



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11411

Hearing Date: October 7, 2019
Decision Issued: October 28, 2019

PROCEDURAL HISTORY

On July 11, 2019, Grievant was issued a Group III Written Notice of disciplinary action with removal for client abuse.

On August 5, 2019, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On August 26, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 7, 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 Licensed Practical Nurse at one of its facilities. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant received training regarding Therapeutic Options of Virginia (TOVA) and knew he was not permitted to touch an individual contrary to TOVA training.

The Patient was brought to the Facility and found to be not competent to stand trial. He had a diagnosis of Schizoaffective Disorder, Bipolar Type. He also had a history of aggression.

On June 27, 2019, the Patient was exhibiting threatening behavior and posturing towards peers and staff at a group meeting. Grievant was asked to remove the Patient from his group meeting. Grievant returned the Patient to the Unit.

Grievant spoke with the Doctor regarding the Patient's behavior. Grievant told the Doctor that the Patient's medication was due in two days but Grievant wanted to give it early based on the Patient's behavior. The Doctor asked Grievant to determine what medications the Patient needed. Grievant checked the Patient's medical record and then asked the Patient, "If I gave you medication by mouth are you going to take them?" The Patient walked past Grievant and Grievant again asked the Patient if he would take the

medication orally. The Patient said, "I don't want to take s—t!" The Patient made a threatening comment to a peer.

The Patient walked next to the Nursing Station and turned around facing Grievant's direction. His fists were balled Grievant moved towards the Patient and said, "I can't have that going on here on [the Unit]." Grievant stood within a few inches of the Patient. Grievant stood squarely in front of the smaller Patient. Grievant gestured twice with his left arm and then brought his left arm down. Grievant took another small step towards the Patient causing the Patient to step backwards. While his left foot was a few inches farther back than his right foot, Grievant raised both of his hands and arms to his shoulder level. He pulled his arms backwards with his elbows moving towards his body. Grievant quickly moved his arms forward while his palms faced outwards. He pushed the Patient backwards. The Patient's right side moved backwards more rapidly than did his left side. This resulted in the Patient turning with his right side closer to Grievant and his left side away from Grievant. The Patient moved backwards until he came up against a wall. Grievant continued to walk towards the Patient. Once Grievant was within approximately one foot of the Patient, the Patient moved to his right and sat down. After Grievant and the Patient finished talking, the Patient stood up and walked across the Unit to go to the window where he could get medication.

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

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

- 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.

On June 27, 2019, Grievant got too close to the Patient and pushed the Patient backwards. There was no therapeutic reason for Grievant to position himself within inches of the Patient and then to push the Patient backwards. Grievant's demeanor suggested he was attempting to dominate or control the Patient. Grievant's action was not authorized by TOVA. Grievant could have caused the Patient physical or psychological harm. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for patient abuse. Upon the issuance of a Group Written Notice, an agency may remove an employee. Accordingly, the Agency's decision to remove Grievant must be upheld.

Grievant argued that the Patient bumped Grievant in Grievant's chest and Grievant attempted to turn the Patient sideways to apply a TOVA hold from the side. Grievant argued that the Patient "launched" backwards giving the appearance of a push. The Hearing Officer can assume for the sake of argument that Grievant's factual assertions are true. This would not affect the outcome of this case. The video of the incident clearly shows Grievant pulling his arms back and moving them quickly forward to push the Patient. If Grievant was attempting to turn the Patient to the side, Grievant used a push as a means of turning the Patient. Nothing in TOVA authorizes an employee to push a client in order to turn a client. The Agency's disciplinary action 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 ..."² 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

² Va. Code § 2.2-3005.

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**.

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.³

³ Agencies must request and receive prior approval from EDR before filing a notice of appeal.

[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