DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 11674

Hearing Date: May 5, 2021
Decision Issued: May 7, 2021

PROCEDURAL HISTORY

On February 2, 2021, the Grievant was issued a Group III Written Notice which resulted in termination on February 26, 2021.[1] On March 4, 2021, the Grievant timely filed a grievance challenging the Agency's actions.[2] On March 11, 2021, the grievance was assigned to this Hearing Officer. A hearing was held on May 5, 2021.

APPEARANCES

Agency Advocate
Agency Representative
Grievant
Witnesses

ISSUES

Did the Grievant, on February 2, 2021, violate D.I. 201 by raising her voice and using profanities toward a patient that may have incited the patient.

AUTHORITY OF HEARING OFFICER

Code Section 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code Section 2.2-3005.1 provides that the Hearing Officer may order appropriate remedies including alteration of the Agency's disciplinary action. By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.[3] Implicit in the Hearing Officer's statutory authority is the ability to independently determine whether the employee's alleged conduct, if otherwise properly before the Hearing Officer, justified termination. The Court of Appeals of Virginia in *Tatum v. VA Dept of Agriculture & Consumer Servs.* 41VA. App. 110, 123, 582 S.E. 2d 452, 458 (2003) held in part as follows:

> While the Hearing Officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are

[1] Agency Exhibit 1, Tab 1, Page 1
[2] Agency Exhibit 1, Tab 3, Page 1
[3] See Va. Code § 2.2-3004(B)

> consistent with law and policy...the Hearing Officer reviews the facts de novo...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action. Thus, the Hearing Officer may make a decision as to the appropriate sanction, independent of the Agency's decision.

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 proof for establishing any affirmative defenses to discipline such as retaliation, discrimination, hostile work environment and others, and any evidence of mitigating circumstances related to discipline. A preponderance of the evidence is sometimes characterized as requiring that facts to be established more probably than not occurred, or that they were more likely than not to have happened. [4] However, proof must go beyond conjecture.[5] In other words, there must be more than a possibility or a mere speculation.[6]

FINDINGS OF FACT

After reviewing the evidence presented, I make the following findings of fact:

The Agency provided me with a notebook containing 7 tabs. The Grievant objected to some of the content, but after questioning by me, I found that Grievant had no relevant objections to the contents of Agency's notebook and it was accepted as Agency Exhibit 1. The Grievant was concerned that there had been a lack of due process, as she received the Written Notice on the date she was terminated. However, the Grievant, on February 23, 2021, received the appropriate due process notice.[8] And, to the extent there was any due process error, it is cured by this formal hearing.

The Grievant provided a notebook with 5 tabs. It was accepted as Grievant's Exhibit I, without objection.

The Written Notice, which was issued on February 26, 2021, set forth a violation of Department Instruction 201(RTS)03. §201-1 states in part that this Agency will not tolerate abuse and neglect of its patients.[9]
§201-3 defines abuse as follows:

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[4] *Ross Laboratories v. Barbour*, 13 Va. App. 373, 377, 412 S.E. 2d 205, 208 1991
[5] Southall, Adm'r v. Reams, Inc., 198 Va. 545, 95 S.E. 2d 145 (1956)
[6] *Humphries v. N.N.S.B., Etc., Co.*, 183 Va. 466, 32 S.E. 2d 689 (1945)
[7] Agency Exhibit 1, Tab 4, Page 4
[8] Agency Exhibit 1, Tab 1, Page 2
[9] Agency Exhibit 1, Tab 6, Page 8

> An act…by an employee…in a facility…that was performed…knowingly, recklessly, or intentionally, and that caused or might have caused…psychological harm, injury, or death to an individual receiving care…[10]

Use of language the demeans, threatens, intimidates, or humiliates the patient falls under the definition of abuse.[11] The STEP Coordinator (SC) testified that she worked on 39/5 ward for the day shift and an evening shift on February 2, 2021. She was doing so because of a staff shortage due to Covid-19. She stated that the Grievant was loud, repeatedly used very foul language, complained about staff scheduling and work in general. This was done in the presence of the patients. She reported this behavior to the Facility Director (FD) on February 3, 2021.[12]

SC further testified that Grievant was particularly agitated by patient X and engaged him in a loud and aggressive voice and used many profanities when talking to and at him. SC stated that X became aggressive and threatening because of the way Grievant talked to and at him. X attempted to sit in some chairs that were open to all, but which were generally used by staff. SC testified that Grievant took umbrage with this and told him in a loud voice not to sit in the [expletive] chairs. Later in the evening, X was pacing in front of these same chairs (pacing being something that his condition often results in) and Grievant, while now seated in the chairs, told X in a loud voice and with profanities to stop. SC stated that a loud voice can and often is a trigger event for patients such as X.

