

Issue: Group III Written Notice with Termination (verbal abuse); Hearing Date: 02/25/14; Decision Issued: 03/14/14; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No.10268; 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: 10268**

Hearing Date: February 25, 2014

Decision Issued: March 14, 2014

#### **PROCEDURAL HISTORY**

On December 13, 2013, Grievant was issued a Group III Written Notice of disciplinary action with removal for verbal abuse.

On January 1, 2014, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On January 27, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 25, 2014, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
Grievant's Counsel  
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 an Emergency Response Team Security Officer at one of its facilities. He had been employed by the Agency since October 10, 2009 without having received any prior active disciplinary action.

The Resident was approximately 65 years old. He had a history of violence towards staff and other residents at the Facility. Several employees did not wish to work with the Resident. The Resident did not like several employees at the Facility. Ms. R had a good relationship with the Resident even though he previously hit her. The Resident did not like Grievant because of prior conflict between them. Grievant had to intervene when the Resident acted inappropriately. On one occasion, the Resident had fallen and hit his head. He tried to hit Grievant but slipped in the shower and hit his head. The Resident received stitches to treat his wound. On one occasion, the Resident was receiving a shot from a nurse who called for an ERT member to be present. Grievant was the only one available and when the Resident realized Grievant would be called, the Resident asked the nurse, "why you call that n—er for." Grievant heard the comment and redirected the Resident because patients were not allowed to use "racial language."

The Resident had a hearing scheduled in a Court located in another locality. The hearing was to determine if the Resident could be transferred to another Facility that was less restrictive for patients residing there. The Agency arranged for the Resident to be transported from the Facility to the Court in a wheelchair accessible passenger van.

The Agency assigned Ms. R, Grievant, and Officer T to transport the Resident to the Court. Ms. R spoke with the Resident to tell him about the trip and that she would be accompanying him. The Resident asked who else would participate in the trip. Ms. R said she was not sure. The Resident said he did not want Grievant to go with them because Grievant did not like the Resident.

On the following morning, Ms. R went to the medical unit to get supplies she might need for the trip. She obtained graham crackers to give to the Resident. Ms. R realized that Grievant would be accompanying them on the trip. She questioned the Charge Nurse about whether Grievant should go given that the Resident did not like him. The Charge Nurse said she would try to get another employee to go on the trip. The Charge Nurse was unable to have another employee go in Grievant's place.

Grievant, Officer T, Ms. R, and the Resident entered the van. The Resident was seated in the back row on the driver's side of the vehicle. Ms. R sat in the back row on the passenger's side of the vehicle. Officer T drove the van. Grievant sat in the front passenger's seat. Between the front seats and back row was another set of seats. The Resident was sitting in the seat with the seatbelt across his front and fastened. The Resident was not wearing handcuffs. A set of restraints had been placed directly behind the driver's seat. The restraints had metal clamps on them that could be used to hit someone if the Resident was able to grab the restraints. As the van moved, Grievant observed that the restraints were beginning to slide backwards towards the Resident. Grievant did not want the restraints to become accessible to the Resident so Grievant put on his gloves<sup>1</sup>, stood up, and moved out of his seat and into the middle of the van. He pushed the restraints forward and since the van was moving, he sat in the middle seat in front of Ms. R.

Grievant turned towards the Resident and began speaking to the Resident. Grievant said "I heard you did not want me to go." The Resident did not respond. Grievant said, "That's manipulation and that's not good for your treatment."

Grievant began making reference to prior incidents between Grievant and the Resident. In a prior incident, the Resident had called Grievant a ni—er. Grievant said to the Resident, "this goes to show you how stupid you are" for calling Grievant that word. Grievant continued to explain the etymology of the word ni—er and said that instead of putting Grievant down, the Resident was praising Grievant. The Resident continued to look forward without responding to Grievant.

As they travelled up and down mountains, Ms. R said to the Resident to look at the view and animals. The Resident did not respond to Ms. R. Grievant said, "I bet you would like to f—k them too."<sup>2</sup>

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<sup>1</sup> Agency employees had been instructed to wear gloves when handling residents or equipment in order to avoid the transfer of germs.

<sup>2</sup> The Resident was a convicted sex offender who had engaged in inappropriate sexual behavior.

Ms. R took the graham crackers she had obtained from the medical unit and began to give them to the Resident. Grievant mistakenly believed the crackers were the property of Ms. R and that she was giving the Resident food not approved by the Agency. Grievant said he needed to check the graham crackers first. Grievant took the crackers and looked at the package. Grievant attempted to give the package to the Resident who said he did not want the crackers. Grievant insisted the Resident take the crackers. The Resident said, "I don't want the damn crackers" and then crumbled the crackers in his hand. Some of the crumbs fell out and into the Resident's seat. Grievant said if the Resident did not want the crackers, the Resident should put them in his pocket. Grievant's voice was elevated. Officer T heard Grievant's voice and said "it's not that serious, just crackers." When the van stopped at a stop light, Grievant threw some of the crumbs out the window to dispose of them.

