

DECISION OF HEARING OFFICER

IN RE: CASE NO. 11832
HEARING DATE: 11/21/22
DECISION ISSUED: 01/31/23

PROCEDURAL HISTORY

The incident regarding this matter occurred on March 19, 2022. It was qualified for hearing on May 12, 2022, and assigned to Hearing Officer on July 11, 2022. The first phone conference was July 22, 2022, and hearing date set by agreement for October 10, 2022. A new Agency advocate was substituted, and a new phone conference was set for September 27, 2022 which was cancelled and reset for October 3, 2022. The October 10, 2022, hearing was moved to October 31, 2022, which hearing date was cancelled and reset for November 21, 2022. As the Hearing Officer was quarantined at the time of the October 31st hearing date, the Hearing Officer offered to do the hearing on October 31st via video conference, but counsel declined. When the hearing was set for November 21, 2022, Counsel was advised the Hearing Officer would be unavailable the month of December and that a decision would not be drafted until January of 2023.

Counsel for Grievant filed a Motion for Discovery which motion was resolved. Counsel for Grievant filed a Motion to Strike based on the unavailability of witnesses requested by Grievant of the Agency. The Motion to Strike was deemed by EDR counsel as not an action available in grievance hearings.

APPEARANCES

Agency Advocate
Agency representative as witness
Four additional agency witnesses
Grievance advocate
Grievant as witness
One additional grievant witness

ISSUES

- 1) Whether the person investigating this matter had a conflict in being assigned to this case.
- 2) Whether the investigative report should be considered part of this process.
- 3) Whether a valid Written Notice was issued if based on the investigative report.
- 4) Whether Grievant violated Standards of Conduct Policy 1.60.
- 5) Whether Grievant's actions met the definition of abuse according to Departmental Instruction 201 (RTS) 03.
- 6) Whether a Group III discipline with termination was an appropriate discipline.
- 7) Whether there were mitigating circumstances.

BURDEN OF PROOF

In disciplinary actions, the burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary actions against the Grievant were 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. Grievant has the burden of proving any affirmative defenses raised by Grievant. GPM §5.8.

APPLICABLE POLICY

This hearing is held in compliance with Virginia Code § 2.2-3000 et seq the Rules for Conducting Grievances effective July 1, 2012, and the Grievance Procedure Manual (GPM) effective July 1, 2020.

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “includes acts of minor misconduct that require formal disciplinary action.” Group II offenses “include acts of misconduct of a more serious and/or repeat nature that requires formal disciplinary action.” Group III offenses “include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.” More than one (1) active Group II offense may be combined to warrant termination. Agency relies on Operational Policy 1.60¹ and Departmental Instruction 201(RTS)03.²

FINDING OF FACTS

After reviewing the evidence presented and observing the demeanor of each witness the Hearing Officer makes the following findings of facts:

The Agency in this case is a hospital that accommodates patients with mental disabilities. The Agency has a nursing staff. Grievant, a CNA, had been a staff member employed by the Agency for 10 years. She has various awards and has contributor status.³

On the morning of Saturday, March 19, 2022, Grievant was about to complete her 1:00 AM to 9:30 AM shift. The day nurses started their shift at 7:00 AM. Between 7:00 AM and 9:00 AM Grievant became aware that day shift staff had ordered coffee and donuts and had not included Grievant. Grievant was upset about this event.

Before 9:30 Grievant and Agency Witness One were together when a patient, who had a proclivity for obtaining other patients clothing, was seen in another patient's clothes. Witness One asked patient to remove those clothes and the patient did. However, patient soon appeared in another patient's clothing at which point, per Grievant testimony, Grievant told patient, “to get the clothes off and take your medications.” Grievant stated that she may have spoken loudly as she was not wearing her hearing aids that day.⁴

¹ Agent Exhibit 9 Standards of Conduct 1.60 (previous edition).

² Grievant Exhibit 2 Departmental Instructions 201 (RTS)03 1/18/18.

³ Grievant Exhibit 5.

⁴ Grievant oral testimony 11/21/22.

Witness One stated Grievant was talking (actually yelling) in a very loud voice to patient to, “take off the clothing and stop stealing from other patients” and also “if you would take your meds, we wouldn’t be having this problem”.⁵

No one else was in the immediate area of this conversation and no other witness heard the specific wording. Witness Two was in a position further down the hall. She heard a loud voice (“almost screaming”) and, at first, believing it to be a patient, went to investigate. Witness Two said she saw Grievant storming off after patient handed the clothing to Grievant.⁶ Witness One stated the patient was “angry” and “confused” by Grievant’s behavior. Grievant stated the patient handed the clothing to Grievant and showed no emotional stress.⁷

Grievant was in counseling from September 2021 to March 2022 with an Agency staff development person. There were several counseling sessions during this seven-month period.⁸ After the incident of March 19, 2022, this same Agency staff person became the investigator of Grievant’s March 19th incident. Based on this and the Investigator’s unavailability at the hearing, Grievant’s counsel made a Motion to Strike the evidence.

