



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11759

Hearing Date: April 6, 2022
Decision Issued: April 26, 2022

PROCEDURAL HISTORY

On September 22, 2021, Grievant was issued a Group II Written Notice of disciplinary action for lacking civility in the workplace.

On October 4, 2021, 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 November 22, 2021, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 6, 2022, a hearing was held by remote conference.

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. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. 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 Psychologist II at one of its facilities.¹ Grievant began working for the Agency on November 25, 2019. He received an overall rating of "Contributor" on his October 21, 2021 performance evaluation. No evidence of prior disciplinary action was introduced during the hearing.

The work environment at the Facility was highly stressful for Grievant and other staff. Staff were responsible for supervising and treating patients who were experiencing severe mental health concerns and sometimes in crisis.

First statement. On June 1, 2021, a "female-to-male transgender patient" experienced blurred vision and eye pain requiring treatment in the Emergency Room. Grievant told staff, "Maybe [patient] grew a d--k and ejaculated into her own eye."

Second Statement. On June 2, 2021, two male patients were experiencing psychosis. Grievant told staff, "Black guys should just hold their d--ks. They just don't

¹ Grievant later left the Facility.

care. That's just what they do." Grievant also said, "Maybe we should just line them up in shackles at the picnic table, take their shirts off, and put a sign for cotton-pickin' there."

Third Statement. On July 13, 2021, Grievant was making rounds. A patient commented that his doctor was "some young man." Grievant said to staff, "Get it?! 'Som Yung Manh!!'" as Grievant mocked an Asian accent.

Fourth Statement. Grievant created a "drinking game" about a transgender patient. Several times in July 2021 and on July 14, 2021, Grievant would say "drink" if staff accidentally referred to the patient using the patient's former pronouns of "she" and "her."

Fifth Statement. A female patient had "body issues and low self-esteem." Another patient began calling the female patient "Madea" to insult the female patient. Several times in July 2021 including July 13, 2021, Grievant referred to the female patient as "Madea" when speaking with other staff at the Facility.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action."² Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

DHRM Policy 2.35 governs Civility in the Workplace and provides:

It is the policy of the Commonwealth to foster a culture that demonstrates the principles of civility, diversity, equity, and inclusion. In keeping with this commitment, workplace harassment (including sexual harassment), bullying (including cyber-bullying), and workplace violence of any kind are prohibited in state government agencies. ***

The Commonwealth strictly forbids harassment (including sexual harassment), bullying behaviors, and threatening or violent behaviors of employees, applicants for employment, customers, clients, contract workers, volunteers, and other third parties in the workplace. ***

Behaviors that undermine team cohesion, staff morale, individual self-worth, productivity, and safety are not acceptable. ***

² The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

Any employee who engages in conduct prohibited under this policy or who encourages or ignores such conduct by others shall be subject to corrective action, up to and including termination, under Policy 1.60, Standards of Conduct.

The Policy Guide to DHRM Policy 2.35 provides examples of unacceptable behavior including:

- Subjecting others to communication or innuendoes of a sexual nature;
- Demonstrating behavior that is rude, inappropriate, discourteous, unprofessional, unethical, or dishonest;
- Behaving in a manner that displays a lack of regard for others and significantly distresses, disturbs, and/or offends others;
- Making disparaging remarks, spreading rumors, or making innuendos about others in the workplace;
- Humiliating others; making public statements with the intent of embarrassing a targeted person; impugning one's reputation through gossip;
- Making culturally insensitive remarks; displaying culturally insensitive objects, images, or messages;
- Making demeaning/prejudicial comments/slurs or attributing certain characteristics to targeted persons based on the group, class, or category to which they belong;

Grievant's statements are sufficient to support the disciplinary action. Grievant displayed a pattern of inappropriate behavior reflecting a lack of civility in the workplace. The fact that Grievant did not express his comments about patients directly to the patients does not undermine the Agency's disciplinary action.

Grievant's first statement involved communication or innuendoes of a sexual nature. He referred to a transgender patient growing a penis and ejaculating. His comments were inappropriate and unprofessional. His comments were demeaning and intended to humiliate. Grievant later recognized his behavior was offensive. During due process, Grievant admitted making the comment and said he was "quite simply ashamed" of making it. Grievant admitted it was "beyond insensitive and I have no doubt that it was highly offensive to everyone that heard it."

Grievant's second statement involved communication or innuendoes of a sexual nature. He referred to patients by race and ascribed behavior of holding their "d--ks" because "that's just what they do." His comments were inappropriate, unprofessional, racist, offensive, humiliating, culturally insensitive, and attributed characteristics based on race.

