

Issue: Group III Written Notice with Termination (client abuse); Hearing Date: 09/06/12; Decision Issued: 09/10/12; Agency: CSH; AHO: William S. Davidson, Esq.; Case No. 9881; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 9881

Hearing Date: September 6, 2012
Decision Issued: September 10, 2012

PROCEDURAL HISTORY

The Grievant was issued a Group III Written Notice on July 9, 2012, for:

Violation of D.I. 201: **Reporting and Investigating Physical Abuse and Neglect of Clients:** The results of the investigation substantiated the allegation of “physical abuse.” Corroborating evidence disclosed that you struck a patient in the eye and that you took and held the patient to the floor in an unacceptable manner. The patient suffered an injury to his eye. ¹

Pursuant to the Group III Written Notice, the Grievant was terminated on July 9, 2012. ² On July 20, 2012, the Grievant timely filed a grievance to challenge the Agency’s actions. ³ On August 8, 2012, the Department of Employment Dispute Resolution (“EDR”) assigned this Appeal to a Hearing Officer. On September 6, 2012, a hearing was held at the Agency’s location.

APPEARANCES

Advocate for Agency
Agency Party
Grievant
Witnesses

ISSUE

1. Did the Grievant violate Departmental Instruction (“DI”) 201(RTS)03, by committing physical abuse against a client?

¹ Agency Exhibit 1, Tab 1, Page 1

² Agency Exhibit 1, Tab 1, Page 1

³ Agency Exhibit 1, Tab 1, Page 2

AUTHORITY OF HEARING OFFICER

Code Section 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code Section 2.2-3005.1 provides that the Hearing Officer may order appropriate remedies including alteration of the Agency's disciplinary action. Implicit in the Hearing Officer's statutory authority is the ability to independently determine whether the employee's alleged conduct, if otherwise properly before the Hearing Officer, justified termination. The Court of Appeals of Virginia in *Tatum v. VA Dept of Agriculture & Consumer Servs.*, 41VA. App. 110, 123, 582 S.E. 2d 452, 458 (2003) held in part as follows:

While the Hearing Officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy...the Hearing Officer reviews the facts de novo...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action. Thus the Hearing Officer may make a decision as to the appropriate sanction, independent of the Agency's decision.

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. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. A preponderance of the evidence is sometimes characterized as requiring that facts to be established more probably than not occurred, or that they were more likely than not to have happened. ⁴ However, proof must go beyond conjecture. ⁵ In other words, there must be more than a possibility or a mere speculation. ⁶

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 Agency provided the Hearing Officer with a notebook containing seven (7) tabs and a compact disc ("CD"). This notebook and CD were accepted in their entirety as Agency Exhibit 1.

⁴ *Ross Laboratories v. Barbour*, 13 Va. App. 373, 377, 412 S.E. 2d 205, 208 1991

⁵ *Southall, Adm'r v. Reams, Inc.*, 198 Va. 545, 95 S.E. 2d 145 (1956)

⁶ *Humphries v. N.N.S.B., Etc., Co.*, 183 Va. 466, 32 S.E. 2d 689 (1945)

The Grievant provided the Hearing Officer with a notebook containing four (4) tabs. This notebook was accepted in its entirety as Grievant Exhibit 1.

The relevant facts in this matter were undisputed. The Grievant was employed as a Forensic Mental Health Technician (“FMHT”) with the Agency. The Grievant had been in that position for approximately eighteen (18) months. On June 17, 2012, the Grievant was seated at a table in an open common area. Two or three other clients were seated at that table with him. The time was approximately 12:20 p.m., and the Grievant was playing cards with another client who was seated at the table. The Grievant provided the Investigator in this matter with a written statement on June 22, 2012.⁷ The Grievant, in his written statement, stated in part as follows:

I was approached by the patient who threw a punch at me while I was sitting that did not land. I then stood in front of the patient when he threw another punch that connected with my mouth. I then reacted suddenly throwing a punch back and grabbing the patient causing us to fall over the chairs in which we laid there until the response arrived and I removed myself from the patient.⁸

In his oral testimony before the Hearing Officer, the Grievant admitted that, after he had been struck in the face by the patient, he reacted quickly by striking the patient with his fist and then grabbed him. In the process, the Grievant and the patient fell over an ottoman and the Grievant ended up on top of the patient.

The Agency introduced a CD which contained a video produced by the surveillance cameras for the common area. The video clearly showed the patient approaching the Grievant, pausing for a moment and then throwing punches at the Grievant. The Grievant stood quickly and struck the patient one time, stepped forward into the patient and both of them fell over the ottoman.

DI 201(RTS)03, is the appropriate policy for this matter. In that policy, at Section 201, abuse is defined in part as follows:

This means any act or failure to act by an employee ...for the care of an individual in a Department facility 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 ...to a person receiving care or treatment for mental health, mental retardation or substance abuse. Examples of abuse include, but are not limited to, acts such as:

...Assault or battery;

...Use of excessive force when placing a person in physical or mechanical restraint;

⁷ Agency Exhibit 1, Tab 2, Page 11

⁸ Agency Exhibit 1, Tab 2, Page 11

...Use of physical or mechanical restraints on a person that is not in compliance with federal or state laws, regulations, and policies, professionally accepted standards of practice or the person's individualized services plan...⁹

The Grievant's written statement following the event, the Grievant's testimony before the Hearing Officer and the video that was introduced by the Agency, clearly establish that the patient struck the Grievant without provocation and that the Grievant struck the patient and then caused the patient and the Grievant himself to stumble over an ottoman. This is clearly patient abuse which this Agency does not tolerate and, as such, in and of itself is a Group III offense.

MITIGATION

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..."¹⁰ 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, (3) the disciplinary action was free of improper motive, (4) the length of time that the Grievant has been employed by the Agency, and (5) whether or not the Grievant has been a valued employee during the time of his/her employment at the Agency.

The Agency head testified before the Hearing Officer that she considered the Grievant's personal work record, his longevity and letters of recommendation that he provided to her. Nonetheless, she found no reason for mitigation in this matter.

DECISION

For reasons stated herein, the Hearing Officer finds that the Agency has borne its burden of proof in this matter and that termination of the Grievant was appropriate.

APPEAL RIGHTS

You may file an administrative review request if any of the following apply:

⁹ Agency Exhibit 1, Tab 5, Page 1

¹⁰Va. Code § 2.2-3005

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. You may fax your request to 804-371-7401, or address your request to:

Director of the Department of Human Resource Management
101 North 14th Street, 12th Floor
Richmond, VA 23219

2. 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. You may fax your request to 804-786-0111, or address your request to:

Office of Employment Dispute Resolution
101 North 14th Street, 12th Floor
Richmond, VA 23219

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 of the original hearing decision. A copy of all requests for administrative review must be provided 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 administrative requests for a review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.¹¹ 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.¹²

[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]

William S. Davidson
Hearing Officer

¹¹An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. Virginia Department of State *Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

¹²Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.