

Issue: Group III Written Notice with Termination (patient abuse); Hearing Date: 08/11/14; Decision Issued: 08/12/14; Agency: DVS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10415; Outcome: No Relief – Agency Upheld; **Administrative Review**: EDR Ruling Request received 08/27/14; EDR Ruling No. 2015-3987 issued 09/10/14; Outcome: AHO's decision affirmed; **Administrative Review**: DHRM Ruling Request received 08/27/14; DHRM Ruling issued 09/02/14; 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: 10415**

Hearing Date: August 11, 2014  
Decision Issued: August 12, 2014

#### **PROCEDURAL HISTORY**

On June 4, 2014, Grievant was issued a Group III Written Notice of disciplinary action with removal for physical abuse of a resident.

On June 5, 2014, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On July 14, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 11, 2014, 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 Veterans Services employed Grievant as a Certified Nursing Assistant. She was responsible for providing care to residents at the Facility. She had prior active disciplinary action consisting of a Group I Written Notice issued on December 20, 2013.

The Resident was often combative with staff. He was a difficult resident for staff to assist.

On May 27, 2014 between 7 a.m. and 7:25 a.m., Grievant was providing assistance to the Resident. She came out of the resident's room and met Ms. M. Ms. M offered to help Grievant with assisting the Resident. They entered the Resident's room. The Resident was in his bed lying flat on his right side. They began to put clothing on the Resident. The Resident moved as clothing was put on him. At one point, he raised his right arm above his head and pulled it back as if to hit someone. The Resident's hand was balled to form a fist. Grievant was standing next to the Resident and would have been hit if the Resident moved his arm forward. Grievant observed that the Resident was ready to strike her. Grievant pulled her right arm backwards and moved it forward quickly to use her right hand to slap the left side of the Resident's face. Ms. M observed the slap and was stunned by what she had witnessed.

Grievant's shift ended at 7:25 a.m. and she left the Facility.

## CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “include acts of minor misconduct that require formal disciplinary action.”<sup>1</sup> Group II offenses “include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action.” Group III offenses “include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.”

The Facility’s policy defines physical abuse as, “hitting, slapping, pinching, and kicking.” On May 27, 2014, Grievant engaged in physical abuse because she slapped the Resident.

“[A]buse ... of clients” is a Group III Offense.<sup>2</sup> Grievant engaged in abuse of a client thereby justifying the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, the Agency’s decision to remove Grievant must be upheld.

Grievant argued that she did not strike the Resident. The Agency presented the testimony of Ms. M who was present in the room when Grievant hit the Resident. Ms. M’s testimony was credible and the Agency has presented sufficient evidence to show that Grievant hit the Resident. Grievant did not testify. She did not present any evidence to show that Ms. M had a motive to be untruthful about her.

Grievant argued that if she had slapped the Resident, the Agency would not have allowed her to work at the Facility after the incident. This argument is not persuasive. The length of time necessary for the Agency to investigate and conclude to take action has no bearing on whether she slapped the Resident or the seriousness of the offense.

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>3</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

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<sup>1</sup> The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

<sup>2</sup> See, Attachment A, DHRM Policy 1.60.

<sup>3</sup> Va. Code § 2.2-3005.

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