Witness Three, the Agency representative, stated he issued a written notice to Grievant based solely on the report of the Agency staff development person.⁹

Grievant states that she is hard of hearing and has a tendency to talk louder when not wearing her hearing aids. No previous accommodation for this disability was known to the Agency nor was any accommodation requested by Grievant prior to this incident.¹⁰ Grievant has an active Group One issued July 7th, 2021, for disruptive behavior, and an active Group Two issued June 19th, 2019.¹¹

OPINION

Typically, an administrative hearing includes evidence that would not be permitted in a court of law. The Hearing Officer is then charged with considering the weight of the evidence. The hearing officer finally makes a decision based on the preponderance of this evidence.¹²

In this case counsel for the Grievant made a Motion to Strike the evidence. His request was denied as not available in administrative hearings. However, in examining the Written Notice in this case there are several reasons why the Written Notice should have little, if any, weight for the following reasons:

⁵ Witness One oral testimony 11/21/22.

⁶ Witness Two oral testimony 11/21/22.

⁷ Witness One oral testimony 11/21/22.

⁸ Grievant Exhibit 4 included in packet of information.

⁹ Witness Three oral testimony 11/24/22.

¹⁰ Witness oral testimony 11/24/22.

¹¹ Grievant Exhibit 3 information in Written Notice.

¹² Rules for Conducting Grievance Hearings Manual.

1. The document was not completed by not checking which Group Notice was being used and did not specify which Offense Code number was to be referenced.
2. The written notice was based on an investigative report. The person issuing the Written Notice had no personal knowledge of the incident and relied solely on the report and the recommendation of the investigator.
3. The investigator was not available at the hearing to be cross examined.
4. The investigator had been Grievant's counselor for the seven months prior to becoming the investigator in this case.
5. A video referenced in the report had been erased.

Grievant's counsel submitted compelling evidence that Grievant had been counseled for the previous seven months with an Agency staff member who, within weeks of Grievant's last counseling session, turned into the investigator in Grievant's matter of March 19th. The staff member was not presented by the Agency as a witness. It would violate Grievant's due process to not be able to cross examine the person who compiled the evidence against her in this matter. Further, there would appear to be a conflict between a person being Grievant's counselor (obtaining much personal and confidential information about Grievant) and then becoming the investigator in a case against her. The video mentioned in the investigative report could not be viewed as it had been erased.

Despite the flaws in the written notice, Grievant did have due process notice of her behavior of March 19th being subject to a discipline. Two employees communicated with Grievant on April 4th, 2022, to explain issues of concern.¹³ Further, Grievant was present at the November 23, 2022, hearing with counsel to confront witnesses and present Grievant's evidence in her defense.

Based on the oral testimony presented by the Agency's Witness One and Witness Two as well as the statements made by Grievant, the Hearing Officer finds sufficient evidence to assume disruptively loud and unprofessional statements were made to a patient at the facility by Grievant. Grievant herself admitted she speaks at a louder than normal voice when not wearing her hearing aids.

Agency stated Grievant "yelled at a patient so loudly that it was audible throughout the unit."¹⁴ A witness called the mentally ill patients' reaction to the yelling as "mad" and "confused." Another witness stated the noise was "like screaming." But there was no proof the patient has felt demeaned, threatened, intimidated, or humiliated.

¹³ Agency Exhibit 7 Notes of Meeting of 4/4/22.

¹⁴ Grievant Exhibit 1.

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 the rules established by the Department of Human Resource Management...” 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:

- (1) whether an employee had notice of the rule, how the Agency interprets the rule, and/or the possible consequences of not complying with the rule.
- (2) whether the disciplinary is consistent with the Agency’s treatment of other similarly situated employees or
- (3) whether the penalty otherwise exceeds the limits of reasonableness under all the relevant circumstances.¹⁹

It is not a mitigating circumstance that Grievant chose to not wear her hearing aids at the time of the incident. While it is understandable that Grievant may have been hurt by the Grievant’s exclusion by other staff members, it does not excuse her behavior before a patient at the facility.

DECISION

Counsel for Grievant raised the issue of conflict between one same person being Grievant’s counselor and then investigator. Agency did not produce this person as a witness to refute this concern. The Grievant’s assertion is probable. The Written Notice was issued solely on the report of the investigator who was not a witness. The Written Notice has little, if any, probative value. None the less, the witnesses present at the hearing provided enough probable evidence to ascertain that Grievant had violated OP 1.60 in that her behavior was loud and discourteous. Grievant’s actions met examples of a Group I offense but did not rise to the level of a Group III offense which was issued on the advice of the tainted Written Notice. There were no facts that lead to considering mitigation.

According to Standards of Conduct O.P. 1.60 revised on March 7, 2022, Exhibit A, a Group I level offense may be used for disrespectful or disruptive behavior and the Agency could issue s Group II if the employee has an active Group I for the same or similar behavior. Further, the accumulation of two active Group II offenses may result in discharge. It is the Hearing Officer’s opinion the March 19, 2022 incident was disrespectful and disruptive behavior elevated to a Group II discipline due to the previous Group I for the same such behavior. The behavior did not rise to the level of abuse of the patient as described in Departmental Instructions 201 (RTS) 03. However, the previous Group II discipline of June 19, 2019 remained active until June 19, 2022 and, as active, it applies to the present matter of March 19, 2022.

Therefore, two active Group II disciplines may result in termination and the Agency determination to terminate Grievant from employment 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].

Sondra K. Alan, Hearing Officer

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