

Issue: Group I Written Notice (unsatisfactory job performance); Hearing Date: 03/06/07; Decision Issued: 03/07/07; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; AHO: Carl Wilson Schmidt, Esq.; Case No. 8525; Outcome: No relief, agency upheld in full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8525

Hearing Date: March 6, 2007
Decision Issued: March 7, 2007

PROCEDURAL HISTORY

On October 30, 2006, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory job performance. On November 21, 2006, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On February 1, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 6, 2007, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Representative
Agency Representative
Witnesses

ISSUE

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. 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 Mental Health Mental Retardation and Substance Abuse Services employs Grievant as an LPN at one of its Facilities. She has been employed by the Agency for approximately 37 years. No evidence of prior active disciplinary action against Grievant was introduced during the hearing. The purpose of Grievant's position is:

Provides quality nursing care to psychiatric and geropsychiatric patients based on standards of nursing practice and care within scope of licensure. Provides supervision to ancillary staff on assigned unit under the supervision of an RN.¹

On August 16, 2006, Grievant was providing direct care services to clients at the Facility. She was filling out paperwork while sitting in the day room of one of the housing areas. She heard a yell and observed the Client running from the nursing station. The person yelling was Grievant's Supervisor. The Supervisor was in the nursing station near a door.² The Client had abruptly and forcefully pushed the door so

¹ Grievant Exhibit 1.

² The Utilization Review Coordinator was standing approximately two feet from the Supervisor when the Supervisor was hit by the door.

that it hit the Supervisor causing her to yell. It upset Grievant when she realized what had happened. Grievant told the Supervisor that the Client needed to be placed into four point restraints since the Client had not calmed down, even after receiving two injections earlier in the day.

Grievant escorted the Client to the chair in the day room. The Client remained seated in the chair and was calm. Grievant returned to the nursing station and for a second time told the Supervisor in a loud voice that the Client should be placed into four point restraints.

Grievant turned away from the nursing station and looked directly at the Client. Grievant said, "we should put her in restraints for that." Grievant was standing approximately ten feet from the Client and spoke in a loud voice towards the Client. The Client was looking at Grievant while Grievant was talking but the Client did not respond to Grievant's comments.

The Utilization Review Coordinator believed Grievant had acted inappropriately because Grievant appeared to be threatening to punish the Client by placing the Client in restraints. The Utilization Review Coordinator was well-positioned to observe Grievant's actions and the reaction of the Client. The Utilization Review Coordinator believed that the Client understood Grievant's statement.³

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force." DHRM § 1.60(V)(B).⁴ Group II offenses "include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal." DHRM § 1.60(V)(B)(2). Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal." DHRM § 1.60(V)(B)(3).

"Inadequate or unsatisfactory work performance" is a Group I offense. In order to prove inadequate or unsatisfactory work performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

³ The Utilization Review Coordinator formed her opinion based on her prior interaction with the Client. The Client was able to interact with other people and follow directions.

⁴ The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

Grievant's duties were to provide care to clients at the Facility. Physical restraints can only be used as part of a legitimate medical care program. Grievant knew or should have known that restraints could not be used as punishment for client behavior including behavior harmful to staff. Grievant looked at the Client and said loudly "we should put her in restraints for that." By saying "for that", Grievant was referring to the Client's action of pushing the door against the Supervisor. The Agency describes Grievant's behavior as a non-therapeutic interaction. The Agency has presented sufficient evidence to support its issuance to Grievant of a Group I Written Notice for unsatisfactory job performance.

Grievant argues she mentioned placing the Client only once when she was in the nursing station and speaking to the Supervisor. She denies making a second and third reference to restraints. The Utilization Review Coordinator's testimony was credible. The Utilization Review Coordinator was standing within a few feet of Grievant and the Client and observed what happened. Grievant could offer no explanation as to why the Utilization Review Coordinator might be untruthful regarding her observations. The testimony of the Utilization Review Coordinator is sufficient to enable the Agency to meet its burden of proof.

Grievant contends she was speaking to her Supervisor and that it was her obligation to express her concerns to her Supervisor. The evidence showed that Grievant was looking at the Client as she spoke and the Client was looking at Grievant. Regardless of to whom Grievant was speaking, the Client could hear and understand Grievant as she spoke. It was not necessary for Grievant to express her opinion to the Supervisor for a third time. Although it appears Grievant's comments were directed at the Client, even if her comments were not directed at the Client, the outcome of this case is unchanged.

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 Employment Dispute Resolution..."⁵ 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.

⁵ *Va. Code § 2.2-3005.*

Grievant contends the disciplinary action should be mitigated. In light of the standard set forth in the *Rules*, 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 I Written Notice of disciplinary action is **upheld**.

APPEAL RIGHTS

You may file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

Director
Department of Employment Dispute Resolution
830 East Main St. STE 400
Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must give a copy of all of your appeals to the other party and to the EDR Director. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for review have been decided.

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.⁶

[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

⁶ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.