

Issue: Group III Written Notice with Termination (client abuse); Hearing Date: 02/02/15; Decision Issued: 02/19/15; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10513; Outcome: No Relief – Agency Upheld; **Administrative Review**: EDR Ruling Request received 03/06/15; EDR Ruling No. 2015-4113 issued 03/20/15; Outcome: AHO's decision affirmed; **Administrative Review**: DHRM Ruling Request received 03/06/15; DHRM Ruling issued 04/03/15; Outcome: AHO's decision affirmed; **Judicial Appeal**: Appealed to Circuit Court in Amherst County, 04/30/15; Outcome: Appeal Dismissed – untimely filed; Appealed to Court of Appeals; Opinion issued 02/23/16; Outcome: Appeal dismissed; **Judicial Appeal**: Appealed to Supreme Court of Virginia; Opinion issued 07/21/16; Outcome: Appeal dismissed due to lack of jurisdiction [1467-15-3]



# **COMMONWEALTH of VIRGINIA**

*Department of Human Resource Management*

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

## **DECISION OF HEARING OFFICER**

In re:

**Case Number: 10513**

Hearing Date: February 2, 2015  
Decision Issued: February 19, 2015

### **PROCEDURAL HISTORY**

On November 5, 2014, Grievant was issued a Group III Written Notice of disciplinary action with removal for client abuse.

On November 14, 2014, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On December 2, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 2, 2015, 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 Medication Aide at one of its facilities. She had been employed by the Agency for approximately 34 years. Grievant had prior active disciplinary action consisting of a Group I Written Notice issued on March 13, 2013.

The Client is a 66 year old woman who lives at the Facility. She has a diagnosis of bipolar disorder. She was sometimes self-abusive and engaged in disruptive behavior.

The Client displayed affection towards a female staff member, Ms. B, but believed the staff member was male. The Client referred to Ms. B as her “boyfriend.” She would often respond more favorably to instructions from her “boyfriend” than from other staff. Grievant knew that the Client would respond favorably to and was protective of the “boyfriend.”

On October 1, 2014, Ms. P was “shadowing” another employee to receive mentoring regarding how to perform the duties of her position. Ms. P arrived at the living facility at approximately 6:45 a.m. The Client was in the living area but left shortly after Ms. P arrived. The Client returned at approximately 9 a.m. Grievant was also in the room with the Client, Ms. P, and several other staff. Grievant was in the process of distributing medication to clients. Grievant said to the staff, “I am going to show you how to get [Client’s first name] riled up.” Grievant then told the Client, “Your man want all of this” as Grievant moved her hands up and down her body as if to display her breasts and thighs for sexual desire. Ms. P was standing a few feet from Grievant and heard Grievant’s comments. The Client became upset and began cussing at Grievant and pointing her finger at Grievant and attempted to strike Grievant in a display of anger. The Client said to Grievant, “You not going to f—k my man.” The Client remained upset for the remainder of the morning.

## 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>1</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 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 October 1, 2014, Grievant used language to provoke or “rile up” the Client. Grievant said to the staff, “I am going to show you how to get [Client’s first name] riled up.” Grievant then told the Client, “Your man want all of this” as Grievant moved her hands up and down her body as if to display her breasts and thighs for sexual desire. Grievant’s behavior served to demean, humiliate, and anger the Client. Grievant engaged in client abuse thereby justifying the issuance of a Group III Written Notice.

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

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.

Grievant argued that she was not verbally abusive to the Client. Ms. P's testimony was credible. She had known Grievant for only a short period of time and had no prior conflicts with Grievant. Grievant presented no explanation as to why Ms. P might be untruthful.

*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>2</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>2</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>3</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>3</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.