

Issue: Group III Written Notice with Termination (client abuse); Hearing Date: 03/31/14; Decision Issued: 04/07/14; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10294; Outcome: No Relief – Agency Upheld; **Administrative Review: EDR Ruling Request received 04/21/14; EDR Ruling No. 2014-3872 issued 04/29/14; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 04/21/14; DHRM Ruling issued 04/30/14; Outcome: AHO's decision affirmed.**



# ***COMMONWEALTH of VIRGINIA***

## ***Department of Human Resource Management***

### **OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

#### **DECISION OF HEARING OFFICER**

In re:

**Case Number: 10294**

Hearing Date: March 31, 2014

Decision Issued: April 7, 2014

#### **PROCEDURAL HISTORY**

On January 10, 2014, Grievant was issued a Group III Written Notice of disciplinary action with removal for placing a patient in seclusion without an order.

On January 31, 2014, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On March 4, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 31, 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 DSA II at one of its facilities. She had been employed by the Agency for approximately seven years prior to her removal effective January 10, 2014.

To enter the seclusion room at the Facility, one must walk down a hallway and unlock and open a door to the observation room. Once inside the observation room, one must open another door to enter the seclusion room. When the door to the seclusion is closed, someone inside cannot open the door from the inside and get out. The seclusion room is used to allow patients to calm down when necessary. A patient cannot be placed in the seclusion room without a doctor's order being requested by a nurse.

The Client is a 62 year old male with an Axis I diagnoses of Schizoaffective Disorder-Bipolar Type, Cognitive Disorder- NOS, Alcohol Induced Persisting Dementia and Alcohol Dependence (in full remission due to controlled environment.) His Axis II diagnosis is Personality Disorder- NOS.

On November 20, 2013, Grievant was pushing the Client in a wheelchair. The Client was cussing, yelling, and spitting at the others around him. He acted violently towards Grievant. Grievant decided to take the Client to the seclusion room. She began walking towards the hallway where the observation and seclusion rooms were located. The Direct Service Associate, Mr. R, began pushing the Client who was sitting in his wheelchair. When they reached the door to the observation room, Grievant

unlocked the door and held it open while Mr. R pushed the Client into the observation room. Grievant walked a few feet to the door of the seclusion room and opened it. She held open the door to the seclusion room while Mr. R pushed the Client into the seclusion room. Once Mr. R and the Client were inside the seclusion room, Grievant walked back to the door from the observation room to the hallway. She took a chair from inside the observation room and propped open the hallway door. Mr. R positioned the Client in the middle of the seclusion room while Grievant watched while standing in the observation room. Mr. R walked out of the seclusion room leaving the Client inside. Grievant touched the handle to the door of the seclusion room and swung the door shut. She removed her hand from the door handle and positioned herself to look through the window in the seclusion room door so she could observe the Client. Less than a minute later, the Nurse walked down the hallway and looked into the observation room. She told Mr. Rand Grievant to remove the Client from the seclusion room. The Nurse knew that the Client was not supposed to be in seclusion because she had not initiated a request to place the Client in the seclusion room. Grievant opened the seclusion room door and Mr. R walked inside the room. Mr. R pushed the Client out of the seclusion room, out of the observation room, and into the hallway and to another location at the Facility.

## **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

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

- 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.

Policy 450-035 defines seclusion as the, "involuntary placement of a patient alone in an area secured by a door that is locked or held shut by a staff person, by physically blocking the door, or by any other physical or verbal means, so that the individual cannot leave it."<sup>2</sup> The Policy provides, "[w]hen a physician is not immediately available, a RN who has demonstrated competency in the application of seclusion and restraint may authorize initiation of seclusion or restraint and must be present at the time of initiation and at the time of termination."

Grievant did not have the authority to place a client in the seclusion room. Clients could only be placed in the seclusion room at the instruction of a nurse. On November 20, 2013, Grievant decided to place the Client in seclusion. She opened the doors to the observation and seclusion rooms to enable Mr. R to push the Client in his wheelchair into the seclusion room. After Mr. R left the seclusion room, Grievant closed the door to the seclusion room thereby secluding the Client inside. The Client did not wish to be in seclusion. Moving the Client into seclusion without following his service plan or under the authority of a nurse meant that Grievant placed the Client at risk of psychological harm. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for verbal and psychological abuse. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

Grievant asserted that she should not have been placed on the unit. In general, agency managers are free to assign employees as the Agency deems appropriate. Even if the Agency incorrectly placed her on the unit, she would remain subject to the Agency's policies that apply when she was working in any unit at the Facility.

Grievant argued that she believed Mr. R was a nurse and that he had authorized placing the Client in seclusion. Neither Grievant nor Mr. R testified. No credible

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<sup>2</sup> Agency Exhibit 8.

evidence was presented to support this claim. Mr. R was not an employee with the authority to authorize seclusion.

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>3</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., 1<sup>st</sup> 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

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<sup>3</sup> Va. Code§ 2 2-3005.

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., 1<sup>st</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>4</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].

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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