



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11940

Hearing Date: May 24, 2023
Decision Issued: June 13, 2023

PROCEDURAL HISTORY

On February 15, 2023, Grievant was issued a Group III Written Notice of disciplinary action with removal for client abuse.

On February 20, 2023, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On February 27, 2023, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 24, 2023, 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 Registered Nurse at one of its facilities. She had been employed by the Agency for approximately two years. No evidence of prior active disciplinary action was introduced during the hearing.

The Patient was a 39-year-old female with a history of unstable schizophrenia. She was admitted to the Facility on January 17, 2023 for possible restoration to competency. Upon admission to the Facility, the Patient was uncooperative with assessments and presented as disheveled and malodorous. She exhibited some sexually inappropriate behaviors, verbal aggression, and has been observed responding to internal stimuli. She had been observed putting objects or clothing into her nose or vagina. The Patient had a history of severe psychosis and stuffing clothing into her vagina. The Patient had a history of being very aggressive towards staff and had injured staff severely in the past.

The Facility employed staff as part of a crisis prevention response team. They were authorized to restrain patients at the direction of a charge nurse.

On January 24, 2023, Grievant was working at the Facility. The LPN observed the Patient ripping clothing and inserting the clothing in her vagina. Grievant spoke with the

Patient and asked the Patient to remove the items from her vagina, but the Patient refused.

At approximately 2:45 a.m., Grievant called the Medical Officer on Duty, a physician, and asked for a hold on the Patient due to the Patient placing foreign objects in her vagina. The MOD authorized the hold and told Grievant to call back to report the duration of the hold. Grievant then called for assistance from the CPRT unit.

CPRTH responded to the call for assistance. He heard Grievant say that the Patient had shoved something into her vagina and that there was a hold order in place. Since a female patient was involved, CPRTH called CPRTB, a female employee, to provide assistance.

CPRTB responded to a call for assistance. She was told that the Patient had stuck something in her vagina. Grievant said she had a hold order. CPRTB observed the Patient asleep in her bed. CPRTB advised the Patient to wake up. CPRTB asked the Patient if she could remove the item. The Patient refused. Grievant told the Patient there was a hold order in place.

CPRTM responded to the call for assistance. He heard Grievant say that “we need to get a cloth from [the Patient], she tore a shirt and placed it in her vagina.” He asked Grievant if there was a hold order for the Patient and Grievant told him there was a hold order.

CPRTJ also responded to the call for assistance.

The Patient was on her back. CPRTB was standing at the top left of the bed. The Patient was directed to remove the item from her vagina, but she refused. CPRTM heard the Patient say, “Don’t f—king touch me.” CPRTH grabbed the Patient’s left leg. CPRTJ grabbed the Patient’s right leg. CPRTM held the Patient’s left arm.

At approximately 2:50 a.m., Grievant pulled down the Patient’s pants while staff readjusted their hands. The LPN assisted. Grievant observed a white cloth in the Patient’s vagina. Grievant put her fingers into the Patient’s genitals and pulled out a white cloth. CPRTJ turned his head to avoid looking at the Patient’s genitals. CPRTJ testified that the “whole incident did not feel right; felt messed up.”

The Patient began screaming, “They’re raping me.” CPRTB attempted to verbally de-escalate the Patient, but was unsuccessful.

Staff released the Patient and left the Patient’s room.

Grievant called the MOD and told her that the hold was for approximately three minutes to remove dirty shreds of clothing. To enter the order, the MOD had to select reasons from a drop down box on an electronic form. In other words, the MOD could not

write the specific reason for the hold authorization. At 3:31 a.m., the MOD entered the order authorizing the hold for “Threatening or Aggressive Towards Others.”

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 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.

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

Critical Policy 450-035 governs Emergency Use of Seclusion or Restraint. The policy states that the Facility is, “committed to preventing, reducing, and striving to eliminate seclusion and restraint.” The policy provides, “[s]eclusion and restraint (physical restraint/hold) will only be used in an emergency to prevent the patient from self or others. A Licensed Independent Practitioner (LIP) order must be obtained for the holding of a patient (physical restraint/hold) for the purpose of a required behavioral emergency intervention.”²

Policy 021-001 governs Patient Searches. The policy’s purpose is to “establish procedures used when searching patient[s] for ... other items that pose a threat to the health or safety of the patient or others.” The policy provides “that a “body search requires two staff of the same sex as the patient being searched. If a person of the opposite sex is present that person will be outside the room with the door slightly ajar.”

This policy provides that Body Cavity Searches are conducted only (1) in extreme circumstances when contraband might be hidden in a rectum or vagina, (2) with a physician’s order, (3) by a physician, and (4) with the Hospital Director’s prior approval.”

Grievant pulled down the Patient’s pants to expose her genitals with at least two male staff able to view the Patient’s genitals. The Patient’s behavior was not an emergency requiring immediate action to avoid harm.³ Grievant did not act in accordance with the Agency’s search policies. Grievant could have waited until the next shift when there would have been more female staff available to assist with restraining the Patient. Grievant instructed male staff to hold a female patient’s legs open thereby violating the Patient’s dignity and respect. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for client abuse. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, the Agency’s decision to remove Grievant must be upheld.

Grievant argued and established that she was authorized by the MOD to conduct the body cavity search. The MOD acted contrary to policy. The MOD’s error, however, is not sufficient to reverse the disciplinary action. The MOD’s order did not include authorization to disregard the Patient’s dignity by using male staff to hold the Patient.

Grievant argued that the Agency’s discipline was excessive. It is clear that the Agency could have issued lesser disciplinary action and still appropriately corrected Grievant’s behavior. The Agency’s discipline, however, is consistent with its authority under the Standards of Conduct. The Hearing Officer disagrees with the Agency’s decision but cannot substitute his preference for that of the Agency when the Agency has acted in accordance with the Standards of Conduct.

² The MOD was the LIP.

³ See, Critical Policy 450-035.

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 ...”⁴ 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

⁴ 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.