

Issues: Group III Written Notice (abuse/neglect of a student), Group II Written Notice (failure to follow policy), and Termination; Hearing Date: 08/28/14; Decision Issued: 09/17/14; Agency: VSDB; AHO: Carl Wilson Schmidt, Esq.; Case No. 10414; Outcome: Partial Relief.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10414

Hearing Date: August 28, 2014
Decision Issued: September 17, 2014

PROCEDURAL HISTORY

On June 12, 2014, Grievant was issued a Group III Written Notice of disciplinary action with removal for abuse or neglect of a student. On June 12, 2014, Grievant was also issued a Group II Written Notice of disciplinary action for failure to comply with policy.

On June 24, 2014, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On July 15, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 28, 2014, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's Counsel
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notices?

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 Virginia School for the Deaf and the Blind employed Grievant as a Trainer and Instructor II. He became a teacher in 2001. The purpose of his position was to, "provide quality educational services to preschool and K-12 students of the Commonwealth with deafness, blindness, and sensory-impaired multiple disabilities."¹

The Student attended classes at the Facility. He had a behavior intervention plan and needed escorts to get from one place to another. The Student is autistic and deaf. He sometimes does not immediately respond to requests or instructions from staff. He sometimes needs additional time to process requests and instructions. He is more flexible than many other students.

Grievant did not know the content of the Student's behavior intervention plan and did not know he had autism. Grievant, however, could observe that two staff were providing assistance to the Student. Grievant did not have the Student in his class.

On May 26, 2014, the Facility held a "Renaissance Fair" to entertain and teach students. Several faculty wore costumes to reflect the time period depicted by the fair. Grievant wore a kilt.

¹ Grievant Exhibit 10.

Grievant brought his personal lawn chair to the festival. He placed it on grass near a large tree.

On May 26, 2014, the Student had two escorts – Ms. S and Mr. B. At approximately 2 p.m., Ms. S instructed the Student to go sit under the tree. Grievant's chair was the only chair under the tree so the Student sat in Grievant's chair. The student placed his arms to his side and sometimes underneath him. He sat with his legs off of the ground and partially curled underneath him.

Grievant left tools underneath the lawn chair. He needed to obtain a tool in order to perform work on his exhibit for the fair. Grievant was "hot and soar." Grievant walked to his chair and observed the Student sitting in the chair. Grievant wanted the Student to get out of the chair. Grievant approached the student and faced the Student as he spoke to the Student. Grievant asked the Student to get out of the chair. Grievant's tone was commanding and stern as he instructed the Student to get out of the chair. The Student remained seated and disregarded Grievant's instructions. This annoyed Grievant.

Mr. B and Ms. S were standing near the Student and visible to Grievant. Ms. S and Mr. B began discussing how to get the Student out of the chair and Ms. S left to get water to bring back and offer to the Student. Her objective was to create an incentive for the Student to move out of the chair. Mr. B began signing to the Student to try to get him out of the chair.

Rather than letting the Student's escorts remove the Student from the Chair, Grievant decided to take action himself. Grievant walked behind the lawn chair and was facing in the same direction as was the Student. Grievant decided to tilt the lawn chair. He pushed the back of the lawn chair forward. As Grievant pushed the chair forward, the back of the chair rose upward and the two rear legs lifted off of the ground. The bottoms of the rear chair legs rose approximately six inches off of the ground. As the chair changed from resting on four legs to resting only on its two front legs, the Student's body slid forward and out of the chair. Ms. S described Grievant's action as a "dumping motion." The Student landed on his feet but in a crouched position. The Student stood up and Mr. B and Ms. S helped the Student moved away from the area. Mr. B told Grievant, "You can't do that. [Mr. N] got fired for the same thing." Grievant replied, "I don't care."

Grievant was not trying to embarrass or hurt the Student when Grievant tilted the chair. Grievant was trying to gain access to the tools underneath the chair.

Staff at the Facility received training regarding how to move and restrain students when necessary. Tilting a chair forward to force a seated student out of a chair was not taught as an appropriate method to move a student. Some teachers might touch a chair and lightly shake it to signal to a student to move from the chair but they would not tilt the chair except in emergency situations.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “include acts of minor misconduct that require formal disciplinary action.”² Group II offenses “include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action.” Group III offenses “include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.”

Group III Written Notice

The Agency presented several theories for discipline but only one supports the issuance of a Group III Written Notice with removal.