This matter was assigned to the Facility Investigator (FI) for further investigation. He filed his report with the Agency on February 12, 2021.[13] As part of his investigation, FI interviewed Grievant. While she denied using profanities, she stated she was "having a bad day." She also apologized for being loud.[14] FI interviewed others who did not testify before me. Based on his investigation, FI found that the allegation of abuse was substantiated.[15]

Grievant's Supervisor (GS) testified. She stated Grievant's Employee Work Profile (EWP) at Part (I)(C)(25) states that the employee [Grievant] modulate her own voice level and avoid staff to staff discussions in the patient area…and utilize therapeutic communication and role modeling.[16] The EWP further states that Grievant should be aware of potential triggers for individual patients.[17]

GS and others clearly testified that therapeutic communications involved calm and moderated voices. Use of a loud voice, laced with profanity, is the antithesis of therapeutic communication.

FD testified that emotional distress could cause psychological harm. Loud noise in and of itself can be a trigger for many patients. Finally, the Human Resources Director testified that the Agency had considered mitigation. Because the Grievant currently had active Group I and Group II Written Notices, the Agency determined that mitigation was not appropriate in this matter.

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[10] Agency Exhibit 1, Tab 6, Page 8
[11] Agency Exhibit 1, Tab 6, Page 8
[12] Agency Exhibit 1. Tab 2, Page 5
[13] Agency Exhibit 1, Tab 2, Pages 1-12
[14] Agency Exhibit 1, Tab 2, Page 9
[15] Agency Exhibit 1, Tab 2, Page 12
[16] Agency Exhibit 1, Tab 5, Page 2
[17] Agency Exhibit 1, Tab 5, Page 3

The Grievant called one witness who testified that he did not remember Grievant being loud or using profanities. However, he stated that he was only there for 4 hours of a 12-hour shift.

The Grievant did not testify.

Based on the documents in Agency Exhibit 1 and the testimony presented at the hearing, I find that the Agency has borne its burden of proof in this matter. Policy 1.60, Standards of Conduct, at §(B)(2)(c) states that Group III offenses include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.[18] Attachment A of Policy 1.60 sets forth examples of such behavior, including "abuse or neglect of clients."[19]

MITIGATION

Va. Code § 2.2-3005(C)(6), authorizes and grants Hearing Officers the power and duty to receive and consider evidence in mitigation or aggravation of any offense charges by an Agency in accordance with rules established by EDR. The Rules for Conducting Grievance Hearings ("Rules"), provide that a Hearing Officer is not a super personnel officer. Therefore, in providing any remedy, the Hearing Officer should give the appropriate level of deference to actions by the Agency management that are found to be consistent with law and policy. Specifically, in disciplinary grievances, if the Hearing Officer finds that (1) the employee engaged in the behavior described in the Written Notice; (2) the behavior constituted misconduct; and (3) the Agency's discipline was consistent with law and policy, then the Agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.

Hearing Officers are authorized to make findings of fact as to the material issues of the case and to determine the grievance based on the material issues and the grounds and the records for those findings. The Hearing Officer reviews the facts *de novo* to determine whether the cited actions constitute misconduct and whether there were mitigating circumstances to justify a reduction or removal of the disciplinary action, or aggravating circumstances to justify the disciplinary action. The Hearing Officer has the authority to determine whether the Agency has established by a preponderance of the evidence that the action taken was both warranted and appropriate under all the facts and circumstances.

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, (3) the disciplinary action was free of improper motive, (4) the length of time that the Grievant has been employed by the Agency, and (5) whether or not the Grievant has been a valued employee during the time of his/her employment at the Agency.

I find no reason to mitigate this matter.

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[18] Agency Exhibit 1, Tab 6, Page 36
[19] Agency Exhibit 1, Tab 6, Page 50

DECISION

For the reason stated herein, I find the Agency has borne its burden of proof in this matter and that the issuance of the Group III Written Notice with termination was proper.

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].

William S. Davidson
Hearing Officer

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