Issue: Group III Written Notice with Termination (client abuse); Hearing Date: 02/24/15; Decision Issued: 03/11/15; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10536; 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: 10536

Hearing Date: February 24, 2015
Decision Issued: March 11, 2015

PROCEDURAL HISTORY

On December 30, 2014, Grievant was issued a Group III Written Notice of disciplinary action with removal for client abuse.

On December 31, 2014, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On January 13, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 24, 2015, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency's 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 Registered Nurse II at one of its facilities. She had been employed by the Agency for approximately three years. Grievant had prior active disciplinary action. She received a Group I Written Notice on February 11, 2014.

The Patient was admitted to the Facility on October 29, 2014 from a local hospital. She was diagnosed with Bipolar Disorder-Mixed-Severe with Psychotic Features.

The Patient was manic, psychotic, delusional, responded to internal stimuli and displayed bizarre behavior. At approximately 2:49 a.m. on October 30, 2014, Dr. P issued an order for the Patient to receive 2 mg of Ativan. At approximately 3:18 a.m., Dr. P issued an order authorizing placement of the Patient in a seclusion room for up to four hours. Agency staff placed the Patient in a seclusion room. Inside the seclusion room was a mattress on the floor and a blanket. The Patient could not exit the seclusion room unless staff opened the door. Employees could watch the Patient through a window next to the door.

At approximately 7:10 a.m., Dr. P ordered a continuation of the Patient's seclusion. The Patient was to be given 5 mg of Haldol to address her psychotic behaviors.

At approximately 7:24, the Patient defecated and began smearing the feces on the floor with her hands. At approximately 7:44 a.m., the Patient laid on top of the mattress and covered her whole body with the blanket. The mattress was on top of the feces.

Dr. P gave a verbal order that the Patient could be held to be cleaned. At approximately 7:47 a.m., several employees entered the seclusion room in order to clean the room. The Patient did not respond to employee requests to get off of the mattress so that the area under the mattress could be cleaned. One employee began pulling the mattress while the Patient remained in a sleeping position with the blanked covering her. Several other employees began cleaning the room. At approximately 7:48 a.m., two employees began pulling the blanket off of the Patient. The Patient responded by trying to get up and push one of the employees. The Patient fell back down. Three employees held the Patient on her back on the floor while two other employees cleaned the room. The Patient pulled her arms in an attempt to break the grip of the employees holding her. Both of the Patient's hands were cleaned.[1]

At approximately 7:54 a.m., the employees finished cleaning the room and the employees holding the Patient released her. She stood up and began walking around in the room. She looked through the window and attempted to speak with an employee outside of the room. At approximately 7:56 a.m., the Patient picked up the blanket from the mattress and wrapped it around her lower body. She walked around the room. At approximately 7:58 a.m., she pulled her shirt up and then pulled it back down. She then re-wrapped her body in the blanket and began walking around in the room. At approximately 7:59 a.m., the Patient laid on the mattress, rolled on the floor, and then sat cross legged on the mattress. She tapped her face and nose. At approximately 8:00 a.m. the Patient stood up and walked in front of the window into the room as she continued to tap her face and nose. At approximately 8:01 a.m., the Patient picked up her blanket and wrapped it around her body and head as she walked around in the room. She then sat in a corner of the room with the blanket over her head. At approximately 8:05 a.m., staff opened the room to the seclusion room. The Patient was resting on the floor in the corner next to the door as it opened. She stood up. An employee handed her a gown to put on but she tossed it to the side and it fell on the mattress. The employee entered the room and picked up the gown. Two other employees grabbed the Patient's arms and escorted her out of the seclusion room.

At approximately 8:06 a.m., the Patient was brought outside of the door to the seclusion room. A gown was placed over her head and staff placed her arms through holes in the gown. One employee held the Patient's left arm and another held the Patient's right arm as they helped her walk down the hallway. The Patient did not resist or fight the staff attempting to move her. The Patient was taken to her bedroom and placed in four point restraints. She was unable to move her arms and legs while restrained. She remained in restraints until approximately 11:15 a.m.

[1] Grievant was not involved in cleaning the Patient. The Registered Nurse on the prior shift supervised the cleaning of the seclusion room.

Grievant began her shift at approximately 7 a.m. She received a verbal report from prior shift employees. She learned that the Patient had defecated inside the seclusion room as she was making her staff assignments. Approximately 30 to 40 minutes after beginning her shift, Grievant looked through the window of the seclusion room. She told another employee that she "wasn't going to clean up s—t all day." At approximately 7:30 a.m., Grievant walked into the medication room and got the restraints. Ms. B was in the room and asked Grievant, "What's going on?" Grievant responded, "I'm not cleaning s—t all day" and then walked out of the room. Grievant spoke with Dr. N at approximately 8:15 a.m. and told him the reasons why the Patient should be put in four point restraints. Based on Grievant's representations, Dr. N ordered that the Patient could be placed in restraints.

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[2] 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:
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> - 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.

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

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.

Va. Code § 37.1-400 provides that each individual admitted to the Facility shall, "[b]e treated under the least restrictive conditions consistent with his condition and not be subjected to unnecessary physical restraint and isolation." Agency employees are taught to utilize the least restrictive form of restraint when it is necessary to restrain a patient. Placing a patient in four point restraints is permitted only if a lesser form of restrain is not an option.

