

Issues: Group II Written Notice (verbal abuse of client) and Termination (due to accumulation); Hearing Date: 07/05/13; Decision Issued: 07/12/13; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10113; Outcome: Full Relief. **Fee Addendum issued 08/01/13 awarding \$917.00.**



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10113

Hearing Date: July 5, 2013
Decision Issued: July 12, 2013

PROCEDURAL HISTORY

On May 23, 2013, Grievant was issued a Group II Written Notice of disciplinary action for engaging in a non-therapeutic interaction with an individual. Grievant was removed from employment based on the accumulation of disciplinary action.

On May 23, 2013, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On June 12, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 5, 2013, 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 DSA at one of its facilities. Grievant had prior active disciplinary action consisting of a Group III Written Notice issued on May 22, 2011.

On April 30, 2013, Grievant was working near Client S and Client H. The LPN entered the suite and said she needed to check Client S for a bruise. She walked towards Client H. Grievant told the LPN that Client S was behind her sitting on the love seat. The LPN went to Client S, but he would not stand up for her. Client S had his legs crossed. Grievant prompted Client S to uncross his legs. Client S stood up with Grievant's assistance and began walking towards the restroom. The LPN was in front of Client S and Grievant was behind Client S. Grievant said "stupid" as they walked toward the restroom. Grievant was referring to the LPN as being stupid because he was annoyed with her for first attempting to check the wrong individual and for not trying to help assist Grievant with getting Client S up from the love seat. Client S was in a position to hear Grievant's use of the word "stupid".

CONCLUSIONS OF POLICY

The Agency alleged that Grievant engage in a non-therapeutic interaction with Client S because he called Client S stupid. The Agency has not met its burden of proof for several reasons.

First, the Agency's primary witness offered numerous variations of what Grievant supposedly said to Client S. The LPN told the Facility Director one version of what Grievant said to Client S. The Investigator conducted an investigation.¹ According to the investigative report, the LPN told the Investigator that Grievant said, "Get up. Get up you so stupid." The Investigator wrote, "[LPN's] initial report varies from her written statement in the sense that she initially said [Grievant] forcefully said [Client S] was doing something stupid and then changed her account and said that [Grievant] actually called [Client S] stupid. The investigation was unable to make a determination as to exactly what was and was not said by [Grievant]."

During the hearing on direct examination, the LPN said Grievant spoke to Client S and said, "You're so stupid stand up." On cross examination, the LPN said Grievant told Client S, "Get up [Client S's first name] you're so stupid." When the Hearing Officer asked the LPN what Grievant said, the LPN responded, , "You're so stupid" "Are you so stupid" "Get up [Client S's first name]" "Get up [Client S's first name]" "You so stupid."

It is not unusual for a witness to have slightly varying accounts of events because memory can change over time. It is unusual, however, for a witness to have three different accounts during a hearing. The LPN's testimony is not sufficiently credible for the Hearing Officer to conclude what Grievant said to Client S.

Second, the Agency did not provide a definition of non-therapeutic. The Agency did not produce any policy defining the term or establishing that Grievant had notice of the meaning of the term.² Without presenting a policy and showing Grievant violated the policy, the Agency's issuance of a Group II Written Notice cannot be established.

Third, the Agency did not establish that when Grievant called the LPN "stupid" and it was overheard by Client S that Grievant engaged in unsatisfactory job performance, a Group I offense.

When the facts of this case are considered as a whole, the Agency has not established by a preponderance of the evidence that Grievant engaged in a non-therapeutic interaction or any other behavior sufficient to establish a basis for discipline.

The Virginia General Assembly enacted *Va. Code § 2.2-3005.1(A)* providing, "In grievances challenging discharge, if the hearing officer finds that the employee has substantially prevailed on the merits of the grievance, the employee shall be entitled to recover reasonable attorneys' fees, unless special circumstances would make an award unjust." Grievant has substantially prevailed on the merits of the grievance because he is to be reinstated. There are no special circumstances making an award of attorney's fees unjust. Accordingly, Grievant's attorney is advised to submit an attorneys' fee

¹ The written statements presented to the Investigator were not submitted to the Hearing Officer.

² The Agency's Investigator testified that it was possible but she was not sure if it was a non-therapeutic interaction if Grievant called the LPN stupid but the Client S overheard the statement.

petition to the Hearing Officer within 15 days of this Decision. The petition should be in accordance with the EDR Director's *Rules for Conducting Grievance Hearings*.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with removal is **rescinded**. The Agency is ordered to **reinstate** Grievant to Grievant's same position prior to removal, or if the position is filled, to an equivalent position. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal and credit for leave and seniority that the employee did not otherwise accrue.

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.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

ADDENDUM TO DECISION OF HEARING OFFICER

In re:

Case No: 10113-A

Addendum Issued: August 1, 2013

DISCUSSION

The grievance statute provides that for those issues qualified for a hearing, the Hearing Officer may order relief including reasonable attorneys' fees in grievances challenging discharge if the Hearing Officer finds that the employee "substantially prevailed" on the merits of the grievance, unless special circumstances would make an award unjust.⁴ For an employee to "substantially prevail" in a discharge grievance, the Hearing Officer's decision must contain an order that the agency reinstate the employee to his or her former (or an objectively similar) position.⁵

To determine whether attorney's fees are reasonable, the Hearing Officer considers the time and effort expended by the attorney, the nature of the services rendered, the complexity of the services, the value of the services to the client, the results obtained, whether the fees incurred were consistent with those generally charged for similar services, and whether the services were necessary and appropriate.

Grievant's Attorney devoted 7 hours to preparation for and participating in the hearing. The hourly rate for attorney for reimbursement is \$131. Accordingly, Grievant must be awarded Attorney's Fees in the amount of \$917.00.

AWARD

Grievant is awarded attorneys' fees in the amount of \$917.00.

⁴ Va. Code § 2.2-3005.1(A).

⁵ § 7.2(e) Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004. § VI(D) *EDR Rules for Conducting Grievance Hearings*, effective August 30, 2004.

APPEAL RIGHTS

If neither party petitions the DHRM Director for a ruling on the propriety of the fees addendum within 10 calendar days of its issuance, the hearing decision and its fees addendum may be appealed to the Circuit Court as a final hearing decision. Once the DHRM Director issues a ruling on the propriety of the fees addendum, and if ordered by DHRM, the hearing officer has issued a revised fees addendum, the original hearing decision becomes “final” as described in §VII(B) of the *Rules* and may be appealed to the Circuit Court in accordance with §VII(C) of the *Rules* and §7.3(a) of the *Grievance Procedure Manual*. The fees addendum shall be considered part of the final decision. Final hearing decisions are not enforceable until the conclusion of any judicial appeals.

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer