



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11541

Hearing Date: August 24, 2020

Decision Issued: August 25, 2020

PROCEDURAL HISTORY

On April 20, 2020, Grievant was issued a Group III Written Notice of disciplinary action with removal for client abuse.

On May 7, 2020, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On June 1, 2020, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 24, 2020, a hearing was held by audio conference.

APPEARANCES

Grievant
Grievant's Representative
Agency's 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 Treatment Technician at one of its facilities. No evidence of prior active disciplinary action was introduced during the hearing.

The Resident lived at the facility. He had "bowel problems" and was often using the restroom. He was sensitive to comments about his health problem.

On March 17, 2020, the Nurse was conducting "pill call." The Nurse was inside a room with a window allowing her to see inside the dayroom. Residents formed a line facing the window. The window had an opening so the Nurse could dispense pills to each resident when he reached the front of the line. Grievant was seated in a chair on the left side of the window inside the dayroom. Grievant was speaking to the Nurse as residents approached the window. The Nurse ignored Grievant so Grievant stood up and moved to the other side of the window. The Nurse asked Grievant to move because he was holding up the line. When Grievant would not move, the Resident asked Grievant to move so he could get his pills. The Resident was seated in a wheelchair. Grievant then turned toward the Resident and leaned towards the Resident's face. Grievant said loudly, "You can wait! You don't run this. I run this. What's wrong, you got to go poop again?" Other residents in the line could hear Grievant's comment about the Resident. The Resident felt humiliated and demeaned by Grievant's comment.

The Nurse heard Grievant's comment and immediately reported her concern to the Agency. The Agency began an investigation and interviewed relevant witnesses.

Grievant presented evidence showing he was a good employee and well-liked by residents.

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:

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

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

show is that the Grievant might have caused physical or psychological harm to the client.

Client abuse is a Group III offense.² The Resident had bowel problems which caused him embarrassment. Grievant had no reason to discuss the Resident's health problem. By asking the Resident if he had to poop, Grievant was pointing out the Resident's health problem and did so in front of other residents. The Resident felt demeaned by Grievant's words. The Agency has presented sufficient evidence to show that Grievant engaged in verbal abuse of the Resident thereby justifying the Agency's decision to issue Grievant 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 making the statement to the Resident. The Nurse's testimony was credible. Other portions of the Nurse's statement were verified by a video of Grievant's interaction with the Resident. For example, the video shows Grievant leaning towards the Resident. Grievant pointed towards the Resident which is consistent with Grievant saying "You don't run this." Grievant pointed to himself which is consistent with Grievant saying, "I run this." The Agency's evidence is sufficient to support its allegations.

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"³ 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 See, Attachment A, DHRM policy 1.60.

³ *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.