



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11786

Hearing Date: June 1, 2022
Decision Issued: June 13, 2022

PROCEDURAL HISTORY

On November 30, 2021, Grievant was issued a Group III Written Notice of disciplinary action with removal for client abuse.

On December 20, 2021, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On January 18, 2022, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 1, 2022, a hearing was held by remote conference.

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. 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 Direct Service Associate II / Psych Tech at one of its facilities.

The Patient was a 25 year old male admitted to the Facility from jail in order for the Patient's competency to be restored.

On November 3, 2021, the Patient walked through the day room ripping pages from a notebook and dropping them on the floor. The Patient was disruptive and the Charge Nurse "called a code" to have staff place the Patient in the Emergency Restraint Chair (ERC). The ERC had arm and leg straps to hold patients in the chair.

An employee brought the ERC to the day room. The Patient walked to the ERC and began to sit down in the chair. Grievant was yelling at the Patient. Grievant felt the Patient should be the one to pick up the papers he threw on the floor.

The Patient was seated in the ERC. Grievant was cursing at the Patient. The Patient began kicking and struggling while seated. Grievant attempted to hold the Patient's right shoulder. The Patient attempted to stand up while pushing Grievant away. Grievant moved backward but stepped forward. While the Patient was seated, Grievant pointed her right index finger towards the Patient's face as she spoke to him. Grievant said, "I'm tired of you." After Grievant put her hand down, the Patient moved out of the

chair and slapped Grievant's face with his left hand. The Patient knocked Grievant's glasses from her face. As Patient fell back into the chair, Grievant moved forward and stood above the Patient. Grievant grasped and shoved the Patient downward. Grievant punched the Patient at least one time while the patient attempted to grasp Grievant. Grievant backed away from the Patient and was assisted backwards by other staff. The CPRT and the RN told Grievant to leave the unit. Grievant and another employee picked Grievant's glasses off of the floor. Grievant put on her glasses and left the room.

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. 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.

For the Agency to meet its burden of proof in this case, it must show that (1) Grievant engaged in an act that he or 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

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

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.

On November 3, 2021, the Patient hit Grievant and knocked her glasses to the floor. In response, Grievant punched the Patient at least one time. Grievant's action was not authorized by policy and not a therapeutic treatment. Grievant's behavior was not in self-defense. She acted in retaliation because of the Patient's attack. Grievant's action constituted client abuse thereby justifying the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an employee may be removed from employment. Accordingly, the Agency's decision to remove Grievant must be upheld.

Grievant argued she was denied procedural due process because the Facility Head had decided to terminate Grievant's employment prior to affording Grievant the opportunity to present any explanation or defenses to the proposed disciplinary action. On November 22, 2021, the Assistant Chief Nursing Executive and RN-J met with Grievant regarding the November 3, 2021 incident. According to Grievant, RN-J told Grievant the Facility Head intended to issue Grievant a Group III Written Notice with removal. Grievant was given a letter dated November 22, 2021 from the Facility Head stating, "Due to the nature of this offense, I intend to issue a Group III written notice under the Standards of Conduct, for violation of DI 201 and Hospital Policy"² Grievant had until November 23, 2021 to provide a response.

Grievant argued that the Standards of Conduct required that Grievant be given a "reasonable opportunity to respond" before Facility Head concluded that Grievant should receive a Group III Written Notice with removal. Grievant asserted that a disciplinary hearing was conducted on November 30, 2021 during which the Assistant Human Resource Director told Grievant the Facility Head wanted to "move forward" with the disciplinary action as written in the due process letter. Grievant asserted that as of December 20, 2021, she had not received the disciplinary action.

The Hearing Officer can assume for the sake of argument that Grievant's assertions are true. Doing so will not affect the outcome of this grievance. The Standards of Conduct require agencies to afford employees' a reasonable opportunity to respond to possible disciplinary action. As Grievant correctly points out, an agency should not decide to issue disciplinary action until after it has received and considered an employee's response to possible disciplinary action. To the extent the Agency failed to fully consider Grievant's response prior to taking disciplinary action, the Agency would have denied Grievant procedural due process. To the extent the Agency denied Grievant procedural due process, however, that defect was cured by the hearing process. Grievant had the opportunity to present evidence and argument in response to the disciplinary action and have the information considered by the Hearing Officer prior to issuance of the hearing decision. There is no basis to reverse the disciplinary action because of any violation by the Agency of Grievant's procedural due process rights.

² Agency Exhibit I.

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 ...”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.

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 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

³ Va. Code § 2.2-3005.

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.