



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11935

Hearing Date: June 8, 2023
Decision Issued: July 14, 2023

PROCEDURAL HISTORY

On January 13, 2023, Grievant was issued a Group III Written Notice of disciplinary action with removal for client abuse.

On February 8, 2023, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On March 6, 2023, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 8, 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 employed Grievant as a Registered Nurse at one of its locations. Grievant had prior active disciplinary action consisting of a Group II Written Notice.

Grievant received training regarding Therapeutic Options of Virginia (TOVA) which informed him of how employees were to restrain patients who were not compliant and combative.

Grievant was working at the Facility on October 18, 2022. Grievant was returning from the cafeteria with lunch bags for patients. Grievant walked past Mr. 1 into the room to store the bags. Mr. 1 and the Patient were in the hallway. The Patient put up both hand and rushed towards Mr. 1 and pushed Mr. 1 backwards several feet into the room Grievant had entered. The Patient began fighting Mr. 1, trying to hurt Mr. 1. Grievant heard a loud bang sound behind him. When Grievant turned around, he observed the Patient lying on top of Mr. 1 and pounding Mr. 1 with closed fists across his face. Mr. 1 could not protect himself from the Patient's attack. Grievant called the Patient's name, but the Patient would not stop his attack.

Grievant grabbed the Patient from behind and pulled the Patient off of Mr. 1. Grievant pulled the Patient into the hallway as the Patient held Mr. 1's glasses. Grievant was attempting a TOVA technique by positioning himself behind the Patient with one of

his hands grasping his other arms to hold the Patient. Grievant dragged the Patient towards the seclusion room.

Grievant called out for help from other staff. Two female staff observed Grievant but did not provide any assistance to help him control the Patient.

Grievant's initial objective was to put the Patient in the seclusion room for the safety of the Patient, staff, and other patients. The seclusion room was locked, and staff were not able to open it immediately.

As Grievant tried to move the Patient to the seclusion room, the Patient was kicking and screaming and threatening to harm staff.

The Patient continued to kick, spit, and try to bite Grievant.

As Grievant attempted to lift and move the Patient towards the seclusion room, the Patient used his right leg to kick at a female staff. The Patient pushed back against Grievant and then moved forward. The Patient fell down facing the floor. Grievant's body moved with the Patient's body and Grievant was on top of the Patient. One female staff positioned herself towards the Patient's right shoulder.

The Patient turned to face upwards and kicked Grievant and the female staff off him.

Grievant backed away and looked at the Patient. The Patient kicked at Grievant and one of his shoes fell off and to his left. The Patient moved to get his shoe. Grievant then moved behind the Patient who was kneeling on the floor. Grievant attempted a TOVA technique to wrap his arms around the Patient's upper body. The Patient resisted and then twisted his body moving to his right. The Patient moved so he was flat on the floor. Grievant's body followed the Patient's body and Grievant was on top of the Patient.¹ Mr. 1 moved towards the Patient's left leg to grasp it. One female staff picked up something off the floor and walked down the hallway away from Grievant.

An employee brought an Emergency Restraint Chair (ERC) to the hallway.

The weight of Grievant's body remained on his knees which allowed the Patient to turn over facing upwards. Grievant continued to hold the Patient's wrists to try to stop him from hitting. Grievant then moved the Patient's left wrist across his neck and face to pin it on the Patient's right side. Grievant move the Patient's right wrist across his neck and face to pin it on the Patient's left side. This meant the Patient's arms were crossed near his neck, chin and jaw. Grievant moved off of the Patient as other staff held the Patient down.

¹ Grievant is 6 feet tall and is approximately 220 lbs.

One employee grabbed the Patient's right ankle. Grievant grabbed the Patient's left ankle. Two other employees held the Patient's wrists while the Patient was facing upwards and struggling.

Grievant and the three other employees lifted the Patient up and moved him towards the ERC. The Patient did not want to be placed in the ERC and he kicked while Grievant was holding his leg. Grievant held the Patient's ankle and then leg as the group tried to position the Patient over the ERC and put him in the ERC. Eventually, the Patient was secured in the ERC and Grievant's involvement in the matter ended.

Several of Grievant's attempts to restrain the Patient did not consist of TOVA techniques. For example, Grievant did not use TOVA techniques when he pulled the Patient across the floor, got on top of the Patient², crossed the Patient's arms at the chin or jaw³, grabbed the Patient's ankle, lifted the Patient by the leg to put the Patient in the ERC, and put the Patient in the ERC against his will.

The Agency took disciplinary action against four other employees involved in the incident.

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 defines⁴ 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;

² The Agency's Seclusion and Restraint Policy provides, "under no circumstances may staff lie on, straddle, apply pressure on an individual's chest/trunk.

³ The Agency's Seclusion and Restraint policy specifically prevent holds that "hold an individuals' chin/jaw closed."

⁴ See, Va. Code § 37.2-100 and 12 VAC 35-115-30.

- 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.

Group III offenses include serious violations of policy such as client abuse.⁵ The Agency equates client abuse with failing to use TOVA techniques. Several OEDR rulings have emphasized the importance of interpreting the Agency's client abuse policy within the context of the application of TOVA training and techniques. Grievant used force on the Patient that was not taught as part of TOVA. He restrained the Patient using methods not approved under TOVA and that could have injured the Patient. 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 remove an employee. Accordingly, Grievant's removal must be upheld.

Grievant disagreed with the Agency's conclusions regarding the facts of the incident. Grievant presented witnesses but did not testify. The Agency has presented sufficient evidence to supports its factual conclusions.

The Hearing Officer does not agree with the Agency's decision in this matter for several reasons. First, Grievant was the primary employee taking action to prevent harm to others. If he had not intervened, the damage to Mr. 1 could have been extensive. Other female staff were near him but did not lend assistance. Second, Grievant did not intend to harm the Patient. Third, Grievant did not injure the Patient. Fourth, it is not possible to perform TOVA techniques at every moment when a patient is fighting staff. Fifth, Grievant was on top of the Patient only because the Patient moved downward and Grievant moved with the Patient because he retained his grasp of the Patient. Grievant attempted to keep his weight on his knees and not the Patient.

⁵ See, Attachment A, DHRM Policy 1.60.

The Hearing Officer believes the Agency should have mitigated the disciplinary action. The Hearing Officer's authority, however, is limited by statute and policy. *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 applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive.

Although the Hearing Officer does not agree with the Agency's decision, the Agency has presented sufficient evidence to support its conclusion that Grievant engaged in client abuse under policies as previously interpreted by OEDR. The discipline does not exceed the limits of reasonableness and, thus, the Hearing Officer will not mitigate 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.

⁶ Va. Code § 2.2-3005.

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.