COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11456

Hearing Date: April 17, 2020
Decision Issued: April 30, 2020

PROCEDURAL HISTORY

On October 16, 2019, Grievant was issued a Group III Written Notice of disciplinary action with removal for client abuse.

On November 11, 2019, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On November 21, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 17, 2019, a hearing was held by video conference.

APPEARANCES

Grievant
Grievant's Counsel
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 Counselor II at one of its facilities. She began working for the Agency in October 2017. The purpose of Grievant's position was:

> To provide clinical social work services to adult mentally ill patients utilizing recovery principles with a goal of assisting patients to be successful in the least restrictive environment consistent with their level of functioning.[1]

Other than the facts giving rise to this disciplinary action, Grievant's work performance was satisfactory to the Agency. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant had a distinguished military service record before joining the Agency. She presented letters from approximately 20 co-workers describing Grievant's excellent work performance. Dr. G testified Grievant went out of her way to help vulnerable patients. She testified that Grievant was passionate and caring.

Grievant received training regarding the Agency's client abuse policy.

[1] Agency Exhibit G.

The Patient was a 37 year old male admitted to the Facility on September 27, 2019 pursuant to a restoration to stand trial court order. He had attempted suicide while in jail. The Patient had a diagnosis of Post-Traumatic Stress Disorder and Antisocial Personality Disorder. The Patient had a history of treatment for mental illness and substance abuse since he was 16 years old. He had at least 15 in-patient hospitalizations. He had reported in the past that he "hears God's voice telling me to do terrible things and kill people."[2]

The Patient had a history of manipulating staff and other patients to his favor. He had a history of assault and seeking media attention. Several employees told Grievant to be careful around the Patient because he had assaulted staff and he had attempted to swallow items such as pens.

The Patient did not want to be determined to be competent for trial. Grievant documented the Patient's behavior and he became aware she was observing him. On one occasion, the Patient told Grievant she did not know what she was doing and he was going to get her. The Patient may have been aware that Grievant intended to declare the Patient competent for trial.[3]

The Patient had initiated litigation against the Agency.

Some employees felt tension working with the Patient. Some employees only approached the Patient in pairs because they were concerned the Patient would take out of context what they said.

On September 30, 2019, the Patient was at the Facility in a two to one relationship. This meant two employees were providing direct care and observation to the Patient at all times. They were expected to write their observations every fifteen minutes. The two employees observing the Patient were the CNA and the DSA II.

The Patient was in the common area, seated, and having lunch as his wound was being dressed. The Patient's wound was bleeding and irritating him. A nurse was cleaning the Patient's wound. The nurse stepped away from the Patient to obtain something to use to clean the wound. The Patient's wound remained uncovered. The wound was severe.

The CNA was seated and facing the Patient who was also seated. The CNA was approximately six feet from Grievant. The DSA II was seated and within arm's length of the Patient. He was facing Grievant.

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[2] See, Grievant Exhibit 9.

[3] On August 26, 2019, Grievant wrote in a progress note that the Patient could be discharged back to jail. The Patient was discharged from the Facility but later returned to the Facility in September 2019. See, Grievant Exhibit 9.

Grievant wanted to ask the Patient if she could contact his grandmother. Grievant approached the Patient and observed the Patient's wound. The wound was deep and "looked awful." She could see fat tissue but was surprised she could not see blood. The wound was "disturbing."

Grievant looked at the wound and said, "If he had cut a little deeper, the job would have been done."[4] Grievant was smiling at the Patient when she spoke.

The DSA II looked at the Patient. The Patient shook his head in response to Grievant's comment. The DSA II put his head down because he was upset with what Grievant said. He believed that Grievant did not need to say what she had said. The DSA II did not report Grievant's comment as abuse because he did not know to whom to report Grievant's behavior.

Grievant later claimed she said, "That looks delicious." The DSA II did not hear Grievant make that comment.

The DSA II had worked with Grievant before. He did not have a problem with Grievant. He has observed Grievant being kind to patients. He thought Grievant was a good person but what she said was inappropriate.

