

Issue: Group III Written Notice with Termination (client abuse); Hearing Date: 06/15/15; Decision Issued: 06/17/15; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10606; 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: 10606

Hearing Date: June 15, 2015

Decision Issued: June 17, 2015

PROCEDURAL HISTORY

On March 23, 2015, Grievant was issued a Group III Written Notice of disciplinary action with removal for client abuse.

On April 15, 2015, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On May 11, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 15, 2015, 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 Direct Support Professional at one of its facilities. The purpose of her position was to "provide competent nursing care to an adult population ranging from ages 18 to 64 in a Forensic/civil setting to maintain a safe, clean, and therapeutic environment and to participate and encourage patients to participate in their prescribed treatment programs."¹ Grievant began working for the Agency in 2010. No evidence of prior active disciplinary action was introduced during the hearing.

The Agency has a system to reward patients for good behavior. When patients accomplished certain tasks they received points. The number of points a patient receives was accounted for on the form listing tasks unique to each patient. The Agency taught employees that the point system was intended to reward good behavior and not used a system of punishment. If a patient received sufficient number of points, he or she may receive special privileges such as being able to purchase items from the Facility's canteen. If a patient engaged in certain offenses, the patient may receive a "level drop" thereby preventing the patient from visiting the Facility's canteen.

The Patient routinely complained about Grievant. Many of those complaints were false. Grievant focused greater attention on the Patient than she did on other patients. Grievant was quick to identify misbehavior by the Patient and hold the Patient accountable when compared with other patients at the Facility. Grievant threaten the

¹ Agency Exhibit 6.

Patient. For example, she told the Patient that the Patient will receive a zero on her point she if she did not take a shower that day. Grievant used an aggressive tone of voice when speaking to the Patient about taking the shower.

The Patient sometimes received medication but then spit it out. As a result, Agency staff required the Patient to sit and be observed for 20 minutes to ensure that she had taken her medication. On one occasion, Grievant was in a one-to-one relationship with another patient in another room from 7:30 to 8:30 a.m. The Patient received her medication at approximately 8 a.m. and was then observed by Agency staff for 20 minutes. Grievant finished her one-to-one assignment yet she instructed the Patient to sit and wait for 20 minutes. Grievant yelled at the Patient as she instructed the Patient to sit down and wait for 20 minutes.

On February 9, 2015, Grievant gave the Patient a “level drop”. This prevented the Patient from going to the Agency’s canteen to purchase items. Grievant reviewed the point sheet and concluded that the Patient had falsified the document. Grievant did not observe the Patient falsify the document. Any falsification by the Patient would have occurred during the shift prior to Grievant’s shift. Grievant issued the level drop at 4:25 p.m. when the Patient was visiting with family members. Grievant did not realize she was supposed to issue a level drop only if she observed the behavior justifying the level drop.

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 defines² 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

² See, Va. Code § 37.2-100 and 12 VAC 35-115-30.

- 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.³ Grievant engaged in client abuse because she singled out the Patient and treated her differently from other patients. Grievant threatened the Patient with punishment if she failed to engage in certain behavior. Grievant spoke to the Patient using an aggressive tone of voice when she required the Patient to wait an additional twenty minutes after taking medication. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice of disciplinary action 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 treat the Patient inappropriately and that the Agency's allegations against her were unfounded. The evidence showed the Grievant focused on the Patient and dealt with her in a stern and aggressive manner. Grievant did not testify or otherwise present sufficient evidence to rebut the Agency's allegations.

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"⁴ 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

³ See, Attachment A, DHRM Policy 1.60.

⁴ *Va. Code § 2.2-3005.*

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 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.⁵

[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

⁵ Agencies must request and receive prior approval from EDR before filing a notice of appeal.