

Issue: Group III Written Notice with Termination (client abuse); Hearing Date: 05/23/12; Decision Issued: 08/08/12; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 9815; Outcome: Full Relief.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 9815

Hearing Date: May 23, 2012
Decision Issued: August 8, 2012

PROCEDURAL HISTORY

On March 12, 2012, Grievant was issued a Group III Written Notice of disciplinary action for client abuse.

On March 12, 2012, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On April 30, 2012, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 23, 2012, a hearing was held at the Agency's office. The Agency sought a compliance ruling prior to the conclusion of the hearing. On May 20, 2012, the EDR Director issued Ruling No. 2012-3359 authorizing the Agency to submit a copy of the video of the incident for review by the Hearing Officer upon the issuance of a protective order. On July 13, 2012, the Hearing Officer issued a Protective Order in accordance with the EDR Director's ruling. On July 16, 2012 the Agency submitted a copy of the video.

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 Services employed Grievant as a Direct Service Associate III at one of its Facilities. He had been employed by the Agency since 1997. The purpose of his position was:

To provide competent nursing care to an adult population ranging from ages 18 to 64 in a Forensics/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 had prior active disciplinary action. On June 8, 2010, Grievant received a Group III Written Notice with a three workday suspension or falsification of a document.

On January 12, 2012, Grievant was standing in a hallway, opening a closet door in order to obtain an air freshener. The hallway was narrow and would accommodate

¹ Agency Exhibit 4.

approximately three adults standing shoulder to shoulder. When compared to other employees, Grievant was significantly taller and larger. Two female employees were also standing in the hallway. They were facing the entrance to a room with the Patient inside. The Patient had a history of violence. The Patient exited his room and began walking down the hallway away from Grievant while interacting with the two women staff. He returned to the front of his room and entered the room. He then quickly exited the room and turned in Grievant's direction. One of the female employees yelled for Grievant to "watch out." Grievant saw the Patient approaching. The Patient stepped quickly towards Grievant. As he moved towards Grievant, the Patient dipped his body downward and then upward. He pulled his right arm back with the objective of punching Grievant. As his body moved towards Grievant, the Patient arched his right arm in a motion from below his shoulder to above his shoulder with his fist approaching Grievant's face.² Grievant had his left shoulder close to the wall of hallway. Grievant observed the Patient about to strike him with his right arm so Grievant thrust his left arm in a manner so that his left hand moved from below his shoulder to above his shoulder and head in order to block the Patient's punch. Grievant also reached upward with his right arm to help block and repel the Patient's attack. The top of Grievant's body moved in the direction of the patient with his shoulders twisting slightly from left to right so that the Patient's momentum toward Grievant would stop and move towards Grievant's right side. Although the Patient was almost as tall as Grievant, the Patient was significantly lighter. As Grievant moved his arms upward and his upper body forward and to his right, the Patient's head moved backwards so that he was facing upwards. As the Patient lost his momentum, he began moving backwards and was off balance. The Patient held his hands on the top of Grievant's shoulders. As the Patient moved backwards he was not able to stand and fell on the floor. The top portion of his body fell inside an open door to a room on the hallway. The bottom part of the Patient's body remained in the hallway and the Patient continued to kick Grievant. While the Patient was falling backwards, Grievant's body was moving forward. As the Patient hit the floor, Grievant bent forward so that he was standing above the Patient with the Patient between his legs. Although not visible on the video, Grievant had bent forward to hold the Patient's shoulders down to the ground. The Patient continued to kick and scramble. Grievant continued to restrain the Patient until other staff came to provided assistance. The two female employees, who observed the Patient leave his room and attack Grievant, provided no assistance to Grievant to help restrain the Patient.

Grievant received training regarding the Agency's Departmental Instruction 201 governing client abuse. He also received Therapeutic Options of Virginia (TOVA) training designed to enable him to properly restrain patients when necessary.

CONCLUSIONS OF POLICY

² Approximately 1 ½ seconds passed from the time the Patient walked out of the entrance to the room to the point he made contact with Grievant.

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 defines³ 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
- 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.

The Agency has not established that Grievant engaged in client abuse. Grievant has the right of self defense to prevent injury to himself by stopping the Patient from harming Grievant.⁴ Nothing in the Agency’s policy removes that right. Nothing in the Agency’s training would have informed Grievant that he could not take action to stop an

³ See, Va. Code § 37.1-1 and 12 VAC 35-115-30.