According to the CNA, Grievant said, "If you went any deeper, you would have bled out."[5] The CNA did not perceive Grievant's comment as "nasty" or made in a "rough way." The CNA was concentrating on her duties and "paid no mind" to Grievant's comment.

The CNA did not write Grievant's comment in her observation notes of the Patient. She did not report Grievant's comment because she did not believe it was client abuse.

The CNA enjoyed working with Grievant. Grievant was friendly and always said "hello" to the CNA. The CNA considered Grievant to be a helpful co-worker.

On October 1, 2019, the Patient reported Grievant's comment to Facility staff and the Agency began an investigation.

The Facility Director reviewed the allegation of client abuse against Grievant. The Facility Director was concerned about Grievant's comment because the Patient was on suicide watch. If the Patient heard someone commenting about his wound, it might cause him to act out. Grievant's statement was not therapeutic.

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[4] During the hearing, the DSA II testified Grievant said, "just a little deeper would have gotten the job done."

[5] During the hearing the CNA testified Grievant said, "Oh [Patient's first name] if that would have been any deeper, you could have bled out."

Prior to the Agency's issuance of the Group III Written Notice, the Facility Director spoke with Grievant's supervisor and department director. The Facility Director reviewed Grievant's statements and letters of support from Grievant's co-workers. The Facility Director chose not to mitigate Grievant's disciplinary action.

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 defines[6] 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:
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> - 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

[6] 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.

Facility Policy 050-020 governs Staff and Patient Interactions and Boundaries. This policy provides:

> All hospital staff … are expected to exhibit behaviors that are professional, appropriate, and therapeutic when interacting with any hospital patient or employees.

Client abuse is a Group III offense.[7] On September 30, 2019, Grievant told the Patient "If he had cut a little deeper, the job would have been done." This language served to demean or humiliate the Patient. The Patient reacted negatively by shaking his head. 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.

This case centers on determining whose account of Grievant's statement is the most believable. In this case, the Hearing Officer finds that the DSA II's account of Grievant's statement is most believable. That statement is sufficient to support the disciplinary action.

Grievant argued that all of the witnesses described Grievant's statement differently and that it could be interpreted differently and, thus, there was insufficient evidence to support the disciplinary action.

The CNA heard Grievant tell the Patient, "If you went any deeper, you would have bled out." The CNA's observation is not more reliable than the DSA II's observation. The CNA was focused on the Patient and did not focus on Grievant's statement. In contrast, the DSA II was close to Grievant and listening to Grievant as she spoke. The DSA II reacted immediately upon hearing Grievant's comment.

Grievant asserted that she told the Patient that his wound "looked delicious" because she did not want to appear startled or afraid. As soon as she made that statement, she knew it sounded "stupid" and "weird." She claimed then to have said, "If you had cut any deeper you could have really hurt yourself." She contends she meant to show concern towards the Patient.

In Grievant's grievance request, she wrote that after saying "that looks delicious", "I do not remember my next words exactly, but I said something to the effect that the wound looked really deep, and that he could have hurt himself if he had cut any deeper."[8] Grievant's account of her statement is not more reliable than the DSA II's

[7] See, Attachment A, DHRM Policy 1.60.

[8] Agency Exhibit I.

account because Grievant was initially focused on her "weird" or "stupid" statement about the wound being delicious. She described her following statement as "something to the effect that." The DSA II did not describe his remembrance as "something to the effect that."

The Patient was manipulative and wanted to undermine Grievant. The Patient did not testify and the facts establishing Grievant's statement were not based on the Patient's assertions regarding his interaction with Grievant.

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 …."[9] 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 chosen to mitigate Grievant's disciplinary action and still corrected her behavior. The Facility Director considered Grievant's work history and the favorable opinions of Grievant's co-workers and chose not to reduce the Group III Written Notice with removal. It is not necessary for the Agency to have considered every conceivable mitigating fact to show that it adequately considered mitigating circumstances. The Agency's decision not to mitigate was within its discretion. The Hearing Officer cannot disturb that decision, unless the Agency's discipline exceeds the limits of reasonableness. This is a difficult standard to meet. 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**.

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[9] 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.