Neuroleptic-Induced Tardive Dyskinesia. There is no Axis II diagnosis. She wears a wig.

During an exit interview on December 15, 2013, Ms. G, an employee who was leaving the Facility, alleged that Grievant took a patient's wig and was putting it on the heads of other patients. The Agency began an investigation and concluded that Grievant had engaged in psychological abuse.

Ms. G testified during the hearing that in 2013 Grievant removed the wig from the Client's head and placed it on the heads of several other patients including a male patient. Grievant typically did this during dinner time. Grievant would put the wig on a patient's head and bring that patient to the dining area. Ms. G believed that Grievant's behavior was disrespectful to patients and created the risk that diseases could be transferred from one patient to another. Her testimony was credible.

The CNA testified that in September 2013, she observed that Grievant had placed the Client's wig on the head of another patient. Her testimony was credible. The DSA II testified that Grievant was "fooling around" with the Client's wig by putting the wig on male patients' heads "as a joke".¹ The DSA II's testimony was credible.

The Clinical Director offered an opinion that Grievant's behavior was "likely [to] constitute psychological abuse." She added:

I believe the actions alleged to have occurred, when taken by an individual in a caretaking position, would commonly be understood by most people to potentially cause emotional anguish or distress, or ridicule, which fits the relevant definition of psychological abuse.²

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 defines³ client abuse as:

Abuse means any act or failure to act by an employee or other person responsible for the care of an individual 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

¹ Agency Exhibit 5.

² Agency Exhibit 10.

³ See, Va. Code § 37.1-1 and 12 VAC 35-115-30.

- 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 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.

In 2013, Grievant intentionally placed the wig of the Client on the heads of other patients at the Facility. He did so to "as a joke." Grievant's behavior might have caused psychological harm to the Client and possibly the other patients because he could have caused emotional anguish, distress, or ridicule. Grievant's behavior constituted psychological abuse.

"Abuse or neglect of clients" is a Group III offense.⁴ The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice of disciplinary action for client abuse. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

Grievant admitted to one instance of placing the Client's wig on another patient. He denied doing so six times as he believed the Agency had claimed. If the Hearing Officer assumes for the sake of argument that Grievant's assertion is true, the outcome of this case does not change. Even one instance of placing a client's wig on the head of another patient "as a joke" constitutes psychological abuse.

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"⁵ 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

⁴ See, Attachment A, DHRM Policy 1.60.

⁵ *Va. Code § 2.2-3005.*

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 14th St., 12th 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 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 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.⁶

[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

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