

Issue: Group III Written Notice with Termination (client abuse); Hearing Date: 01/22/14; Decision Issued: 01/23/14; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10242; 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: 10242

Hearing Date: January 22, 2014
Decision Issued: January 23, 2014

PROCEDURAL HISTORY

On October 29, 2013, Grievant was issued a Group III Written Notice of disciplinary action with removal for client abuse and violation of the Agency's alcohol abuse policy.

On November 16, 2013, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On December 16, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 22, 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. She is responsible for providing services to individuals residing at the facility.

The Client is a 56 year old male with severe mental disabilities. He is non-verbal.

At approximately 7:10 a.m. on October 12, 2013, Grievant was working in the dayhall along with several staff. She was sitting on a couch next to the wall. The Client was sitting on another couch facing Grievant's couch. The Client was sitting a few feet away from Grievant. The Client began a "behavior" in which he went to the floor and began moving while on his back. He moved towards Grievant and kicked her. She redirected him back to his couch. The Client then moved on the floor back towards Grievant and hit her between her legs. She punched the Client on the front of his body above his stomach using her left hand with a closed fist. Grievant said, "Don't kick me!" She turned the Client away from her so that he would not kick her again. Several employees observed Grievant punch the Client.

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:

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 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 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.

On October 12, 2013, Grievant punched the Client with her fist in response to his hitting her. Her action was intentional with the objective of harming the Client. Grievant’s behavior was not authorized by any Agency policy or justified under any training she received. Her behavior constituted client abuse contrary to the Agency’s policy. Client abuse is a Group III offense.² Upon the issuance of a Group III offense,

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

² See, Attachment A, DHRM Policy 1.60.

an agency may remove an employee. Accordingly, the Agency's decision to remove Grievant must be upheld.³

Grievant argued that she did not abuse the client but rather turned him around and placed him in his wheelchair. Grievant did not testify and did not present any witnesses to confirm her argument. The Agency's witnesses were credible and showed that Grievant punched the Client's body. The Agency has presented sufficient evidence to support its allegation that Grievant engaged in client 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"⁴ 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**.

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

³ The Agency also argued that Grievant should receive disciplinary action because she tested positive for alcohol based on a fluid sample taken the day after the client abuse. The Agency did not present sufficient evidence to support this allegation. The Agency did not present evidence regarding its sample collection procedure, the chain of custody, the testing procedure, or any interpretation of the test results. Although the Agency did not establish a basis for discipline for violating its substance abuse policy, Grievant's client abuse remains a sufficient basis to support the removal.

⁴ Va. Code § 2.2-3005.

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.⁵

[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

⁵ Agencies must request and receive prior approval from EDR before filing a notice of appeal.