During the trip, the Resident was positioned in the middle of the seat but would sometimes move out of that position. Ms. R would push the Resident back to the middle of the seat. Grievant said, "remember what happened that day on 4A when you had to get stitches." Grievant said this while adjusting the Resident's seatbelt as the Resident had shifted his position in his seat.

After the Resident returned to the Facility, he spoke with other residents who asked about his trip. The Resident said that Grievant was mean to him and wanted to fight him.

On November 6, 2013 at 2:56 p.m., Ms. R sent the Nurse Manager an email stating:

As you know on 11-6-13, I accompanied [Resident] to [Location] for his Annual Review. As we got ready to leave and [Resident] saw what security staff was going with us he stated he did not want to go with [Grievant] due to previous incidents between them. I assured the resident everything would be okay. Once on the van, [Grievant] said, "I heard about you not wanting me to go with you, you see how far that went. That is called "manipulation." During the ride, [Grievant] kept bringing up past conflicts ([Resident] calling him a ni—er, the day that [Resident] slipped in the shower on 4A and required stitches, and other things from [another Facility]. He stated that they could pull the van over if needed and that they could justify sustained injuries. I had taken some snacks (graham crackers from Medical) along with us. I opened a pack for [Resident] and [Grievant] stated he needed to check them. At that time he took the crackers from me looked at them and then handed them to [Resident] and [Resident] stated he did not want them. [Grievant] then stood up and insisted that [Resident] took them. When we started our trip, [Grievant] was in the front seat of the van, he then relocated to the seat in front and to the right of [Resident]. [Resident] remained quiet and [Grievant] continued to taunt [Resident] and attempt to get him to reach and talk.

[Resident] was called a “defiant ni—er, stupid and other things.) I felt really offended and I do not feel this behavior was appropriate. I am not sure how [Grievant] will feel about me relaying this information but I felt I needed to.<sup>3</sup>

## 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<sup>4</sup> 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

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<sup>3</sup> Agency Exhibit 4.

<sup>4</sup> See, Va. Code § 37.1-1 and 12 VAC 35-115-30.

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.

Abuse of clients is a Group III offense.<sup>5</sup> Grievant engaged in verbal abuse of the Resident. Before Grievant stepped into the van, he knew that the Resident did not like him. Grievant initiated the discussion with the Resident even though there was no need for discussion. The Resident did not initiate a conversation with Grievant. Once Grievant began speaking to the Resident, the Resident was non-responsive to Grievant's comments. Grievant's behavior amounted to lecturing a resident who did not like Grievant and did not wish to be subjected to Grievant's lecturing. Ms. R perceived Grievant's behavior as intended to taunt the Resident into having a reaction to his comments. Her perception is supported by the evidence.

Grievant lectured the Resident that the Resident had attempted to engage in "manipulation" and "that's not good for your treatment." Grievant did not have mental health treatment responsibilities and, thus, there was no basis for Grievant to inform the Resident that his behavior was manipulative and not good for his treatment. Medical staff at the Facility would have been better suited to determine whether the Resident's behavior was problematic.

Grievant told the Resident that calling Grievant a ni—er "shows how stupid you are." Grievant was demeaning to the Resident by calling him stupid. It was unnecessary for Grievant to address a conflict occurring several months earlier.

Grievant argued that he did not call the Resident stupid for calling Grievant a ni—er but rather was commenting that people who use the term were stupid because they do not know the word's etymology. Ms. R's testimony was credible regarding Grievant's statements. Even if the Hearing Officer assumes for the sake of argument that Grievant did not expressly tell the Resident he was stupid, the effect of Grievant's conversation was the same as saying the Resident was stupid. There was no reason for Grievant to begin discussing the Resident's name calling other than to criticize the Resident's prior behavior. If Grievant said that use of the word was "stupid", it would be reasonable for the Resident to believe that Grievant was calling the Resident stupid give that the Resident had used the word when referring to Grievant.

Grievant told the Resident, "I bet you would like to f—k them too" referring to animals that they observed as they looked out the vehicle's windows. Grievant's comments served to demean and humiliate the Resident. Grievant denied making this statement. Ms. R's testimony was credible that she heard Grievant make this statement.

Although Grievant's job duties included correcting patients when they misbehaved, the Resident was not misbehaving while they travelled on the van. Grievant was not correcting the Resident's behavior, he was taunting and verbally

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<sup>5</sup> See, Attachment A, DHRM Policy 1.60.

abusing the Resident. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for verbal abuse. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, the Agency's decision to remove Grievant must be upheld.

*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 ...."<sup>6</sup> 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 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 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by fax to (804) 371-7401, or e-mail.

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<sup>6</sup> Va. Code § 2.2-3005.



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 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto: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.<sup>7</sup>

[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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>7</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.