

Issue: Group III Written Notice with Termination (client abuse); Hearing Date: 06/03/14; Decision Issued: 06/16/14; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10361; Outcome: No Relief – Agency Upheld; **Administrative Review: EDR Ruling Request received 07/01/14; EDR Ruling No. 2015-3930 issued 07/28/14; Outcome: AHO’s decision affirmed; Administrative Review: DHRM Ruling Request received 07/01/14; DHRM Ruling issued 07/28/14; 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: 10361

Hearing Date: June 3, 2014
Decision Issued: June 16, 2014

PROCEDURAL HISTORY

On March 18, 2014, Grievant was issued a Group III Written Notice of disciplinary action with removal for psychological abuse and exploitation under Departmental Instruction 201.

On April 14, 2014, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On May 7, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 3, 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 PNA at one of its facilities. She had been employed by the Agency for approximately 8 years prior to her removal effective March 18, 2014. No evidence of prior active disciplinary action was introduced during the hearing.

The Patient resided at the Facility where Grievant worked. She was 20 years old and had a diagnosis of: Axis I, Anxiety Disorder not otherwise specified and Axis II, Borderline Personality Disorder. The Patient liked to hug employees and sometimes kissed them on the cheek. The Patient sometimes engaged in self injurious behavior by "cutting" herself. Staff were required to be in a "direct" observation of the Patient to ensure her safety. This meant staff were to be in a position to observe the Patient's hands and her behavior. The Patient had a Treatment Team of mental health professionals who developed a Treatment Plan governing how staff were to interact with the Patient.

On February 4, 2014, Ms. H was sitting "direct" with the Patient in the Patient's bedroom. The Patient told Ms. H that she had a romantic relationship with Grievant. The Patient stated that Grievant told the Patient that Grievant did not like f-gs and that it hurt the Patient's feelings but the Patient "let it go" because it wasn't the Patient's business to judge Grievant. The Patient said that Grievant asked the Patient for money and food and that the Patient gave those items to Grievant. The Patient said that Grievant was asking the Patient to pass "love notes" to other patients and that she had seen Grievant kiss another patient.

The Agency conducted an investigation of the allegations against Grievant. The Investigator met with the Patient to discuss the allegations. The Patient stated “I figure I might as well tell you the rest of the story ... things that actually went beyond just kissing and stuff.” The Patient claims she had intimate physical contact with Grievant on at least 10 to 15 occasions when the Patient was in the shower and Grievant was also in the shower room. The Patient claimed that she wanted to break up with Grievant and when the Patient told Grievant that their relationship should end, Grievant became angry and said “all fa—ots are like that. Why don’t you go and off yourself.”

The Investigator spoke with Grievant and she admitted giving the Patient the nickname “toad.” Grievant denied she and the patient had ever kissed but later on in the interview said that the Patient had kissed Grievant on the cheek and was immediately told by Grievant that such behavior was inappropriate and not to do it again. Later on during the interview, Grievant stated that the Patient had kissed her several times in her bedroom and also given her hugs. Grievant said she had not reported this behavior to the Registered Nurse or to the Patient’s treatment team. Grievant said she did not report the behavior because the Patient was just being friendly and Grievant was comfortable with the behavior.

Initially, Grievant told the Investigator that nothing personal was ever discussed between her and the Patient. Later in the interview, Grievant revealed that she had told the Patient personal information. Grievant admitting telling the Patient that Grievant had a boyfriend and Grievant had a daughter. Grievant explained that she told the Patient about her personal life so the Patient could learn, understand and move on and make something of herself. Grievant stated that she had recently had surgery and that the Patient and “everyone knew about it”. Grievant admitted to bringing in a 2 liter soda bottle and writing the Patient’s name on a label on the bottle to reserve the bottle for the Patient.

Grievant was playful and friendly towards the Patient. Grievant would sit “side-by-side” and “shoulder to shoulder” with the Patient even though Grievant was on direct observation. Because Grievant was on direct observation, Grievant should have been sitting across from the Patient in order to observe the Patient’s hands. Several other staff perceived Grievant to have a “buddy to buddy” relationship with the Patient.

Grievant received training regarding “boundaries” between staff and patients. She should have known not to develop a personal friendship with a patient.

Grievant should not have been “playful” with the Patient because doing so amounted to a crossing of the boundaries between a professional and personal relationship.

After Grievant had been removed from employment, the Patient told another employee, Ms. B, that the Patient thought she had gotten Grievant fired. The Patient said that the Patient had lied about Grievant having a relationship with the Patient. Ms.

B had worked with the Patient in the past and was familiar with the Patient. Ms. B believed the Patient was telling the truth because of the emotions being expressed by the Patient.

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 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.

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

Hospital Instruction Number 3125 governs Staff/Patient Relationship. This policy provides, in part:

Developing relationships with patients that are not considered professional and therapeutic is prohibited. Employees, not on duty, shall not make telephone calls to patients.

Staff members are prohibited from engaging in sexual activity with patients.

The Agency has not established that Grievant had an inappropriate intimate physical relationship with the Patient. The Patient did not testify at the hearing. Several employees testified that they believed the Patient's allegations because she repeated them consistently over time and she had not made similar allegations regarding any other staff. One employee, however, testified that after Grievant had been removed from employment, the Patient admitted to and was remorseful for having lied about her relationship with Grievant. The Patient's Treatment Plan stated, in part:

[The Patient's] life is characterized by emptiness, with few emotional attachments, few intermediate or long-term goals, and no sense of who she is as a person beyond being a "mental patient". Do not underestimate how ill she is and how vacant her life is. Creating "uproar" gives her some sort of fleeting interaction/meaning. She often ... tells tragic tales ... later found to be untrue.

When these factors are considered as a whole, the Hearing Officer cannot conclude that the Patient's allegations about having an intimate physical relationship are true.

The Agency has presented sufficient evidence to show that Grievant developed a friendship with the Patient, crossed many "boundaries" with the Patient, and shared family and other personal information with the Patient.

The Patient's Treatment Plan stated, in part:

Be mindful of the need for clear interpersonal boundaries) for example, no personal information, no hug/physical affection, it's okay to say "I don't talk about that when I'm at work"). If [the Patient] feels that she is "friends" with the staff, she will **likely get worse rather than better**.

If she is on direct supervision, maintain supervision of her but distance yourself physically from her if possible and do not talk with her except about basic needs. Monitoring staff will state "My job is to be with you for safety so I cannot talk with you while you are on direct."² (Emphasis added).

² Agency Exhibit 4, D-5.

By developing a friendship with the Patient, Grievant placed the Patient at risk of getting “worse rather than better.” Grievant’s behavior created the risk of psychological harm to the Patient thereby constituting Client Abuse under DI 201.

“[A]buse or neglect of clients” is a Group III offense.³ Grievant engaged in client abuse thereby justifying the Agency’s issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant’s removal must be upheld.

Grievant argued that no one told her that she was “crossing boundaries” with the Patient. The evidence showed the Grievant had received training regarding client abuse and properly working with personality disordered patients. In 2006, 2007, and 2008, Grievant received training on “Staff – Patient Boundaries”. Grievant knew or should have known that developing a friendship with the Patient was inappropriate.

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. 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:

³ See, Attachment A, DHRM Policy 1.60.

⁴ *Va. Code § 2.2-3005.*

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].

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

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer