

Issue: Group III with Termination (client abuse); Hearing Date: 06/29/15; Decision Issued: 06/30/15; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10624; 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: 10624

Hearing Date: June 29, 2015

Decision Issued: June 30, 2015

PROCEDURAL HISTORY

On May 8, 2015, Grievant was issued a Group III Written Notice of disciplinary action with removal for client abuse.

On May 18, 2015, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On June 9, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 29, 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 FMHT at one of its facilities. She had been employed at the Facility for approximately two years. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant received training regarding maintaining professional boundaries with patients at the Facility. She knew or should have known that conversations with patients that included sexual references or innuendo were prohibited by the Agency under its client abuse policy.

On April 22, 2015, Grievant was sitting with the Patient playing cards. Grievant said, "I will suck that thing dry." She then said, "I will suck all the juice out [of] that." The Patient said, "Wow, wow you f—ked me up with that." Grievant replied, "This thing will be all wet and juicy." The Patient repeated, "Wow, you f—ked me up with that, you f—ked me up with that, I won't expecting that." Grievant and the Patient got up and went to "rec".

The Agency's Hospital Director testified that Grievant's behavior was best categorized as sexual abuse because the Facility's patients are especially vulnerable to sexual references and innuendo.

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 defines¹ 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 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 April 22, 2105, Grievant spoke to a Patient and referred to engaging in oral sex. Because of the nature of the clients at the Facility, Grievant’s comments may have caused psychological harm to the Patient. Grievant received training informing her to avoid discussing sexually oriented topics with patient. She knew or should have known her comments to the Patient were inappropriate and prohibited by Agency policy. The Agency has presented sufficient evidence to support the issuance of a Group III Written

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

Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

Grievant denied saying anything sexual to the Patient. She contends she was talking about a rapper appearing in a television show on the television near her. Grievant argued that she was referring to taking the money of the rapper. Grievant did not testify or call any witnesses. Her evidence was insufficient to rebut the Agency's evidence. Even if the Hearing Officer relies solely on the comments Grievant made to the Investigator, there remains sufficient evidence to support the issuance of a Group III Written Notice. Grievant admitted to the Investigator, "Patient [name] did ask me what type of lotion I was wearing and I told him it was Victoria's Secret Pure Seduction and I showed him the bottle."² The Agency's witnesses established that discussing the lotion she was wearing improperly "crossed a boundary" especially given that the name of the lotion contained the word "seduction."

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"³ 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

² Agency Exhibit 2.

³ Va. Code § 2.2-3005.

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.⁴

[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

⁴ Agencies must request and receive prior approval from EDR before filing a notice of appeal.