

Issue: Group III Written Notice with Termination (client abuse); Hearing Date: 12/12/14; Decision Issued: 01/05/15; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10494; 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: 10494

Hearing Date: December 12, 2014

Decision Issued: January 5, 2015

PROCEDURAL HISTORY

On September 24, 2014, Grievant was issued a Group III Written Notice of disciplinary action with removal for physical abuse.

On October 8, 2014, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On November 3, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 12, 2014, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
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 Licensed Practical Nurse for approximately two years prior to her removal effective September 24, 2014. No evidence of prior active disciplinary action was introduced during the hearing.

The Client was transferred to the Facility for continued psychiatric care. She was hostile and aggressive when she arrived at the Facility on August 5, 2014.

On September 14, 2014, Grievant was in the nursing station handing out medication to clients. The nursing station was approximately 10 feet by 12 feet. Clients lined up outside of the nursing station in the day hall and passed by a window between the day hall and nursing station. Grievant identified clients and then passed each client medication through an opening in the window. Mr. K was in the day hall watching the clients as each client passed by the window. Mr. K could see Grievant through the window. The door between the day room and the nursing station was locked. Clients inside the day room could not enter the nursing station where Grievant was working unless a staff member opened the door between the two rooms.

The Client approached the window and spoke with Grievant through the opening in the window. Grievant handed the Client her medication and a cup of water. The Client wanted to take her medication with juice instead of water and asked Grievant for juice. Grievant told the Client that only water was available and the Client became angry. The Client threw her water towards the window opening and at Grievant.

Grievant moved to her side and quickly pushed the door to the nursing station open and into the day room. The Client was standing in front of the door. When the door opened, it struck the Client in the chest. Grievant walked through the door and grabbed the Client's arm. The Client responded by pulling her arm back and a scuffle between the two followed.

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

¹ 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.

Client abuse is a Group III offense.² On September 14, 2014, the Client threw water at Grievant. Grievant responded by pushing open a door that hit the Client. Grievant then grabbed the Client's arm. Grievant's behavior was reckless when she opened the door because it was unnecessary for her to do so. Grievant inappropriately grabbed the Client's arm causing the Client to pull back. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for client abuse. 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 she did not intend to hurt the Client when she pushed the door open. Even if the Hearing Officer assumes for the sake of argument that Grievant did not intend to harm the Client, the Agency has established client abuse. Grievant's behavior was reckless because she disregarded the likely consequences of her actions and because her actions were unnecessary. If she felt threatened by the Client, she had two other doors she could have opened to exit the nursing station. Neither of those doors were accessible by the Client. The Agency only has to show that Grievant's behavior was reckless in order to support its allegation of client abuse.

Grievant argued that she opened the door in order to gain the attention of Mr. K. The evidence does not support this assertion. Mr. K was within an arm's length of the Client and he observed the Client throw the water at the window towards Grievant. There was no need for Grievant to attempt to gain Mr. K's attention since his attention was already focused on the Client.

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. 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 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 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.