

Issue: Group III Written Notice with termination (patient abuse); Hearing Date: 02/25/10; Decision Issued: 02/26/10; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 9270; Outcome: No Relief – Agency Upheld.



**COMMONWEALTH of VIRGINIA**  
*Department of Employment Dispute Resolution*

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 9270**

Hearing Date: February 25, 2010  
Decision Issued: February 26, 2010

**PROCEDURAL HISTORY**

On September 2, 2009, Grievant was issued a Group III Written Notice of disciplinary action with removal for client abuse.

On September 28, 2009, 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 January 25, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 25, 2010, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Grievant's Counsel  
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 employed Grievant as a direct support employee at one of its Facilities until her removal effective September 2, 2009. She worked in one of the Facility's cottages providing services to residents.

The Resident is a non-verbal, ambulatory, 34-year-old male who has been living at the Facility since 1999. The Resident continues to function intellectually within the range of profound intellectual disability.

On a day several weeks prior to June 26, 2009 when the incident was reported to the Facility Director, Grievant was working in the cottage where the Resident resided. The Resident became agitated and started making loud noises and clapping his hands. Ms. R asked the Resident to please keep the noise down but he continued to make noise. Grievant entered the room and yelled at the Resident telling him to stop all the noise. Grievant walked towards the Resident with her finger pointed at him and as she approached the Resident, he held one arm to the side of his face and the other arm in front of his face as if to protect himself from Grievant. Grievant approach the Resident and slapped him in the back of his head. Grievant slapped the Resident hard enough for Ms. R to hear the slap. The Resident's head moved forward upon impact.

Ms. R did not timely report Grievant's actions toward the Resident because she was afraid that some of Grievant's friends would learn that she reported Grievant's

actions and take action against Ms. R. Ms. S also observed Grievant slap the Resident but did not report it immediately because she was afraid someone might get back at her.

The Investigator interviewed Grievant and asked if anyone had ever seen her hit the Resident in the back of his head. Grievant said "Yes, I did playfully hit [the Resident] in the back of his head, but I was not mad at him when I did it." The Investigator asked Grievant why she would slap the Resident in the back of his head. Grievant responded, "I was just being playful, but I also have a heavy hand." The Investigator then asked [Grievant] to demonstrate how hard she hit the Resident in the back of his head and to try and hit the Investigator the exact same way Grievant hit the Resident. Grievant again said "I'm heavy-handed". Grievant struck the Investigator in the back of his head causing the Investigator's head to move forward abruptly. Grievant immediately hugged the Investigator's head and stated "I'm sorry dog, I was just playing."

### **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 defines<sup>1</sup> client abuse as including assault or battery.

By slapping the Resident in the back of his head, Grievant engaged in battery of the Resident. Grievant acted contrary to Departmental Instruction 201. Under DHRM Policy 1.60, Attachment A, "abuse or neglect of clients" is a Group III offense. Upon the issuance of a Group III offense, an agency may remove an employee. In this case, the Agency has presented sufficient evidence to support the issuance of a Group III Written Notice with removal.

Grievant denies that she slapped the Resident and engaged in client abuse. The Agency has presented sufficient evidence to show that Grievant slapped a client inappropriately based on several factors. First, the testimony of Ms. R was credible. She observed Grievant slap the Resident. Second, the testimony of Ms. S was credible. She also observed a time when Grievant slapped the Resident. Third, Grievant admitted to the Investigator that she had slapped the Resident. She described herself as "heavy-handed". When Grievant demonstrated on the Investigator how hard she had hit the Resident, the Investigator's head moved forward abruptly. Grievant hit the Investigator hard enough for him to conclude that the hit hurt and that it caused him the desire to hit Grievant back.

Grievant contends that the Agency cannot establish the precise date on which Grievant supposedly hit the Resident. Although the Agency cannot establish the exact

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<sup>1</sup> See, *Va. Code § 37.1-1 and 12 VAC 35-115-30.*

date on which Grievant slapped the Resident, it is clear that Grievant slapped the Resident on at least one or two occasions. It is not necessary for the Agency to identify the date of the client abuse, given the other evidence showing that Grievant engaged in client abuse.

Grievant argues that Ms. R and Ms. S should have timely reported what they observed and their failure to do so should have resulted in disciplinary action against them. Although Grievant was correct that the witnesses should have timely reported what they observed, their failure to timely report does not exonerate Grievant's client abuse.

*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....”<sup>2</sup> 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 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

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<sup>2</sup> *Va. Code § 2.2-3005.*

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 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

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. Please address your request to:

Director  
Department of Employment Dispute Resolution  
600 East Main St. STE 301  
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 the decision was issued. You must give a copy of all of your appeals to the other party and to the EDR Director. 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.<sup>3</sup>

[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].

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>3</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.