

Issue: Group III Written Notice with Suspension (client abuse); Hearing Date: 03/16/15; Decision Issued: 03/27/15; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10543; Outcome: No Relief – Agency Upheld; **Administrative Review**: EDR Ruling Request received 04/10/15; EDR Ruling No. 2015-4132 issued 04/29/15; Outcome: AHO's decision affirmed; **Administrative Review**: DHRM Ruling Request received 04/10/15; DHRM Ruling issued 04/30/15; 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: 10543**

Hearing Date: March 16, 2015  
Decision Issued: March 27, 2015

### **PROCEDURAL HISTORY**

On December 9, 2014, Grievant was issued a Group III Written Notice of disciplinary action with a five workday suspension for client abuse.

On December 17, 2014, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On February 9, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 16, 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 employs Grievant as a Counselor II at one of its facilities. The purpose of her position is:

To provide clinical social work services to adult mentally ill patients utilizing Recovery principles with a goal of assisting patients to be successful in the least restrictive environment consistent with their level of functioning.<sup>1</sup>

When employees attempt to control patients, they are expected to follow the training they received regarding Therapeutic Options of Virginia (TOVA). Grievant received TOVA training and knew of her obligation to follow the principles taught during that training.

The Patient was admitted to the Facility from a local jail on September 23, 2014 under a Court order for restoration to competency to stand trial for assault and battery on a law enforcement officer and shoplifting. He was diagnosed with Schizoaffective Disorder, Bipolar Type, Polysubstance Dependence, and Mild Retardation.

On November 13, 2014, Grievant entered the Common Area of the Ward where the Patient was located. Other patients and staff were also in the Common Area. The Patient sat in a chair at a table. Grievant walked near the table. She was carrying in

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<sup>1</sup> Agency Exhibit 4.

her left hand and arm a three to four inch thick loose leaf binder. She held a coffee thermos in her right hand. The Patient asked if he could speak with Grievant. Grievant sat down to the Patient's right and began speaking with him. The Patient told Grievant that the Doctor told him to ask staff if he could have coffee. Grievant reminded the Patient that he had several incidents of throwing coffee on people including the day before. The Patient stood up and walked away from the table but returned to continue speaking with Grievant. He sat down at the table and continued speaking with Grievant. The Patient got up from the table and walked away from Grievant. Grievant remained seated at the table for a few seconds and stood up. She carried her binder and thermos into the nursing office.

The Patient returned to the table carrying two Styrofoam cups. He sat at the table and placed one cup in front of him and the second cup on the table in front of the seat where Grievant was sitting. The Patient began talking even though no one was in front of him listening. Dr. V walked into the Common Area and the Patient began talking towards Dr. V. The Patient stood up and walked around the table to speak with Dr. V. When their conversation ended, the Patient walked back to his seat and sat down. Dr. V left the Common Area. Grievant came out of the nursing office and walked near the table. The Patient began speaking with her and said, "There go that bi—h." The Patient became agitated and stood up and picked up a cup with his left hand. He began moving aggressively towards Grievant and pointed at her with his left hand. Grievant began stepping backwards. The Patient said, "I'm going to kill you bi—h!" Mr. V was also working in the Common Area. He walked across the room and stood with the Patient to his left and Grievant to his right. The Patient pushed his arms towards Grievant. Mr. V moved towards the Patient and moved him a few inches away from Grievant. The Patient lunged towards Grievant and slipped away from Mr. V's grasp. He punched at Grievant and Grievant moved backwards. Mr. V attempted to regain control of the Patient. Mr. V briefly held the Patient but the Patient was able to escape from Mr. V's hold. The Patient charged Grievant. Grievant walked backwards away from the Patient but he quickly closed the distance between them. She was holding the thermos with her arm down and near her hip. When the Patient was within approximately three feet of Grievant, she raised her right hand and arm above her head as she held the thermos. She moved her left arm and hand upward as she held the binder but did not raise it above her head. While her right hand was above her head, she moved it forward to throw the thermos at the Patient as she continued to step backwards. The thermos hit the top of the Patient's head causing injury. The Patient continued after Grievant and struck her. Other employees approached the Patient from behind and were able to hold him away from Grievant.

## **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>2</sup> client abuse as:

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<sup>2</sup> See, Va. Code § 37.1-1 and 12 VAC 35-115-30.

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.

"[A]buse or neglect of clients" is a Group III offense.<sup>3</sup> Throwing a thermos at a patient is an action that might cause physical harm. On November 13, 2014, Grievant threw a thermos at the Patient as he approached her with the objective of harming her. 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 suspend an employee for up to 30 work days in lieu of removal. Accordingly, Grievant's suspension must be upheld.

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<sup>3</sup> See, Attachment A, DHRM Policy 1.60.

Grievant argued that she was acting in self-defense by raising her arms to block the Patient's blows. Although Grievant is entitled to defend herself, the video of the incident does not show she limited her actions to self-defense. The video does not show Grievant raising her right arm above her head simply to block the Patient's advance. The video shows Grievant moving her right arm in a manner with a wind up and follow through throwing motion. Grievant's action was not consistent with TOVA and sufficient to support the Agency's conclusion that disciplinary action should be taken.

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>4</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.<sup>5</sup>

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with a five work day suspension 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:

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<sup>4</sup> Va. Code § 2.2-3005.

<sup>5</sup> Grievant argued that the disciplinary action was too harsh. The Agency's discipline was consistent with the Standards of Conduct and did not exceed the limits of reasonableness.

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.

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>6</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>6</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.