



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11621

Hearing Date: February 4, 2021
Decision Issued: May 10, 2021

PROCEDURAL HISTORY

On October 1, 2020, Grievant was issued a Group III Written Notice of disciplinary action with removal for client abuse.

On October 7, 2020, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On November 9, 2020, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 4, 2021, 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 Safety Security Technician at one of its facilities. She had been employed by the Agency for approximately two and a half years. No evidence of prior active disciplinary action was introduced during the hearing.

Resident T was a patient resident at the Facility where Grievant worked. Resident T told an agency employee, Ms. T, that he had been the recipient of extra attention from Grievant for about two months. Ms. T believed Resident T because she asked him about those instances several times and he repeated the same information. She observed that Resident T was anxious about telling her about Grievant and seemed relieved after doing so.

The Agency began an investigation. The Investigator interviewed several residents and Grievant and obtained written statements from them.

Resident T wrote a statement indicating that sometime in June 2020, Grievant began making comments to him that made him feel uncomfortable.

Resident L wrote that Grievant told him, "look at all that man over there" referring to Resident T. Resident L wrote that Grievant told Resident L, "I want to give him the

world” referring to Resident T. Resident L wrote that Grievant asked him where Resident T was located and asked him if Resident T had said anything about her.

Resident T told the Investigator, Grievant told him, “let me be the first when you get out” and “you look good in white” and “you look good when you come down the stairs.” Resident T told the Investigator Grievant offered to buy him a business and would ask him if he thought about her when she was off from work. Resident T told the Investigator Grievant told him, “I knew you were something special the first time I saw you. I remember the first time I saw you, you were wearing orange and were excited about having a cheeseburger.” Resident T told the Investigator Grievant would get other residents to get him. Grievant told Resident T’s roommate to, “Go get your roommate.” Resident T told the Investigator that Grievant asked him to run away with her. She would tell Resident T to stay with her because she was bored. Grievant told Resident T, “I want day two with you” according to Resident T.

Resident T told the Investigator Grievant told him, “You hurt my feelings this morning” to which Resident T responded, “Stay the f—k away from me.” Resident T told the Investigator that Grievant asked Resident T if he could see them together.

Resident T told the Investigator that Grievant harassed him when he was in the yard trying to work out.

Resident T told the Investigator, “Personally, she told me she’s dating someone who owns a business but they haven’t had sex yet.” When the Investigator asked how he would know this information, Resident T replied, “She told me, I didn’t ask.”

Grievant told the Investigator she was dating a man who owned a trucking company and they had been “dating for about two months but haven’t had any sexual involvement to date.”

Resident T told the Investigator he felt harassed, intimidated, bothered, and annoyed by Grievant’s behavior towards him. He felt embarrassed because Grievant would send other residents to get him and he felt obligated to comply with her direction because of her position.

The Investigator interviewed Resident T and believed his allegations were truthful.

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:

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

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;
- 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.

Facility Instruction 503 governs, "Staff and Resident Interactions and Boundaries." This policy required staff to conduct themselves in a professional manner at all times. This policy defined "Inappropriate Interactions" as:

Behaviors considered inappropriate and to be unacceptable in a professional interaction between facility staff or residents, includes ... [s]howing favoritism or the appearance of favoritism towards certain residents, including, but not limited to ... [g]iving excessive time and attention to certain residents when not relevant to treatment.

Under this policy:

Staff members displaying inappropriate interactions are subject to disciplinary action(s) up to and including termination of employment.

Grievant engaged in inappropriate interactions with Resident T. She directed excessive attention and showed favoritism towards Resident T. She made comments to him about his appearance and her interest in him. Grievant told Resident T about her relationship and business interests. Grievant made Resident T feel uncomfortable about her interaction with him. He felt harassed, intimidated, and bothered by Grievant's behavior. 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, the Agency's decision to remove Grievant must be upheld.

Grievant denied devoting excessive attention or making inappropriate comments to Resident T. Resident T did not testify during the hearing. Although no individual fact was sufficient to support the disciplinary action, when the facts are considered as a whole, the evidence is sufficient to support the disciplinary action. Resident T's statements were believed by the Investigator and Ms. T as well as other staff. His statements were consistent with the statements of other residents. Although the videos presented by the Agency did not have sound, Resident T's demeanor was consistent with his claims. Grievant has not established any motive for Resident T to be untruthful about her interaction with him.

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"² 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**.

² Va. Code § 2.2-3005.

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].

/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.