

Issue: Group III Written Notice with Termination (client abuse/neglect); Hearing Date: 09/21/16; Decision Issued: 09/23/16; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10862; Outcome: Full Relief.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10862

Hearing Date: September 21, 2016

Decision Issued: September 23, 2016

PROCEDURAL HISTORY

On July 13, 2016, Grievant was issued a Group III Written Notice of disciplinary action with removal for client abuse and neglect.

On August 5, 2016, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On August 22, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 21, 2016, 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 Virginia Department of Behavioral Health and Developmental Services employed Grievant as a Safety Security and Treatment Tech at one of its facilities. No evidence of prior active disciplinary action was introduced during the hearing.

On May 6, 2016, Grievant was working in a residence building. The building had two tiers with an open day room in the middle and stairs inside the day room connecting the two tiers. Resident rooms were located on the bottom and top tiers. The day room had at least six tables with four seats per table. The day room also had a big screen television and three rows of chairs for residents to sit while watching television. Sounds from activities in the building could be heard throughout the day room.

The building had a closet on the lower floor next to two shower stalls. The closet had a key pad lock and was supposed to be locked at all times and accessible only to staff who knew the key code.

Resident RS learned the key code to the closet door. Grievant did not know that Resident RS or any other resident had access to the closet.

Resident TL challenged Resident CO to a fight in the closet. Resident RS entered the code into the lock to the closet door. Resident CO entered the closet and waited until Resident TL arrived. The two men fought. If they heard the sound of an employee's radio, they stopped fighting until the employee passed. At some point during the fight, one of the men picked up a mop bucket with a metal mop ringer in the

bucket. He threw the bucket and metal ringer at the other man but hit the inside closet wall. This made a loud sound.

Grievant did not see the men go into the closet. Although he knew that residents sometimes preferred to fight in closets, he did not have any reason to believe that the two residents were inside the closet. When Grievant heard the sound, he did not know where in the building the sound originated.

An SSTT was walking beside Grievant when the sound occurred. They both heard the sound. The SSTT walked towards the closet and looked around but did not hear another sound. She turned and walked back towards Grievant. The Agency did not take disciplinary action against the SSTT.

A few minutes later, Resident TL opened the closet door and walked out. He asked Grievant to let him into his room on the second floor. That was the first time Grievant realized a resident was inside the closet. Grievant returned to the closet and went inside. He observed Resident CO with a towel on his head. Grievant asked Resident CO if he wanted to obtain medical care and Resident CO declined. Resident CO left the closet and returned to his room. Grievant could not force Resident CO to receive medical care if Resident CO refused the offer of assistance.

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 defines¹ client abuse as:

This means any act or failure to act by an employee or other person responsible 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 or death to a person receiving care or treatment for mental illness, mental retardation or substance abuse.

Departmental Instruction (“DI”) 201 defines Neglect as:

The failure by an individual, program, or facility operated, licensed, or funded by the department responsible for providing services to do so, including nourishment, treatment, care, goods, or services necessary to the health, safety, or welfare of a person receiving care or treatment for mental illness, mental retardation, or substance abuse.

¹ See, Va. Code § 37.2-100 and 12 VAC 35-115-30.

The Agency has not presented sufficient evidence to support the issuance of disciplinary action in this case. The Written Notice must be reversed and Grievant reinstated.

The Agency argued that Grievant engaged in client abuse and neglect because he failed to look inside the closet after hearing a loud sound. The evidence showed that one resident threw a mop bucket and mop ringer against the wall inside the closet causing a loud sound. Grievant heard the sound but could not tell where the sound came from. The video of the incident does not have audio. The room where Grievant worked was large enough to have at least six tables with four seats. Resident rooms were placed on the first floor and on a second floor. The middle of the room was open so that sound from the top floor could be heard on the bottom floor and vice versa. The sound could have come from a direction other than the closet. It is not an obvious conclusion that Grievant should have known the sound came from inside the closet. He did not see the residents enter the closet and did not know the security code to the close door had been compromised. Grievant did not think to look inside the closet because he did not know where the sound came from. He waited to see if the sound occurred again but it did not. The SSTT walked towards the closet and showers but she could not tell where the sound originated. The Agency took no action against the SSTT for failing to locate the sound, yet it disciplined Grievant for failing to do so.

The Agency alleged that Grievant engaged in client neglect by failing to ask the two residents who were in the closet how and why they got into the closet. Asking these questions does not involve the provision of health services to the residents. Grievant was focused on providing assistance to Resident CO who had a towel to his head to cover a bloody wound. Grievant's decision to focus on the injuries to the residents was a more appropriate decision than serving as an investigator. Grievant testified that he wrote an incident report that day. The Agency has not presented any evidence to show he failed to write such an incident report.

No basis exists to take disciplinary action against Grievant. The Agency's finding that he engaged in client abuse and neglect is in error.

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 **rescinded**. The Agency is ordered to **reinstate** Grievant to Grievant's same position at the same facility prior to removal, or if the position is filled, to an equivalent position at the same facility. 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

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
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.²

² 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