



**COMMONWEALTH of VIRGINIA**  
*Department of Human Resource Management*

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 11662**

Hearing Date: May 25, 2021  
Decision Issued: May 26, 2021

**PROCEDURAL HISTORY**

On February 1, 2021, Grievant was issued a Group III Written Notice of disciplinary action with removal for client abuse.

Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On February 23, 2021, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 25, 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 Direct Service Associate II at one of its facilities. No evidence of prior active disciplinary action was introduced during the hearing.

The Facility issued coats and other clothing to patients. Patient 1 received a coat from the Facility and kept that coat in her room. Patient 2 had a history of going into the rooms of other residents and removing items that did not belong to Patient 2. Patient 2 was admitted to the Facility in May 2020. She had a history of being impulsive, aggressive, yelling, spitting at staff, and denying having a mental illness.

On January 12, 2021, Grievant was working in the Pod with several residents. Patient 2 went into Patient 1's room and took the coat issued by the Facility to Patient 1. Grievant observed Patient 2 wearing the coat and wanted to have the coat returned to Patient 1 in order to avoid a fight between Patient 1 and Patient 2. Grievant approached Patient 2 and repeatedly asked Patient 2 to take off the coat. Grievant told Patient 2 that Grievant needed to have the coat. Patient 2 refused to give Grievant the coat. Patient 2 became loud, aggressive, and delusional. Patient 2 claimed the coat was her coat. Grievant approached Patient 2 and began pulling the sleeves of the coat in order to pull the coat off of Patient 2. As Grievant was removing Patient 2's coat, Patient 2 was screaming and resisting. Grievant scratched Patient 2's left arm leaving three vertical

scratches. Grievant walked away from Patient 2. The RN noticed bleeding from the scratches on Patient 2's arm. The RN cleaned and treated Patient 2's wound.

The Facility had an adequate supply of coats. Grievant could have obtained another coat to give to Patient 1 instead of removing Patient 2's coat.

### **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 defines<sup>1</sup> 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;
- 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

---

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

employee's intentional act. All the Agency must show is that the Grievant might have caused physical or psychological harm to the client.

On January 12, 2021, Grievant approached Patient 2 and pulled the sleeves of the coat Patient 2 was wearing and pulled the coat off of Patient 2. Patient 2 expressed to Grievant that Patient 2 was refusing to have the coat removed. Grievant acted contrary to Patient 2's refusal. Grievant engaged in client abuse by removing the coat from Patient 2 without Patient 2's consent and by scratching Patient 2 during the struggle to remove the coat. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for client abuse. 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 argued that she had to remove the coat from Patient 2 in order to avoid a fight between Patient 1 and Patient 2. She asserted she was screaming for help but no one helped her.

It was unnecessary for Grievant to remove the coat from Patient 2. The Facility had additional coats that Grievant could have given to Patient 1. Other staff knew Patient 2 sometimes removed items from the rooms of other patients. If Patient 2 refused to return items, staff would wait for a reasonable period of time and then approach Patient 2 again to request and obtain the items. The conflict was created when Grievant chose to remove the coat from Patient 2. Grievant's perception of an emergency was not a sufficient basis to justify her actions.

Grievant objected to the absence of video evidence of the incident. The Agency did not present video evidence because the cameras in the room were not working. Although the lack of video evidence seems unusual, the Hearing Officer has no basis to conclude the Agency's claim was untruthful. Disciplinary action may be established by witness testimony even without the benefit of video evidence. The Agency has presented sufficient evidence to support the issuance of disciplinary action in this case.

*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 ...."<sup>2</sup> 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

---

<sup>2</sup> Va. Code § 2.2-3005.

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 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto: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.<sup>[1]</sup>

[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].

---

<sup>[1]</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.

*/s/ Carl Wilson Schmidt*

Carl Wilson Schmidt, Esq.  
Hearing Officer