

Issue: Group III Written Notice with Termination (client abuse); Hearing Date: 02/27/14;
Decision Issued: 04/07/14; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case
No. 10258; 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: 10258

Hearing Date: February 27, 2014

Decision Issued: April 7, 2014

PROCEDURAL HISTORY

On December 17, 2013, Grievant was issued a Group III Written Notice of disciplinary action for verbal/psychological abuse.

On December 17, 2013, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On January 13, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 27, 2014, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee
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 LPN at one of its facilities. She had been employed by the Agency for over five years.

The Patient was difficult for staff at the Facility to manage. He was often argumentative, aggressive, and threatening. He often tried to manipulate staff by threatened to have them fired. He was verbally abusive to others. The Patient had a history of biting and poking others. The Patient often falsely claimed staff were out to get him when they actually were trying to help him.

The Agency uses four point restraints only when a patient is a danger to him or herself or to others.

On November 21, 2013, the Patient went to the Ward from another location with a group of patients and staff. When the group finished their activities in the Ward, they left the Ward. The Patient, however, refused to leave the Ward despite repeated requests from staff. He knew that if he refused to leave the Ward, staff would place him in a wheelchair and escort him to the other location.

The Patient remained seated in a chair in the middle of the Ward. Grievant opened the door to the Ward and rolled a wheelchair into the room. The RNCA observed Grievant approaching with the wheelchair and said to hold off on transporting the Patient until she spoke with the Doctor. Grievant rolled the wheelchair to a plastic

chair next to a wall. She sat down in the plastic chair and positioned the wheelchair to her right and parallel to her chair but slightly in front of her. The center of the wheel of the wheelchair was positioned parallel with Grievant's knees.

The Patient observed Grievant bring the wheelchair into the room and recognized that the chair was being brought for his use. After he walked seven or eight steps, Grievant realized that the Patient was walking over to sit in the wheelchair. Grievant told the Patient to "hold on". Grievant wanted to wait until there was an order authorizing the use of a wheelchair for the Patient. Grievant placed her right hand on the left push handle of the wheelchair and twisted the wheelchair counterclockwise so that the wheelchair and Grievant's chair were at a 90 degree angle. Grievant lifted her right leg and placed her calf on the open right leg rest of wheelchair. She was attempting to communicate to the Patient that she was not ready for him to sit in the wheelchair. The Patient continued walking another four or five steps towards the wheelchair. Grievant observed that the Patient intended to get into the wheelchair despite her having put her leg on part of the wheelchair. Grievant rolled the wheelchair a few inches from her right to her left to position the wheelchair closer to the center of her body. She raised her right leg higher on the wheelchair rigging and focused the sole of her right shoe toward the Patient. The Patient continued walking to the chair. He placed his left hand on the right rail of the wheelchair. Grievant continued to hold the left rail of the wheelchair with her right hand. The Patient turned his body to the side as he raised his left leg over Grievant's right foot and lower leg. He slid his hips to his left and sat in the wheelchair. As he lowered his left leg, the back of his leg at the knee touched the knee of Grievant's right leg and pushed Grievant's right leg downward so that her right foot rested near the floor. After he was seated, the Patient aligned his right leg with the direction of the wheelchair and put his feet down into the foot rests of the wheelchair. The Patient removed his right foot from the footrest and used it to twist the wheelchair clockwise to face the same direction that Grievant was sitting. He used his right foot to push the wheelchair forward and came to a stop a few feet away from Grievant. He remained seated in the chair without incident.

Grievant remained seated in her chair. The RNCA was inside an office with a door opening to the wall next to Grievant. The RNCA opened the door and spoke with Grievant. Grievant told the RNCA that the Patient had kicked her. The Patient heard Grievant's claim and knew he had not kicked her.

The RNCA called the Doctor and asked about putting restrains on the Patient. She told the Doctor that the Patient had kicked a staff member. The Doctor ordered that the Patient could be placed in restraints. If the Doctor had known the Patient did not kick Grievant, he would not have ordered that the Patient be placed in restraints.

On November 21, 2013, Grievant wrote an Interdisciplinary Note regarding the incident. She wrote, in part, "[Patient] put [Patient's] leg over mine and then kicked my leg off of the chair."¹

¹ Agency Exhibit 2.

On November 25, 2013, the Patient filed a complaint against Grievant claiming that Grievant falsely told the RNCA that the Patient kicked her and as a result he was placed in four point restraints.

On December 5, 2013, Grievant wrote an incident report stating, in part, "[i]nstead, [Patient] walked over to the chair and began sitting down, kicking my leg out of the way and then rolling the chair away. I asked [Patient] then not to put [Patient's] feet or hands on me again."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 defines 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.

² Agency Exhibit 2.

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

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 November 21, 2013, Grievant brought a wheelchair into the Ward and used her "body language" to convey to the Patient that he was not to sit in the wheelchair. She pointed the bottom of her foot at the Patient and attempted to block his entry into the wheelchair. This action violated the Agency's standards regarding treating patients with dignity. The Patient disregarded Grievant's verbal instructions to refrain from getting into the wheelchair. The Patient's behavior was consistent with his mental health concerns. Grievant knew or should have known that blocking the Patient from entering the wheelchair would serve to provoke him. After the Patient used his leg to push Grievant's leg off of the wheelchair, Grievant told the RNCA that the Patient had kicked her. Grievant's assertion was false. The Patient had not kicked Grievant. As a result of Grievant's claim that the Patient had kicked her, the Doctor concluded it was appropriate to place the Patient in four point restraints. At the time the Patient was placed in four point restraints, he was not disruptive or acting in a manner that would otherwise have justified placing him in restraints. The Patient overheard Grievant's statement to the RNCA and filed a complaint claiming that Grievant had falsely accused him of kicking her. The Agency has presented sufficient evidence to support its allegation that Grievant engaged in verbal/psychological abuse of the Patient. Accordingly, the Agency's issuance of a Group III Written Notice must be upheld. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Grievant's removal also must be upheld.

Grievant argued that the definition of "kick" would include the behavior the Patient displayed when he forced her leg away from the wheelchair. The Hearing Officer adopts the common usage of the term "kick" to include use of one's foot. In this case, the Patient did not use his foot to push Grievant's leg away and, thus, he did not kick her.

Grievant argued that she placed her foot on the chair to block the chair from moving away. The wheelchair was on a flat surface and not moving away from Grievant. The video of the incident showed that Grievant grabbed the wheelchair's push handle when she observed the Patient approaching. She turned the chair as the Patient continued approaching her. She moved her leg slightly higher on the rigging and angled the sole of her foot toward the Patient to communicate to the Patient that he was not to sit in the wheelchair. Grievant's assertion is not supported by the evidence.

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.

Grievant presented evidence of FHMT W who put her foot on a chair when a patient wanted to sit in the chair next to her. She wanted the patient to sit across the table from her because she did not like having that patient so close to her. The patient wanted her to remove her foot but she refused. She received a Group I Written Notice for a non-therapeutic interaction. Grievant is not similarly situated to FHMT W. FHMT W did not falsely claim that the patient she encountered had kicked her. The Agency did not inconsistently discipline its employees.

In light of the standard set forth in the Rules, 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., 11h Floor
Richmond, VA 23219

⁴ Va. Code § 2.2-3005.

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., 1st 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].

Carl Wilson Schmidt, Esq.
Hearing Officer

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