⁴ The Agency has not argued that Grievant should have permitted the Patient to hit him without attempting to block the attack.

oncoming attack from a Patient. The Patient lunged at Grievant and pulled his right hand back in order to punch Grievant. As the Patient was moving his right hand towards Grievant's face, Grievant used his left arm to block the Patient's attack. Grievant moved his block upward in order to push⁵ the Patient away from Grievant. Grievant's initial response to the Patient's attack was appropriate. The Patient was nearly as tall as Grievant but significantly lighter in weight.⁶ As Grievant pushed the Patient away, the Patient's head went backwards so that his face was facing the ceiling⁷ and his body began moving away from Grievant.⁸ In order to stop the Patient's attack, Grievant had to thrust his arms forward and began moving his body forward towards the Patient. Once the Patient's momentum towards Grievant had been stopped, Grievant's momentum continued to push the Patient backwards. Because the Patient's head was facing upwards and his body was moving backwards, the Patient was unable to land on his feet. Instead, the Patient fell backwards and onto the floor. The Patient had his hands on the top of Grievant's shoulders as he fell backwards. As the Patient fell backwards, Grievant's body also fell forward so that Grievant was standing and bent over the Patient.

The Agency argued that Grievant used excessive force to slam the Patient onto the floor. This argument fails. The video does not represent motion as clearly as one would see while watching television. The video contains a series of approximately seven to eight images within each second. The video shows two frames in which Grievant is bent forward and his chest moves from above his waist to below his waist while he is struggling with the Patient. Those two frames could suggest the Grievant slammed the Patient on the floor. Those two frames could also simply reflect the continuation of Grievant's initial momentum without Grievant having formed any intent to harm the Patient or slam him against the ground. The two images also show Grievant's

⁵ The Agency argued that staff were not permitted to push patients. To the extent Grievant was pushing the Patient, it was as a continuation of the initial momentum of his body as Grievant initiated a block of the Patient's punch. Grievant's left shoulder was close to the hallway wall and it was appropriate for him to move forward in a manner to block and repel the Patient's punch.

⁶ One witness described the Patient as being half the size of Grievant. Grievant described the Patient as being 6'2" tall and weighing 140 lbs.

⁷ The Agency attached significance to the fact that the Patient appears to be moving upward after his contact with Grievant. The Patient was moving upwards, in part, because Grievant attempted to block the Patient's punch by moving his hand from below his shoulder to above his shoulder. Grievant's movement was appropriate given that the Patient's punch was moving from below the Patient's shoulder to above the Patient's shoulder and towards Grievant's face. Grievant had to block upwards in order to prevent the blow from hitting his face. As Grievant blocked upwards, the Patient's body began moving upwards. It is also unclear whether the Patient's own movement contributed to his upward movement. As the Patient stepped out of the doorway, his body dipped and moved upward as he approached Grievant. Instead of moving in the path of a horizontal line, the Patient was moving in the path of a slight horizontal wave. If the Patient was in the upward portion of the wave as he made contact with Grievant, the Patient's momentum would have contributed to the Patient's upward movement upon contact with Grievant.

⁸ Grievant appeared to be moving his shoulders to his right in order to direct the Patient's momentum to his side. Grievant's response of attempting to redirect the attack was consistent with the TOVA training offered by the Agency.

lower body to be unstable which would be consistent with Grievant simply having lost his balance while moving forward. The quality of the video is insufficient for the Hearing Officer to conclude that Grievant's takedown of the Patient was inappropriate.

The Agency alleged the Grievant placed his knee across the Patient's chest to hold the Patient down. Once the Patient was on the floor, only his legs remained in the hallway and were visible in the video. The video does not show the Patient's chest and does not show Grievant placing his knee across the Patient's chest. The Video shows Grievant standing but bending forward. The video is consistent with Grievant's assertion that he stood over the Patient, bent forward, and held the patient on the floor with his hands.⁹

An important consideration with respect to the method by which Grievant attempted to restrain the Patient is the fact that the Patient was on his back on the ground attempting to kick Grievant. Only Grievant attempted to restrain the Patient. The two female staff, who observed the attack, took no action to help Grievant restrain the Patient. Because Grievant had to act by himself, it was appropriate for him to stand over the Patient and placed his hands on the Patient's shoulders to hold the Patient down.¹⁰

The Agency has not presented sufficient evidence to support its conclusion that Grievant engaged in client abuse. Accordingly, the Group III Written Notice with removal must be reversed.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action 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

⁹ In other words, it may be the case that the video suggests Grievant slammed the Patient onto the floor, but what actually happened was that Grievant's body continued to move forward and he lost his footing and was unable to stop his downward movement and stop the Patient from hitting the floor.

¹⁰ The Agency suggested that Grievant should have released the Patient once he was on the floor. Grievant responded that if he had done so, the Patient could have gotten up and continued his attack Grievant. Grievant's response to continue to restrain the Patient while the Patient was on the floor was appropriate given that other employees did not respond quickly to assist him.

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 have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. 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 email.

3. 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 the Office of Employment Dispute Resolution to 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 email 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 give a copy of all of your appeals to the other party and to EDR. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for 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.¹¹

¹¹ Agencies must request and receive prior approval from EDR before filing a notice of appeal.

[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