

Issue: Group III Written Notice (client neglect/abuse); Hearing Date: 02/19/14;
Decision Issued: 03/10/14; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.;
Case No. 10264; 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: 10264

Hearing Date: February 19, 2014

Decision Issued: March 10, 2014

PROCEDURAL HISTORY

On September 13, 2013, Grievant was issued a Group III Written Notice of disciplinary action for client abuse.

On September 26, 2013, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On January 22, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 19, 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 employs Grievant as a Direct Service Associate II at one of its facilities. He received an overall rating of "Contributor" on his most recent annual performance evaluation. No evidence of prior active disciplinary action was introduced during the hearing.

The Resident sometimes uses a wheelchair. The Resident is tall and his wheelchair has a high back to accommodate his height. The wheelchair has a tray that slides on the front. The tray is padded because the Resident has a history of banging his head on the tray. The wheelchair has a seatbelt to secure the Resident's pelvis snugly in the seat of the chair. The wheelchair has foot rests that can be attached or removed from the chair. When the foot rests are attached to the chair, they can be flipped upwards to enable the Resident to get in and out of the chair. Once the Resident is seated in the chair, the foot rests can be flipped down to create a platform on which the Resident can rest his feet.

On August 6, 2013 at approximately 8:06 p.m., Grievant was with the Resident in a hallway near the Resident's room. The Resident's wheelchair did not have the foot rests attached to the chair. The Resident was sitting in the chair but with his pelvis was forward towards the front edge of the chair. If the seatbelt was fastened, it was not fastened tight enough to secure the Resident from falling out of the wheelchair. The Resident was hunched forward with his hands cupped over the front of the tray. The Resident was holding on in a manner to prevent him from sliding out of the wheelchair and onto the floor. His feet were touching the floor. Grievant began pulling the

Resident backwards. Grievant pulled the Resident backwards approximately ten feet into his bedroom. The Resident continued to hold on in order to avoid slipping out of his wheelchair while Grievant pulled the wheelchair backwards.

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 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.

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

Abuse of clients is a Group III offense.² Grievant engaged in client abuse because he engaged in an action that might have caused physical injury to the Resident. The Resident was not sitting properly in the wheelchair. His pelvis was too far forward in the seat of the chair. The wheelchair did not have its foot rests attached. The Resident's feet were touching the floor. Because the Resident's hips were not towards the back of the seat and his feet were touching the ground, Grievant placed the Resident at risk of slipping out of the wheelchair as Grievant pulled the Resident backwards into his room. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for client abuse.

Grievant argued that he followed proper procedures. Grievant argued that the Resident had the right to sit the way he wished. Grievant asserted that he was simply doing his job and that the discipline was too harsh. Grievant said that others should have helped him instead of just watching him. The evidence showed that Grievant engaged in client abuse as defined under policy. Grievant did not satisfy the Agency's expectations for his work performance because the Resident should have been seated properly so that he did not have to hold on to the tray and have his feet placed in the foot rests so that his feet did not drag on the ground as Grievant pulled the Resident. Once the Agency has established that an employee has engaged in behavior justifying disciplinary action, the Hearing Officer can only reduce the disciplinary action upon the showing of mitigating circumstances.

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. The Agency mitigated the disciplinary action from a Group III with removal to a Group III Written Notice. Grievant did not present evidence of mitigating circumstances that would justify a further reduction in the level of disciplinary action taken against him. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

² See, Attachment A, DHRM Policy 1.60.

³ *Va. Code § 2.2-3005.*

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action 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.⁴

[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

⁴ Agencies must request and receive prior approval from EDR before filing a notice of appeal.