Issue: Group III Written Notice with Termination (client abuse); Hearing Date: 05/01/15; Decision Issued: 05/12/15; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10574; Outcome: No Relief – Agency Upheld; **Administrative Review: EDR Ruling Requested 05/27/15; EDR Ruling No. 2015-4161 issued 06/03/15; 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: 10574

Hearing Date: May 1, 2015
Decision Issued: May 12 2015

PROCEDURAL HISTORY

On February 4, 2015, Grievant was issued a Group III Written Notice of disciplinary action with removal for client abuse.

On March 4, 2015, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On March 19, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 1, 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 Unit Manager at one of its facilities. He also served as a Therapeutic Options of Virginia (TOVA) instructor meaning that he taught other employees how to respond when patients were abusive and confrontational. Under TOVA, an employee faced with an aggressive patient should respond by maintaining a safe distance from the patient and attempting to de-escalate the conflict. Grievant was employed by the Agency for approximately 6 years prior to his removal. No evidence of prior active disciplinary action was introduced during the hearing.

On January 6, 2015, the Patient threw coffee on another person at the Facility. Agency staff decided to place the Patient in seclusion as punishment. The Patient sat on a bench in a room at the Facility. Several employees including Grievant and the Facility Manager stood facing the Patient. The Patient was verbally threatening staff and arguing with staff. The Patient was told he would be placed in seclusion. The Patient refused to leave the room. The Patient said that staff did not have the power to "do that." Grievant responded that "I do have the power." The Patient said, "If you man enough to take me then come on". Grievant stepped forward toward the Patient as the Patient began rising from his seat. Grievant said "I'm going to give you what you want". The two men stood face-to-face. The Facility Manager positioned himself in front of Grievant and redirected Grievant several times to back away. Grievant did not back away so the Facility Manager pushed Grievant backward to get him away from the Patient. A Security Officer working in the control booth pulled Grievant into the control booth. A few seconds later, Grievant left the control booth and reentered the room. He

told the Facility Manager "I'm good". The Facility Manager and other employees continued their discussion with the Patient. Grievant positioned himself several paces from the Patient but within the Patient's view. The Patient observed Grievant and continued his discussion directing it towards Grievant. The Patient began moving towards Grievant. The Patient repeatedly told Grievant to "suck my d—k." Grievant responded, "pull that little mother f--ker out then." Grievant's comment referred to the Patient's penis. The Facility Manager pushed Grievant into the nursing station and away from 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 defines[1] client abuse as:

> This means any act or failure to act by an employee or other person responsible for the care of an individual in a Department facility 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 he 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

[1] See, Va. Code § 37.2-100 and 12 VAC 35-115-30.

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 January 6, 2015, Grievant became angry and argued with the Patient. When the Patient challenged Grievant to "come on", Grievant responded "I'm going to give you what you want" and then stepped toward the Patient. Grievant's posture and words were intended to intimidate, threaten, and confront the Patient. The Facility Manager observed Grievant's behavior and had to push him away from the Patient. When the Patient said to suck his penis, Grievant responded, pull that little mother f—ker out then". Grievant's comment was intended to confront the Patient and demean the Patient by referring to his penis as little and as a "mother f—ker". None of Grievant's responses were appropriate under the TOVA training he received and provided to other staff. Grievant use language that demeans, threatens, intimidates, and humiliates a client thereby justifying 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.

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 …."[2] 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.

Grievant contends the disciplinary action should be mitigated. Grievant argued that the Agency could have addressed his behavior with a lesser punishment. Although this statement is true, the Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. The discipline does not exceed the limits of reasonableness. Grievant argued that other employees engaged in similar behavior but received lesser disciplinary action. No credible evidence was presented to support this allegation. In light of the standard set forth in the Rules , the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

DECISION

[2] Va. Code § 2.2-3005.

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.[3]

[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

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