

Issue: Group III Written Notice with Termination (client abuse); Hearing Date: 10/24/14; Decision Issued: 11/13/14; Agency: DBDHS; AHO: Carl Wilson Schmidt, Esq.; Case No.10461; 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: 10461

Hearing Date: October 24, 2014
Decision Issued: November 13, 2014

PROCEDURAL HISTORY

On August 12, 2014, Grievant was issued a Group III Written Notice of disciplinary action with removal for client abuse.

On September 2, 2014, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On September 22, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 24, 2014, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee
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 Disabilities employed Grievant as a Forensic Mental Health Tech at one of its facilities. No evidence of prior active disciplinary action was introduced during the hearing.

Employees receive training regarding Therapeutic Options of Virginia. Employees are taught how to respond to clients who are engaging in behavior that may harm an employee. For example, employees learn how to respond to a client who begins pulling an employee's hair. Employees are not taught to strike clients.

The Client has a diagnosis of borderline personality disorder. She seeks attention and will attack staff and other clients at the Facility. She has threatened many employees at the Facility and has harmed herself.

On July 22, 2014, Grievant was monitoring the Client. The Client entered her room. Inside the room were a bed and two dressers. When standing at the foot of the bed, the upper right corner of the bed was in the corner of two walls. The right side of the bed was against one wall. The two dressers were on the left side of the bed and against the other wall. The Client sat on her bed and turned her body to lie on the bed. Grievant sat in a chair and faced the left side of the Client's bed so she would be able to observe the Client. To Grievant's left were two dressers that were against the wall.

The Client said she was going to harm Grievant. She quickly got up from the bed and moved towards Grievant and grabbed Grievant's hair and began pulling Grievant's hair. The Client began punching Grievant's face and head. Grievant told the Client to stop as she tried to pry the Client's hand open, but the Client continued to attack Grievant. Grievant was screaming so that other staff could hear her. An employee called a "10-33" emergency over the radio. Grievant used her radio to hit the Client on the left side of the Client's face above the Client's eyebrow. Grievant and the Client fell to the ground. Grievant fell to her right away from the dresser against the wall. When they got up, the Client released Grievant's hair. Ms. V responded to the emergency call and went to the Client's room. The Client said, "[Grievant] hit me with a radio." Grievant said the Client "attacked me pulling my hair. I screamed and someone called a 10-33."¹

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:

Abuse means any act or failure to act by an employee or other person responsible for the care of an individual 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

¹ Agency Exhibit 3.

² See, Va. Code § 37.1-1 and 12 VAC 35-115-30.

- 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.

Client abuse includes assault or battery.³ On July 22, 2014, Grievant responded to an attack from the Client by using her radio and hitting the Client on the side of the head. She was not trained to respond to an attack from a client using this method. Because Grievant hit the Client with a radio, the Agency has presented sufficient evidence to support the issuance of a Group III Written 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 using her radio to hit the Client in the head. She contends the Client fell and hit her head on the dresser as they fell to the ground. This argument is not supported by the evidence for several reasons. First, the injury to the Client's face reflects a "mirror image" pattern of the radio and not of the dresser. In other words, the cut on the Client's face appears to have been made by a radio with rounded edges and not by a dresser with sharp edges and corners. Second, when the Client first accused Grievant of hitting her with a radio, Grievant did not deny the allegation. Third, Grievant testified that she fell to her right as she struggled with the Client. The dressers would have been to Grievant's left during the struggle and, thus, Grievant and the Client would have fallen away from the dressers and not into them.

Grievant argued that the Client had been "targeting" Grievant all day and that the Agency should have removed her from the Client's unit. The evidence is insufficient for the Hearing Officer to conclude that the Agency's failure to remove Grievant from the Client's unit should justify reduction or elimination of the disciplinary action. It is not clear that Agency managers were aware that the Client was targeting Grievant. The Agency did not violate any policy by having Grievant remain in supervision of the Client. The Agency is entitled to consider its staffing needs when determining where to place its employees.

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

³ See, Attachment A, DHRM Policy 1.60.

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 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

⁴ Va. Code § 2.2-3005.

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.