

COMMONWEALTH OF VIRGINIA
Department of Human Resources Management
Office of Employment Dispute Resolution

DECISION OF HEARING OFFICER

In re: Grievant v. Department of Behavioral Health and Developmental Services (DBHDS)

EDR Case Number 11984

Hearing Date: July 6, 2023
Decision Date: July 18, 2023

PROCEDURAL HISTORY

Grievant was a Security officer IV (CPRT) at a DBHDS facility ("Facility"). Grievant timely filed a grievance to challenge the Agency's disciplinary action by submitting the Grievance Form A on May 17, 2023 from a dismissal date of May 16, 2023; as per the EDR executed statement on Grievance Form A that the Grievance is qualified in full. Grievant's Form A requested "...reinstated back into my position, remove the level three group 1 was given and terminated for and to review all written statements given and video. Also to get an apology and give back my recognition that I received as a distinguished employee..." (Grievance form A of 05/17/2023).

The DBHDS written notice, issued 05/19/2023 stated Group III offenses of 11, 13, and 81 with an offense date of 04/25/2023. That written notice also stated at Section IV- that "...Grievant engaged in a pattern of intentional actions and verbal comments that threatened, intimidated and humiliated a patient in a manner grossly inconsistent with [Facility] policies...". Additionally on May 17 2022, a second investigation found that [Grievant] engaged in conduct displaying disregard for a patient's dignity and welfare. Therefore, no mitigation is warranted".

EDR appointed the undersigned as the Hearing Officer ("HO") effective June 13, 2023.

A telephone Prehearing conference was held on June 16, 2023, with participation by the Grievant, the Agency representative, and the Hearing Officer. The Grievant requested an expedited hearing date. The parties reached agreement on a hearing date and the production of witnesses and documents. All exhibits and witness lists were exchanged on or before June 30, 2023. On July 6, 2023, a hearing was held at the Agency's Facility office.

APPEARANCES

Grievant
Agency Representative
Witnesses

*EDR Case Number 11984***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 characterize 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 what is sought to be proved is more probable than not. GPM§ 9.

FINDINGS OF FACT

All proposed exhibits submitted by either party were admitted as relevant and material. After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

1. Grievant has been employed at the Facility since July 10, 2021 as a Security Officer III.
2. Grievant's performance evaluations of 11-08-2021 11-14-2022 state the second highest rating of "contributor" "...work that is characterized by successfully performing job responsibilities...". (Agency Exhibits 111 and 129).
3. Grievant submitted co-worker support documents which state her professional demeanor and Facility commendations as "Employee of the Month".
4. Grievant has completed numerous training activities in 2021 and 2022 on topics including Abuse /Neglect Training, Human Rights, Management, Civility Cultural Diversity, Stress Management, and Therapeutic Communication.

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5. Grievant received a disciplinary probation of ninety days dated May 16, 2022, regarding an incident of April 29, 2022 for a violation of Facility policy #053-066-Civility in the Workplace, which involved a coworker. The document states that "During this period your performance will be evaluated, and any violation of policy may result in disciplinary actions, up to and including termination...". (Agency Exhibit #142).

6. The parties referred to an incident of April 23, 2023 in reference to Grievant conduct. The evidence submitted of documents, testimony and video identify that the Grievant was exonerated from blame or a violation in that incident.

7. The incident at issue occurred on April 25, 2023. At that time, by both Agency and Grievant reports, Grievant and other named staff were assigned to perform a contraband search on Patient. Grievant was accompanied by other support staff. Patient became verbally profane and verbally threatening on an ongoing basis, directed specifically to Grievant, so Grievant called for additional staff assistance who then arrived. Also present at a distance were two staff observers ("Observers") who were new employees.(Documentation and testimony).

8. A silent video of the incident viewed at the hearing shows the two Observers at a distance the Agency stated was fourteen feet from the Patients's door, which measurement appears reasonable to the Hearing Officer. The video also shows several staff at the Patient's door, but the video is unclear as to identity or actions of participants.

9. The Patient is described by documents and testimony as a thirty- year old male hospitalized for restoration of competency, with a history of hallucinations, suicidal ideation and attempts, prior mental illness hospitalizations, and with current criminal charges of assault of a family member and strangulation of another causing harm. The Patient presently suffers from adverse symptoms of mental illness as per documentation, reports, and testimony.