Facility Policy 450-035 provides:

> Mechanical Restraint – The use of a mechanical device that involuntarily restricts the freedom of movement or voluntary functioning of a limb or a portion of an individual's body as a means of controlling his physical activities, and the individual cannot easily remove the device.
> ***
> Restraints for Behavioral Purposes – The use of a … mechanical device to control behavior or involuntarily restrict the freedom of movement of an individual in an instance when all the following conditions are met: (i) there is an emergency; (ii) non-physical interventions are not viable; and (iii) safety issues require an immediately response.
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> Restraint for Health Related Purposes: -- The use of a restraint, as ordered by a physician, for:
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> a) Medical, diagnostic, or surgical purposes;
> b) To otherwise ensure the physical safety of the individual, but only if absolutely necessary during the conduct of a specific medical or surgical procedure;
> c) Or only if absolutely necessary for the individual's protection during the time a medical condition exists.[3]

Leaving a patient in a seclusion room is a lesser form of restraint or seclusion than placing a patient in four point restraints. In a seclusion room, a patient can walk or sit in the room and freely move his or her arms or legs. In physical restraints, a patient cannot move around a room or move his or her legs or arms. If a patient can be treated

[3] Agency Exhibit 5.

appropriately using isolation, it would be unnecessary to place that patient in physical restraints.

On October 30, 2014, the Patient did not display any behavior that would have justified removing her from the seclusion room and placing her in four point restraints. While in the seclusion room, the Patient was not a danger to herself or to others. She remained safe and secure in the seclusion room. By moving the Patient from the seclusion room and into four point restraints, Grievant imposed an unnecessary and more restrictive form of restraint contrary to the expectations set forth in DI 201. The Agency has presented sufficient evidence to support the 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 the Patient was a danger to others.[4] Grievant argued that placing the Patient in four point restraints was appropriate because the Patient struggled and hit employees when they entered the seclusion room. Based on witness testimony and review of the video of the Patient's behavior, the Patient did not pose a threat to herself or others. She was passive and disoriented. Her inability to comply with some commands from staff did not mean she was a danger to others. She only briefly moved her arms in a manner that could have posed a danger to staff. When staff entered the seclusion room, the Patient did not attack them. Several staff held the Patient down on the floor. She resisted their attempts to control her. When the Patient briefly pushed or shoved the staff, it was in a defensive manner rather than with the objective of targeting staff for a physical altercation. Several minutes before being removed from the seclusion room, the Patient was sitting passively in the corner of the room. When an employee entered the room and handed her a gown to put on, she threw the gown away to the side instead of throwing it the employee who gave the gown to her. The Patient was compliant, docile, and disoriented as she left the seclusion room.

Grievant argued that placing the Patient in four point restrains was justified because the Patient had feces under her fingernails and was masturbating. Grievant was concerned about the possibility that the Patient might contract a urinary tract infection. Even if the Hearing Officer assumes for the sake of argument that Grievant's assertion of fact is true[5], the solution would have been to re-clean the Patient's fingers not place her in four point restraints. Employees were able to hold the Patient still for several minutes when they entered the seclusion room to clean the room. Grievant could have instructed staff to re-enter the room and focus their cleaning on the Patient's

[4] On the other hand, she testified that the reason the Patient was placed in restraints was because she might injury herself and not others. Grievant emphasized that the Patient was swinging her arms and could have injured other staff.

[5] Ms. C, a Registered Nurse, testified that she did not see any feces under the Patient's fingernails at 7:50 a.m. when she was in the seclusion room and looking at the Patient.

fingernails.[6] The Agency's Hygiene Without Informed Consent (Emergency) policy provides that "[e]mergency bathing can take place if the patient's personal hygiene has endangered his/her own health …."[7] The Agency offered other alternative such as putting mittens on the Patient's hands or placing the Patient in a jump suit but those methods were not routinely used at the Facility. Cleaning the Patient's hands or bathing the Patient would have been sufficient to remove the risk of injury from having dirty hands.

In order to place the Patient in four point restraints, Grievant had to obtain an order from a doctor. At approximately 8:15 a.m., Grievant spoke with Dr. N and he authorized the four point restraints based on Grievant's representation that the Patient was a danger to herself and to others. Dr. N's conclusion has no bearing on the outcome of this case. Dr. N did not make any independent assessment of the Patient. He relied on Grievant's assertions of fact that were incorrect. Dr. N's failure to properly assess the Patient is not a basis to excuse Grievant's conclusion and decision to place the Patient's in four point restraints.

When the facts of this case are considered as a whole, the best course of action for the Patient was to leave her in the seclusion room. Grievant's decision to remove the Patient and place her in four point restraints was inappropriate under the Agency's policies.[8]

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 …."[9] 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

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[6] Grievant argued that if the Patient balled her fists, staff could not have cleaned under the Patient's fingernails. The difficulty with Grievant's argument is that a second cleaning was not attempted and, thus, it is not known whether the Patient would have balled her fists to prevent cleaning under her fingernails.

[7] Agency Exhibit 5.

[8] Grievant argued that the Written Notice described her offense as not considering alternatives to placing the Patient in restraints and that she, in fact, considered alternatives thereby exonerating her from disciplinary action. The evidence is clear that the Agency's discipline was for client abuse. The Agency established client abuse by showing that the Patient should not have been removed from the seclusion room.

[9] Va. Code § 2.2-3005.

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 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.[10]

[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

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