



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11550

Hearing Date: November 4, 2020
Decision Issued: November 16, 2020

PROCEDURAL HISTORY

On May 15, 2020, Grievant was issued a Group III Written Notice of disciplinary action with removal for client abuse.

On May 30, 2020, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On June 23, 2020, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 13, 2020, a hearing was held by audio 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 Direct Service Associate II at one of its facilities. He began working for the Agency in June 2018. Grievant had prior active disciplinary action. On January 8, 2020, Grievant received a Group II Written Notice for client abuse.

Except for the facts giving rise to this grievance, Grievant "was a wonderful employee" and "highly respected" according to the Facility Head.

Grievant received Therapeutic Options of Virginia (TOVA) training regarding how properly to restrain patients. TOVA is designed to advance the use of positive approaches, build coercion free environments, and reduce the reliance on physical restraints in managing aggression.

The Patient was a 12-year-old female with a diagnosis of Oppositional Defiant Disorder.

On April 28, 2020, Grievant was working as Lead staff in Unit 4 when an emergency code was called in Unit 1. He went to Unit 1 and determined that Patient K and Patient N had attempted to fight each other. There were enough staff helping to restrain Patient N so Grievant assisted with moving Patient K away from Patient N.

Patient K was in 4 point restrains with a connecting belt. She would not have been able to kick or punch Grievant if he remained a short distance from her.

Grievant began walking with Patient K into another room. The room had several chairs. Patient K stopped next to a chair. Grievant wanted Patient K to sit in the chair. Patient K did not want to sit in the chair and she began backing away from Grievant. Grievant reached forward and grabbed her connecting belt. He forcefully pulled her towards him and the chair. She resisted but moved approximately one or two feet and fell into the chair in a seated position. Grievant stood over her but was approximately one to two feet away. As Grievant began to move back, Patient K immediately jumped from the chair and faced Grievant. She advanced towards him. Grievant quickly braced himself and began pushing against Patient K. His hands were around her upper chest and collar bone area and a few inches below her throat. Patient K yelled, "you choking me" even though she was not being choked. Grievant pushed Patient K into the chair as she grabbed his wrists with her hands. Grievant straddled her as he looked down on her with his hands on her upper chest and collar bone area. Grievant then positioned his hands to grasp Patient K's wrists. Patient K was kicking her legs so Grievant moved to his left as he held Patient K down. Grievant held Patient K in the chair for approximately 15 to 20 seconds until other staff came to the room. Grievant moved away from Patient K and resumed his other duties.

Patient K and Grievant were speaking throughout the interaction. Patient K was sometimes screaming and yelling at Grievant.

On the following day, Patient K told another employee she had been choked. The Agency began an investigation.

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

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

- 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.

Client abuse is a Group III offense.² The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for client abuse. Grievant pulled the connecting belt of Patient K. His action is best described as yanking the patient into the chair. When she attempted to get up from the chair, Grievant pushed Patient K into the chair and straddled her with his hands briefly around her upper chest and collar bone area. Grievant held her in the chair for over fifteen seconds. Grievant's behavior served to restrain Patient K in the chair. None of these actions were authorized TOVA techniques. Grievant used excessive force to restrain Patient K. Grievant's actions could have cause psychological harm to Patient K. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

Grievant argued he did not have any bad intent. He only put his hands on Patient K as a last resort. He had to put her back in the chair since she approached him.

Grievant's objective was to keep Patient K away from Patient N who was in the other room. Grievant could have blocked Patient K without pulling her connection belt to force her into the chair. He could have blocked Patient K's advance when she got out of the chair instead of pusher her back and straddling her to hold her in the chair. Grievant used excessive force to restrain Patient K.

² See, Attachment A, DHRM Policy 1.60.

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”³ 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

³ Va. Code § 2.2-3005.

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.