10. The Patient repeatedly engaged in verbal insults directed to Grievant including profanity (including specifically repeating the word "bitch"), and threats of harm, but without physical aggression to Grievant; as per documents and testimony. The Patient complaint states he "cussed" at Grievant" after she "said something back" ,and that Grievant said "I wish you would, is what she said. I wish you would hit me said CPRT female ponytail brown skin..."(A-17, 32).

11. At all times during the incident, two or more other staff members were in close proximity to Grievant for safety purposes.

12. The Agency exhibits include statements of named employee witnesses ("Reporters") and the testifying Agency Investigator interview reports of those witnesses. The Agency Investigator report provides verbal statements to her by Reporters which affirm the Reporters' written statements. The Hearing Officer found their testimony to be credible and demeanor appropriate.

A. Two Reporters were new employees present as observers only.

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B. Observer "1" reported that Grievant was "...calling each other 'bitches'...egging the situation on by saying ' I wish you would hit me; I would treat you like an inmate...". (A-13,20).

C. Observer "2" reported the Grievant and Patient were arguing with each other using profanities such as "bitch" and the CPRT member encouraged the patient to hit her over and over....[and] continued to yell at the patient stating she will treat him like an inmate not a patient...patient asked that [she] be reported...". (A-14, 23)

D. Reporter "3" stated that Grievant said "you a bitch for calling me a bitch", and " I ain't scared and " that she wasn't going to let him keep disrespecting her...". (A-14, 26).

E. Reporter "4" stated that Grievant said " I ain't gonna be too many more bitches stop calling me a bitch..."(A-15, 27).

F. Grievant (Reporter "5") reported she stated " I ain't a bitch so don't call me one"; abd that she did not interact inappropriately with Patient ..."(A-15,30).

G. The Patient report (Reporter "6") states Grievant said " I wish you would hit me"(A-17, 32).

H. Reporter "7" stated that [Another employee] and "T" began yelling back at Patient but "...I do not recall what was said..." and that Patient was posturing as if he would follow [Grievant] ..." (A- 17, 31).

I. Neither party called any of the above Reporters to testify. The Grievant did not object to the written eyewitness reports and Investigator report of eyewitness statements, or ask for production of adverse eyewitnesses. Both parties received timely notice of those named employee reporters by timely exhibits and witness list exchanges.

13. The Grievant called eye witness employees to testify. All testified that they were not present for the entire incident, that they heard a male voice shouting but not a female at the time they were not within eyesight; and that during the time they were present in close proximity, the Grievant acted appropriately and was not verbally abusive. All Grievant witnesses testified to Grievant's exemplary work performance and appropriate interactions with staff and patients. The Hearing Officer found their testimony to be credible and their demeanor appropriate.

14. An Agency Administrator, testifying for the Agency, stated that Agency policy and practice is to terminate an employee for verbal abuse of a patient, absent mitigating factors, even if an employee was otherwise exemplary. Administrator, not an eye witness to the incident, testified to his/her review of the investigation documents, conclusion that termination was correct in this case and that no mitigation existed. Administrator cited the Facility policy that the violation which occurred during the incident at issue constituted a pattern of intentional actions and verbal comments that threatened, humiliated and intimidated a patient in a manner grossly inconsistent with [Facility] policy. The Hearing Officer found this testimony to be credible and witness demeanor appropriate.

15. An Agency Administrator, testifying for Grievant, who was not an eye witness to the incident, stated he considered her to be an exemplary employee, but that Agency policy and practice is

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to terminate an employee for verbal abuse of a patient, absent mitigating factors, even if an employee was otherwise exemplary. The Hearing Officer found that testimony to be credible and demeanor appropriate.

16. Verbal abuse of a patient is considered a serious, Group III offense in such a facility, which serves mentally ill patients with problematic behaviors. Staff are expected to maintain professional demeanor despite patient provocation, and can obtain assistance when provoked, by Testimony and Facility Policy. One Policy concern, stated herein, is that verbal abuse can provoke or upset a patient, and may cause physical or psychological harm. The Hearing Officer identifies this potential harm to this Patient at issue, as stated in the evidence herein.

17. The Hearing Officer acknowledges that the evidence presented was primarily by written documents, hearsay, and Agency investigation results presented by the Investigator, not by eye witnesses. However, the Hearing Officer finds the documentary and hearsay evidence admissible, relevant, reliable, material, and sufficient to meet the Agency burden, for the reasons stated herein. The Agency has presented sufficient evidence to show that Grievant did engage in verbal abuse of a patient which rises to the level of a Group III offense. The Agency has met its burden of proof by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances.

