



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11905

Hearing Date: March 6, 2023

Decision Issued: June 6, 2023

PROCEDURAL HISTORY

On July 29, 2022, Grievant was issued a Group III Written Notice of disciplinary action with a three workday suspension for failure to follow policy.

On August 25, 2022, 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 21, 2022, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 6, 2023, 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 employs Grievant as an LPCT at one of its facilities. No evidence of prior active disciplinary action was introduced during the hearing.

In-sight supervision means an employee is responsible for being able to see an individual at all times.

On July 7, 2022, Grievant was assigned responsibility from 2 p.m. to 5 p.m. to oversee Individual S who required in-sight supervision. Grievant was required to keep Individual S within Grievant's line of sight at all times. At 5 p.m., Grievant did not transition to her next supervision and, thus, she remained responsible for in-sight supervision of Individual S.

Ms. H was assigned general supervision of Individual Su and Individual Da.

Grievant checked the water temperature binder and noticed it was not complete. Grievant told Ms. H that Grievant was about to start preparing dinner and take the water temperatures. Grievant asked Ms. H to watch the individuals. Ms. R walked into the unit. Grievant told Ms. G that she was stepping into the kitchen to prepare dinner and record water temperatures.

Grievant entered the kitchen while Individual S remained in the living room. Individual A was also in the living room. Grievant was not able to see Individual S while Grievant was inside the kitchen. Grievant was no longer in-sight supervision of Individual S.

From 5:26:47 p.m. until 5:27:16 p.m., Individual S and Individual A engaged in a series of slaps and punches while they were in the living room. Grievant did not see the fight because she was in the kitchen.

While in the kitchen, Ms. G said that two staff cannot be in the kitchen and that one needs to cover the floor.

Grievant and several other employees in the kitchen heard Individual A scream. Grievant turned and looked towards the living room. Grievant noticed Ms. G, Mr. R, and Ms. H were also in the kitchen. Grievant and several other employees went to the living room to calm Individual S and Individual A.

Ms. H did not realize that Grievant had asked her to watch the individuals in the living room while Grievant entered the kitchen. Ms. H did not assume in-sight supervision of Individual S. The shift log did not show Grievant made an entry indicating that she has transferred in-sight supervision to Ms. H.

Grievant was tested for prohibited drugs on July 11, 2022. She tested positive for marijuana. The Agency's policies prohibited employees from consuming marijuana.

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 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.

Programming Guideline 48 provides that:

Any time a staff needs to leave supervision of an individual for a break, however short or long, a proper pass off must be verbally made with another staff that is assuming supervision. If it's a reassignment of supervision, the reassignment needs to be documented in the shift log.

Grievant was obligated to make a “proper pass off”. Grievant failed to make a proper pass off to Ms. H because Ms. H was not aware of the pass off and did not acknowledge she became obligated to perform in-sight supervision of Individual S. Grievant did not have in-sight supervision of Individual S when Grievant entered the kitchen. Ms. H did not assume in-sight supervision of Individual S. Ms. H was also in the kitchen. Individual S did not have in-sight supervision for approximately one minute during which time she and Individual A began to hit each other. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may suspend an employee for up to 30 workdays in lieu of termination. Accordingly, the Agency’s decision to suspend Grievant for three workdays must be upheld.

Grievant argued that she told Ms. H she was going into the kitchen and that Ms. H became responsible for supervising Individual S. The evidence showed that Grievant did not properly complete the pass off and, thus, Grievant remained responsible for Individual S.

Grievant argued that Adult Protective Services concluded she was not neglectful of Individual S. The evidence showed that APS did not conduct its own investigation and that its determination was not controlling of the outcome of this grievance. Grievant did not testify during the hearing.

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”¹ 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 a three workday suspension is **upheld**.

¹ Va. Code § 2.2-3005.

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.