Policy S011 governs Physical Restraint, Time Out, Seclusion. The policy provides:

The Virginia School for the Deaf and Blind (VSDB) does not restrain students as a means to manage behavior. If a student is out of control, dangerous, and in a position to harm self or others, physical intervention may be used as outlined in the following procedures. The Virginia School for the Deaf and the Blind (VSDB) does not use time out and seclusion techniques for behavior intervention purposes with students as per Virginia Code.

Grievant did not restrain the Student’s movement. Grievant did not try to hold the Student or prevent him from moving his body in any manner. Grievant used the chair to push the Student. Grievant did not violate Policy S011.

12VAC35-115-30 defines “Abuse” as:

"Abuse" means any act or failure to act by an employee or other person responsible for the care of an individual in a facility or program operated, licensed, or funded by the department, excluding those operated by the Department of Corrections, 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 acts such as:

1. Rape, sexual assault, or other criminal sexual behavior;
2. Assault or battery;

² The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

3. Use of language that demeans, threatens, intimidates or humiliates the person;
4. Misuse or misappropriation of the person's assets, goods or property;
5. Use of excessive force when placing a person in physical or mechanical restraint;
6. 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 individualized services plan; and
7. 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. See § 37.2-100 of the Code of Virginia.

This regulation does not apply to the circumstances of this case. The Student was not “a person receiving care or treatment for mental illness, mental retardation, or substance abuse.” Testimony presented during the hearing, showed that the Student was a person with autism but autism is not mental illness, mental retardation, or substance abuse.

Agency Policy S004 governs Child Abuse and Neglect. This policy contains, “Short Definitions of the Type of Abuse/Neglect.” “Physical abuse” is defined as, “Severe injury or threat of severe injury to a child by a caretaker.” Grievant did not engage in physical abuse under this policy because the Student did not suffer a severe injury. Grievant’s action created the risk of injury to the Student but not the threat of severe injury.

Under Policy S004, “Bizarre Discipline” is defined as, “Caretaker uses markedly unusual, eccentric, irrational or grossly inappropriate procedures to modify a child’s behavior.” Grievant disciplined the Student because the Student refused his instruction to get out of the chair. Grievant’s method of disciplining the Student was unusual because it was not taught as part of the Facility’s methods of controlling students physically. It was “marked” based on evidence that Mr. B immediately recognized Grievant’s action as inappropriate. Mr. B was shocked by Grievant’s behavior. Other witnesses were surprised by Grievant’s behavior.

“[A]buse or neglect of clients” is a Group III offense.³ The Student was the Agency’s client. Grievant engaged in client abuse thereby justifying the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Grievant’s removal must be upheld.

Grievant argued that he did not act with “malice” when he pushed the chair forward. It is not necessary for the Agency to show that Grievant acted with malice in order to show abuse under the regulation.

³ See, Attachment A, DHRM Policy 1.60.

Grievant argued that he should be granted deference based on Va. Code § 22.1-279.1. Section A prohibits corporal punishment but provides that corporal punishment shall not be deemed to prevent the use of incidental, minor or reasonable physical contact or other actions designed to maintain order and control. Section B provides that, “due deference shall be given to reasonable judgments at the time of the event which were made by a teacher” This statute does not excuse Grievant’s behavior. Grievant’s judgment to force the Student out of the chair was not reasonable. He knew that Mr. B and Ms. S were escorting the Student. He should have let them take responsibility for moving the Student because that was part of their job duties.

Group II Written Notice

The Agency issued a Group II Written Notice for violation of Policy S010. The Agency interprets this policy to allow physical intervention only if a student is out of control, dangerous, and in a position to harm himself or others.

As Policy S010 is interpreted by the Agency, it becomes part of the justification for concluding that Grievant engaged in abuse. Policy S010 would not have authorized Grievant to use force to move the Student. To the extent Grievant violated Policy S010, his actions were a lesser included offense within the Group III Written Notice. The Group II Written Notice must be reversed because it is not a materially separate offense under the facts and policy of this grievance.

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”⁴ 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 further the disciplinary action.

DECISION

⁴ Va. Code § 2.2-3005.

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**. The Group II Written Notice is **rescinded**.

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 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

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR 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:

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 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 provide a copy of all of your appeals to the other party, EDR, 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.

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.⁵

[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

⁵ Agencies must request and receive prior approval from EDR before filing a notice of appeal.