



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11404

Hearing Date: October 21, 2019
Decision Issued: November 12, 2019

PROCEDURAL HISTORY

On June 18, 2019, Grievant was issued a Group III Written Notice of disciplinary action with removal for client abuse.

On July 15, 2019, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On August 5, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 21, 2019, a hearing was held at the Agency's office.

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 Support Professional at one of its facilities. No evidence of prior active disciplinary action was introduced during the hearing.

The Resident is a nonverbal individual who communicates with the use of gestures, facial expressions, total body movements, and infrequent vocalizations.

As individuals finished their dinners on June 11, 2019, the Resident began to display self-injurious behavior. The Resident was asked to remove his finger from his eye. The Resident then began to break straws in order to obtain more straws from staff.

Grievant and the Resident were in the common room. Grievant told the Resident she was going to his room to "mess up" his room. The Resident's room was down a hallway adjacent to the common room. The Resident walked to his room because he knew Grievant was walking there. The door to the Resident's room was closed. The Resident got to the door first and Grievant followed him. The Resident held onto the doorknob and tried to prevent Grievant from entering his room. Grievant used both of her hands to push the Resident backwards against the door. She briefly held him against the door and then backed up as the Resident pushed Grievant away. Grievant approached the Resident a second time and pushed him away from the door. The Resident released his grip on the door handle and Grievant opened the door. Grievant

entered the Resident's room. The Resident followed her inside. Grievant grabbed the Resident's blanket and pillow and threw them into the hallway. Grievant threw a mattress top into the hallway. Grievant threw the bedsheets into the hallway. The Resident backed out of his room with Grievant still inside. He was upset with Grievant's actions. Grievant picked up the mattress from the Resident's bed and carried it out of the Resident's room into the hallway as the Resident watched from the hallway. Grievant carried the mattress down the hallway and took it into the common room. The Resident followed Grievant. Grievant dropped the mattress in the common room. As the Resident entered the common room, Grievant directed him towards a couch. While the Resident was seated, Grievant walked to another couch and turned it on its back. The Resident quickly left the common room. Grievant flipped another couch and moved a chair.

Grievant followed the Resident into the hallway. The Resident tried to push Grievant away from his room and Grievant pushed back. Grievant pushed by the Resident and moved quickly into his room. This caused the Resident to become anxious as evidenced by his hopping. Grievant moved a rocking chair out of the Resident's room and flipped it on its back.

The Resident had a Behavior Support Plan allowing staff to take certain actions to redirect the Resident when he engaged in inappropriate behavior. The Plan allowed staff to empty hangers from his closet and hand them to the Resident so the Resident could put them back in the closet. It also allowed staff to re-arrange table chairs to encourage the Resident to focus on re-organizing the chairs. None of Grievant's actions in the Resident's bedroom were authorized by any Behavior Support Plan.

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

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

- 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.

Client abuse is a Group III offense.² On June 11, 2019, Grievant engaged in client abuse. She pushed the Resident two times. She was not authorized to push the Resident and she did not use any technique sanctioned under the Agency's Therapeutic Options of Virginia training. Grievant entered the Resident's room and threw out his bedding and blankets. This upset the Resident by causing him anxiety. Grievant removed the Resident's mattress and took it to the common room. She flipped over a couch while the Resident watched. She removed a rocking chair from his room. These actions also upset the Resident. Grievant's actions were demeaning to the Resident. 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, Grievant's removal must be upheld.

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

² See, Attachment A, DHRM Policy 1.60.

³ Va. Code § 2.2-3005.

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.

Grievant acknowledged her mistakes and asserted she would not repeat them. She pointed out that she did not intend to harm the Resident and had no prior disciplinary action. Although these are factors the Agency could have considered to mitigate the disciplinary action, they are not factors making the Agency's disciplinary action exceed the limits of reasonableness. Thus, the Hearing Officer cannot reduce the disciplinary action. In light of the standard set forth in the Rules, 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 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.