CONCLUSIONS OF POLICY

1. Employee Offenses: Unacceptable behavior is divided into three types of offenses, according to their severity, as per the Virginia Department of Human Resource Management ("dhrm") Attachment A: Policy 1.60.

Group I offenses "include 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 require formal disciplinary action".

Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination".

A. DHRM Policy 2.35 governs Civility in the Workplace and provides:

"...It is the policy of the Commonwealth to foster a culture that demonstrates the principles of civility, diversity, equity, and inclusion. In keeping with this commitment, workplace harassment including sexual harassment, bullying (including cyber bullying) and workplace violence of any kind are prohibited in state government agencies..."

"The Commonwealth strictly forbids harassment (including sexual harassment, bullying behaviors, and threatening or violent behaviors of employees, applicants for employment, customers, clients, contract workers, volunteers, and other third parties in the workplace..."

Behaviors that undermine team cohesion, staff morale, individual self-worth, productivity, and safety are not acceptable...

Any employee who engages in conduct under this policy or who encourages or ignores such conduct by others shall be subject to corrective action, up to and including termination under Policy 1.60 Standards of Conduct..."

2. The Department of Behavioral Health and Developmental Services ("dbhds") Department Instruction 201 (RTS)03 addresses "...reporting and investigating abuse and

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neglect of individual receiving services in Department facilities". The instruction states " There is no tolerance fo abuse and neglect. The department investigates and acts upon every allegation of abuse or neglect (201-1). Abuse is defined at 201-3 as "...any act or failure to act by an employee or other [responsible] person...that was performed knowingly, recklessly, or intentionally, and that caused or might have caused physical or psychological harm, injury, or death to an individual receiving care or treatment for mental illness, developmental disability, or substance abuse. Examples include...Use of language that demeans, threatens, intimidates, or humiliates the individual..."

3. Facility Policies

A. Policy: " All staff will conduct themselves in a professional manner at all times in accordance with cited DI's policies, and within the standards of practice of their discipline. Staff will continue this professional interaction with patients for the entire period that the patient is hospitalized and for as long as the staff is employed or provides and service [at the Facility].

B. Procedures (See facility Policy 050-020):

"1. All hospital staff...are expected to exhibit behaviors that are professional, appropriate, and therapeutic when interacting with any hospital patient or employees [including] Treating each patient with courtesy and respect; Being considerate and respectful of the patient's uniqueness...or limitations..."

2. Behaviors considered inappropriate and unacceptable in a professional interaction between hospital taff or patients include, but are not limited to...Using profanity, vulgarity, and/or abusive language with anyone at any time while working;...Using words, tone, body language, or any other action done deliberately or repeatedly to provoke, entice, or upset a patient..."

3. All allegations of abuse must be reported to the Hospital Director or designee immediately..." (See facility Policy 050-020).

C. Evidence: A hearing officer may allow written statements of a witness to be admitted into the record. The probative weight of a written statement is left to the hearing officer's discretion Hearsay evidence may be admissible provided it is otherwise reliable ... if it appears to be relevant, reliable and not otherwise improper. (Hearing Officer Handbook of 11/21 citing Virginia Code §2.2-4020. Formal rules of evidence do not apply (EDR Grievance Procedure Manual).

D. Mitigation: Virginia Code§ 2.2-3005 .1 authorizes hearing officers to order appropriate remedies including "...mitigation or reduction of the agency disciplinary action...in accordance with rules established by the Department of Human Resources 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 [and] mitigate only if the agency's discipline exceeds the limits of reasonableness..." . In this case, upon Hearing Officer review the evidence does not identify any mitigation circumstances : including that the Hearing Officer, referencing Rule provided examples, found (1) adequate notice to Grievant of the existence of the rule the employee is accused of violating,(2) the Agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was not imposed for an improper motive. Further, the Hearing Officer found no other valid mitigators to the acts of Grievant at issue herein. In consideration of mitigation factors, the Hearing Officer FINDS that the Agency denial of mitigation is reasonable based on the facts of the case as stated herein and the hearing Officer does not identify mitigation.

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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 was issued. Your request must be in writing and must be **received by EDR within 15 days of the date the decision was issued.**

Please address your request to:

Office of Employment Dispute Resolution
Department of Human Resource Management
10 North 14th Street, 12th Floor
Richmond, VA 23219

Or send by email 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 to 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.

[See Section 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/ Lois N. Manes

Lois N. Manes, Esq.
Hearing Officer