



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11454

Hearing Date: June 10, 2020

Decision Issued: June 15, 2020

PROCEDURAL HISTORY

On September 30, 2019 Grievant was issued a Group III Written Notice of disciplinary action with removal for client abuse.

On October 29, 2019, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On November 20, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 10, 2020, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency's Representative
Witness

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. She had been employed by the Agency for over two years. No evidence of prior active disciplinary action was introduced during the hearing.

On July 30, 2019, Grievant was working in the Unit at the Facility. Approximately 35 patients were in the Unit. Grievant was assisting Ms. W who was dispensing medication to patients. Grievant was on the "floor" while Ms. W was inside an area with a "plexiglass window." Patients would form a line called a "pill line" and wait their turns to approach Ms. W. Ms. W would dispense medication to each patient as the line advanced.

Mr. V was a convicted felon and resident at the Facility. He was receiving treatment from the Agency. Mr. V was in the pill line and receiving medication from Ms. W. He was taking an unnecessary amount of time to obtain his medication. Grievant noticed that Mr. V was delaying the pill line so she asked him to move along through the line. Mr. V told Grievant to, "let me do this." Mr. V started talking to another resident and said, "la para". Grievant understood this word to mean "bi-ch" in Spanish. Grievant redirected Mr. V and told him, "don't call me a Bi-ch in Espanola. Grievant told Mr. V words to the effect, "you are in the United States and should speak English; if you want to speak Spanish, go back to Mexico."

Approximately three weeks later¹, Mr. V reported Grievant's comment to the Agency and it began an investigation. The Investigator spoke with Mr. V. Mr. V told the Investigator Grievant's language was demeaning and humiliated him in front of a group of people. Mr. V told the Investigator he was born in the United States and was a US citizen. He said he was not from Mexico. He said he was regressing in his treatment and questioned the potential of harm because of what Grievant said to him. He told the Investigator he was fearful of retaliation² from Grievant because he made this complaint.

Grievant told the Investigator that Mr. V was taking a long time in the pill line and she was trying to move him along. Mr. V told Grievant to, "let me do this." Mr. V then started speaking Spanish to another resident and said "labara"³ which was slang Spanish for "bi-ch." The Investigator asked Grievant if she told Mr. V "to speak Spanish, you're not in Mexico anymore. You're in the U.S. so speak English, If you want to speak Spanish go back to Mexico." Grievant said she did not recall saying, "Go back to Mexico." Grievant also said, "I don't recall saying go back to Mexico – I may have said it but I don't recall. There was so much going on – I could have said it, I just don't recall."

Grievant wrote an Observation Note where she explained that Mr. V. was standing by the pill window being inconsiderate of other residents. Grievant wrote that she re-directed Mr. V for taking a long time during bill call. She wrote that Mr. V told her, "Let me do this". After Mr. V moved, he started speaking in Spanish to another resident and called Grievant a bi-ch in Spanish. Mr. V said, "La Parra." Grievant told Mr. V not to call her a bi-ch in Espanola. Mr. V told Grievant, "This is the [United] States of America, I can speak Spanish or English whatever and whomever I chose too."

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 defines⁴ 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

¹ Following the three week delay, the Agency's video recordings were no longer available.

² The Agency did not find any evidence that Grievant retaliated against Mr. V.

³ It unclear which spelling of the word was appropriate and what it meant in Spanish slang.

⁴ See, Va. Code § 37.2-100 and 12 VAC 35-115-30.

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

"[A]buse or neglect of clients" is a Group III offense.⁵ Client abuse includes using language that demeans or humiliates a person. On July 30, 2019, Grievant told Mr. V, "[i]f you want to speak Spanish go back to Mexico." This is the type of language that could demean and humiliate an individual. Mr. V was in America and confined to the Facility. Telling him to leave this country because he was speaking Spanish could have caused psychological harm to Mr. V. 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.

During the Hearing, Grievant denied telling Mr. V to go back to Mexico. The Hearing Officer is not persuaded by Grievant's assertion. If Grievant's denial was true, she would have denied telling Mr. V to go back to Mexico when first asked by the Investigator. Instead, Grievant indicated a conversation occurred with Mr. V about speaking Spanish and then admitted she could have, but did not remember saying go back to Mexico. Grievant asserted the Investigator told her to write that she could have

⁵ See, Attachment A, DHRM Policy 1.60.

said but did not remember saying go back to Mexico. There is little reason for the Investigator to disregard or cover up a denial by Grievant if Grievant had made such a denial. The Investigator would receive no benefit by asking Grievant to include something in her statement that was untrue. In addition, Grievant could have refused to write something that was untrue.

Grievant argued that the discipline should be reversed because the Agency failed to prove that Mr. V suffered any adverse consequences from Grievant's statement. For example, Mr. V did not mention Grievant's comment during his therapy treatments. It is not necessary for the Agency to show actual damage or consequences resulting from an employee's comment in order to establish verbal abuse. The Agency is only obligated to show that Grievant's statement to Mr. V might have caused him psychological harm. Mr. V was receiving mental health treatment. A statement that insulted him could have adversely affect him. The Agency has met its burden of proof.

Grievant objected to the Agency's failure to permit Mr. V and several other residents to testify. Grievant argued she was being denied her procedural due process rights to have a full and fair hearing. During the hearing, the Hearing Officer ordered the Agency to produce the individuals. The Hearing Officer, however, does not have contempt authority and the Agency refused to produce the individuals because doing so might have undermined their treatment. The Hearing Officer's authority is limited to drawing an adverse inference against the Agency. The Hearing Officer will not to do so because the Hearing Officer can disregard the statements of the individuals and treat Mr. V's statement as an allegation. Even with these assumptions, the outcome of the hearing is not affected.

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"⁶ 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.

The Agency could have addressed Grievant's behavior by issuing discipline without removal. EDR has not authorized a grievance Hearing Officer to impose a preferred level of discipline. Only if the level of discipline exceeds the limits of reasonableness can the Hearing Officer reduce the disciplinary action. The Agency's

⁶ Va. Code § 2.2-3005.

discipline in this case is consistent with the Standard of Conduct. 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]

^[1] 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