Grievant argued that his second statement was taken out of context. He believed overly harsh restrictive interventions were being used and that some of the decisions were

human rights violations. He claimed he was being hyperbolic in order to shame others into altering their approach. He asserted his method was effective because the two patients were removed from four-point restraints.

Although Grievant's objective of ending harsh restrictive interventions may have been valid, his method of doing so was not appropriate. Grievant should have expressed his concerns without attributing characteristics to patients based on their race. There is no context in which Grievant's comments could be justified.

Grievant's third statement involved mocking an accent. His comments were culturally insensitive and unprofessional.

During due process, Grievant claimed he "vaguely remembered this quote." He claimed to be engaged in "joking banter" with Dr. Y. Grievant said, "I apologize for mocking an Asian accent." Although Grievant's apology was meaningful, it did not erase his offensive comment and the reason for disciplinary action.

Grievant's fourth statement involved creating a "drinking game." The Agency considered Grievant's behavior to be inappropriate. Grievant argued his behavior was not offensive and was intended to remind staff to implement training he received on "Recommendations for Implementing Gender Affirming Care." One of those recommendations was to "gently correct" a person who used an incorrect pronoun for a transgender individual.

Grievant's explanation of his behavior appears reasonable. Even if the Hearing Officer disregards the fourth statement, however, there remains sufficient evidence to support the disciplinary action.

Grievant's fifth statement involves adopting an insult used by one patient to refer to another patient with "body issues and low self-esteem." Grievant's behavior was rude, discourteous, disparaging, humiliating, and demeaning.

Grievant argued he called the female patient "Madea" because he could not remember her name. He called her that name several times. Grievant should have made the effort to learn the patient's name rather than continue to use an insulting name for the patient.

Grievant argued that all of his statements reflected having to work in an extraordinarily stressful environment. He experienced stress from having to work with patients who were often experiencing crisis. He experienced stress working with Dr. Y. Many staff at the Facility had difficulty working with Dr. Y, according to Grievant. Grievant said he used "dark humor" or "gallows humor" to minimize the stress he experienced.

There is little doubt that Grievant's work environment was extraordinarily stressful and sometimes dangerous.³ His use of dark humor may have explained his behavior but

³ Grievant suffered a black eye following an altercation at the Facility.

it does not excuse his behavior. Grievant's behavior was contrary to DHRM Policy 2.35 thereby justifying the issuance of disciplinary action. The Hearing Officer is not persuaded that gallows humor is "not only almost universally utilized by emergency personnel, but that it is vital to their profession."⁴

Grievant argued that Dr. Y reported him to retaliate against him for correcting her inappropriate behavior. How the Agency learned of Grievant's behavior does not prevent the Agency from applying disciplinary action. The Agency independently investigated Grievant's behavior and afforded Grievant the opportunity to contest the Agency's conclusions. The Agency took disciplinary action against Grievant solely because it believed Grievant acted contrary to the Standards of Conduct.

Grievant argued that the Agency failed to take progressive disciplinary action. Grievant had no prior disciplinary action. He asserts he should have received lesser disciplinary action. Although agencies are encouraged to engage in progressive disciplinary action, the Standards of Conduct does not require agencies to do so. The Agency elected to issue Grievant a Group II Written Notice and has presented sufficient evidence to support its decision.

Grievant argued that the Agency acted inappropriately by taking 62 days to "get my final notice." Although the Agency could have issued the Written Notice sooner, the amount of time taken by the Agency was not so extreme as to render the Agency's disciplinary action invalid.⁵ The Agency presented credible testimony to support the disciplinary action.

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 Human Resource Management"⁶ 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

⁴ Grievant Exhibit p. 55.

⁵ It appears that part of the delay resulted from the Agency attempting to find ways to mitigate the disciplinary action.

⁶ Va. Code § 2.2-3005.

applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive.

Grievant argued the Agency inconsistently disciplined its employees. Grievant presented a witness who testified about other employees making offensive comments and yet those employees were not disciplined. Grievant did not establish that Agency executives knew of the comments and intentionally refused to take disciplinary action for some impermissible reason. The Hearing Officer does not believe that the Agency singled-out Grievant for disciplinary action.

The Agency could have issued Grievant a Group III Written Notice with removal. The Agency considered Grievant's good working relationship with patients and decided to mitigate the disciplinary action to a Group II Written Notice. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the Group II Written Notice.

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 request an administrative review by EDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EDR within 15 calendar days of the date the decision was issued.

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 must also provide a copy of your appeal to the other party 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.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a

specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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.^[1]

[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

^[1] Agencies must request and receive prior approval from EDR before filing a notice of appeal.