

Issue: Group II Written Notice (verbal client abuse); Hearing Date: 08/31/12;
Decision Issued: 09/28/12; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.;
Case No. 9868; Outcome: No Relief – Agency Upheld; Administrative Review: EDR
Ruling Request received 10/09/12; EDR Ruling No. 2013-3451 issued 10/18/12;
Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request
received 10/09/12; DHRM letter issued 10/19/12; Outcome: No Ruling – declined to
review.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 9868

Hearing Date: August 31, 2012
Decision Issued: September 28, 2012

PROCEDURAL HISTORY

On March 13, 2012, Grievant was issued a Group II Written Notice of disciplinary action for client abuse.

On April 3, 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 she requested a hearing. On August 8, 2012, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 31, 2012, 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 Behavioral Health and Developmental Services employs Grievant as a Registered Nurse Manager 1. The purpose of her position is:

To provide quality nursing care and a safe therapeutic environment for a specific patient population, utilizing knowledge base and experience through the nursing process. Evaluates, supervises, and documents performance of staff. Coordinates services on assigned shifts. Communicates clinical and administrative issues to nursing administration.¹

No evidence of prior active disciplinary action was introduced during the hearing.

Grievant received training informing her of her obligation to provide for the safety of residents at the Facility. Providing safety to residents included the obligation to step between two residents involved in a verbal altercation and/or physical confrontation.

On February 21, 2012, Client K and Client W began fighting. While Grievant was attempting to separate the two clients, Client W kicked Grievant's right wrist. After the clients were separated, Client K went to the hallway and began talking to Ms. J about the altercation she had with Client W. Grievant asked Client K not to talk about the incident in the hallway because Client K was very loud and Grievant was afraid that

¹ Grievant Exhibit 8.

Client W would hear Client K speaking and attempt to attack Client K again. Grievant explained to Client K that she needed to “let the situation go” and stop talking about it because she was exacerbating the situation and she was making it difficult for Grievant to keep her safe. Client K stated that it was the fourth time she had been attacked by Client W and the treatment team had done nothing about it. Grievant again asked Client K to stop talking about the fight. Client K became defensive towards Grievant. Grievant explained that it was her job to keep Client K safe and that Client K was making it difficult by continuing to talk about the fight. Client K said she was safe because she was under direct observation from staff. Grievant then said “if she comes out of that room there is nothing I can do to keep you safe except hit the panic alarm and wait for assistance. I cannot get between the two of you fighting.” Client K said, “I am reporting you for saying that you would stand by and let [Client W] attack me.”

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
- 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.

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

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.

Grievant received training that she was obligated to attempt to stop to clients from fighting. Her obligation included placing herself at risk of injury. Grievant knew of her obligation because she had intervened when Client W and Client K fought. After the fight, Grievant told Client K, "I cannot get between the two of you fighting." Grievant's statement caused Client K to believe that she would not protect Client K from being hurt by Client W because Grievant would not get between the two of them while they were fighting. Grievant caused or might have caused psychological harm to Client K by making Client K fear that Grievant would not physically intervene if Client W attacked her. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for client abuse. The Agency mitigated the Group III Written Notice to a Group II Written Notice.

Grievant argued that her comments were misunderstood by Client K and that by telling Client K that she would hit the panic button, she was telling Client K that she would intervene if Client W attacked her. This argument fails. One method of intervening in a fight between clients would include stepping between the clients and physically stopping the fight. Grievant indicated she would intervene by hitting a panic button and waiting for assistance but not intervene by getting "between the two of you fighting." Grievant clearly conveyed to Client K that she would not use one method of stopping a fight.

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 Employment Dispute Resolution...."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.

³ Va. Code § 2.2-3005.

DECISION

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

October 19, 2012

[Grievant]

RE: **Grievance of [Grievant] v Eastern State Hospital**
Case No. 9868

Dear [Grievant]:

The agency head of the Department of Human Resource Management, Ms. Sara Redding Wilson, has asked that I respond to your request for an administrative review of the hearing officer's decision in the above referenced case. Please note that, pursuant to the Grievance Procedure Manual, §7.2(a), either party to the grievance may request an administrative review 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 (DHRM) to review the decision. You must refer to the specific policy and explain why you believe the decision is inconsistent with that policy.
3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply.

Concerning item number 2 above, in each instance where a request is made to this Agency for an administrative review, the party making the request must identify with which human resource policy, either state or agency, the hearing decision is inconsistent. While you referenced Departmental Instruction 201 in your appeal, you did not identify how the hearing officer misinterpreted or misapplied that directive in making his decision. Rather, it appears that you are disagreeing with how the hearing officer assessed the evidence and with the resulting decision. We therefore must respectfully decline to honor your request to conduct the review.

Sincerely,

Ernest G. Spratley
Assistant Director
Office of Equal Employment Services