

Issue: Group II Written Notice with Suspension (client abuse); Hearing Date: 02/28/14; Decision Issued: 04/01/14; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10266; Outcome: Partial Relief.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10266

Hearing Date: February 28, 2014
Decision Issued: April 1, 2014

PROCEDURAL HISTORY

On October 18, 2013, Grievant was issued¹ a Group II Written Notice of disciplinary action with a five work day suspension for client abuse.

On November 20, 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 she requested a hearing. On January 27, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 28, 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?

¹ Grievant signed the Written Notice on October 21, 2013.

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 at one of its facilities. No evidence of prior active disciplinary action was introduced during the hearing.

The Client was a 50 year old woman with an Axis I diagnosis of Schizoaffective Disorder, Bipolar Type and Polysubstance Dependence. Her Axis II diagnosis was Antisocial Personality Disorder.

One of the Client's behaviors was to dig into her vagina and spread secretions on the tables, wall, and staff. Her inappropriate behavior was often preceded by her beginning to remove her clothing. Staff were instructed to redirect her by guiding her to her room.

On September 24, 2013, Grievant was responsible for continuously monitoring the Client. Grievant and the Client were sitting at a table with four chairs. Each of the chairs weighted at least 100 lbs. The backs of the chairs rose to the middle of the Client's back. The Client's room was located towards the back of the Client as she sat in the chair. Grievant was seated in the chair at the table to the Client's right. The Client stood up from the table and walked to her right towards the end of the dayhall. Grievant followed after the Client. Grievant was holding a clipboard. The Client turned and began walking back towards the table. Grievant followed the Client. The Client sat

back down in the chair. Grievant returned to the table and sat in a chair. The Client stood up again and walked to her right and stood next to the chair where Grievant had been sitting. Grievant also stood up and walked forward and turned with her back to the Client's room. The Client faced Grievant and began to adjust her clothing to begin to undress. The Client had her arms akimbo with her wrists behind her hips. Grievant recognized this as the beginning of a behavior. Grievant attempted to verbally redirect the Client to stop her behavior. The Client continued adjusting her clothing. Grievant placed the clipboard under her left arm pit and held the clipboard to her side by holding her left elbow to her side. Grievant used her right arm and attempted to hook her arm around the Client's left arm in order to escort the Client to her bedroom. The Client resisted but moved forward a few steps in Grievant's direction and the direction of the bedroom. The Client wanted to return and sit in her chair at the table instead of moving forward as Grievant wanted. The Client moved to her right towards the Chair and pulled Grievant along with her. Grievant continued trying to move the Client towards the Client's bedroom. Grievant took her left hand and positioned her body within a few inches of the Client's left arm. Grievant used her left hand to attempt to hold the Client's left arm. Grievant used her right hand to attempt to hold the Client's right arm as the Client tried to pull away from Grievant. Grievant was slightly hunched downward and continued to pull the Client toward the bedroom. At this point, Grievant was pulling the Client to Grievant's left while the Client was trying to move forward to sit in the chair. The Client turned to her right while standing so that she could position herself to slide to her left and sit in the chair as she sat down. Grievant continued pulling the Client backwards but relented as Grievant recognized that the Client intended to sit in the chair and Grievant would not be able to move the Client to her bedroom. Grievant pushed the Client slightly backwards as the Client fell into the chair.² The weight of the Client's body along with the force of Grievant's push moved the heavy chair a few inches 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 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

² The Hearing Officer does not believe Grievant pushed the Client with the objective of harming the Client or punishing the Client. It may have resulted from an acceptance that Grievant would not be successful in redirecting the Client to her room.

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

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 September 24, 2013, Grievant was attempting to redirect the Client to her room. When the Client chose to return to the chair at the table and Grievant recognized this, she pushed the Client as the Client moved to sit in the chair. As a result of the push, the Client sat in the chair with greater force than she would have otherwise experienced. The Agency has demonstrated that the Client could have been hurt by Grievant's behavior such that Grievant engaged in client abuse. Although the Agency mitigated the disciplinary action from a Group III to a Group II Written Notice with suspension, the disciplinary action must be further mitigated.

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

⁴ Va. Code § 2.2-3005.

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.

Although Grievant's action was intentional, Grievant's action was influenced by two factors. First, Grievant was pulling the Client in the direction of the Client's room but then stopped pulling and moved in the direction of the chair as the Client was attempting to sit down. In other words, much of Grievant's action was a reaction to the Client's movement and momentum. Second, Grievant did not have complete balance as the Client began sitting in the chair. Grievant had a clipboard under her left arm that she was holding by keeping her left elbow close to her body. Her right foot and ankle became intertwined with the Client's right foot which adversely affected her balance. There is sufficient evidence to show that Grievant could have helped the Client sit down with less force, but there is not sufficient evidence to support issuance of a Group II offense. The disciplinary action must be reduced to a Group I Written Notice.

The Agency argued that Grievant failed to comply with the Therapeutic Options of Virginia (TOVA) techniques when handling the Client. The evidence showed that Grievant was authorized to place her hands on the Client in order to assist with escorting the Client to her room. The Client was not aggressive towards Grievant but rather was attempting to get away from Grievant. Grievant's actions towards the Client were consistent with attempting to escort the Client. Grievant's failure to use a TOVA technique was not a basis for taking disciplinary action.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with a five workday suspension is **reduced** to a Group I Written Notice. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of suspension and credit for leave and seniority that the employee did not otherwise accrue.

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.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.