



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11468

Hearing Date: March 2, 2020
Decision Issued: March 23, 2020

PROCEDURAL HISTORY

On November 25, 2019, Grievant was issued a Group III Written Notice of disciplinary action with removal for client abuse.

On November 26, 2019, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On December 16, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 2, 2020, 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 Unit Manager at one of its facilities. She was employed by the Agency for approximately seven years. No evidence of prior active disciplinary action was introduced during the hearing.

The Resident was a sex offender residing at the Facility. He was placed in the Behavior Unit for several days because of his poor behavior at the Facility. The Resident did not like Grievant and frequently targeted her with threats and abuse. He had threatened to harm her and her family. The Resident had been targeting Grievant for over a year.

The Control Room had several tables abutting a wall with glass windows. Employees inside the Control Room could see into a Unit where there were residents. To the side of the Control Room was a hallway connecting the Unit. The Control Room had a tray slot that opened to the hallway. An employee inside the Control Room could open the tray slot to pass trays, papers, or other items from the Control Room to someone standing in the hallway. The hallway had a yellow line close to the tray slot. Residents were not supposed to pass the yellow line without permission.

Sound travelled from inside the Control Room into the hallway and into the Unit when the tray slot was open. Grievant and other staff were aware that what they said in

the Control Room could be heard by someone standing in the hallway or Unit if the tray slot was open.

On September 25, 2019, Grievant entered the Unit. The Resident approached Grievant and spoke her name. Grievant did not “fully engage with him in undivided attention” because of his history of targeting her. She continued to walk from one resident’s room doorway to another. The Resident turned to the floor officer and said, “Get me an informal complaint [form].”

Grievant walked out of the Unit and into the Control Room to help Ms. G look for a complaint form to give to the Resident. They had difficulty finding a complaint form.

While in the Control Room, Grievant was standing approximately five feet from the open tray slot. Ms. G was standing in front of Grievant closer to the Control Room window. Ms. G was looking for forms requested by the Resident. Grievant said aloud that the Resident was a “fa—ott ass bi—h” and “fa—ott bi—h”. Grievant repeated her insults. She also said the Resident would still be there and she would be going home. The Resident was in the Unit and standing closer than ten feet from the slot window. He heard her comments about him. He became angry about her comments.

Two Emergency Response Team Officers entered the Unit with Grievant following them. The Officers stood shoulder to shoulder and approached the Resident. They began walking slowly towards the Resident which forced the Resident to move backwards. The Resident was looking at Grievant and yelling and cursing at her. Grievant spoke to the Resident as the Resident continued to yell and argue with Grievant. Grievant had been trained to remove herself from the area when a resident targeted her. Grievant remained at the entry doorway as the Officer moved the Resident farther away from her. Grievant nodded her head and wrote on her paper as she listened to the Resident yelling at her.

The Agency investigated the incident. The Investigator spoke with the Resident. The Resident said he felt degraded and humiliated by Grievant’s comments because she was calling him out by his name and she was being inappropriate as a supervisor for the Facility.

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

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

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

Abuse or neglect of clients" is a Group III offense.² On September 25, 2019, Grievant engaged in client abuse. Grievant repeatedly called the Resident a "fa—ott ass bi—h" and "fa—ott bi—h". The Resident heard Grievant's comments. Grievant knew or should have known that the Resident could hear her through the slot window. Grievant used language that demeaned and humiliated the Resident thereby justifying the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

Grievant denied insulting the Resident. The evidence showed that Ms. G heard Grievant insult the Resident and that Grievant knew or should have known that the Resident would hear her comments.

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

² See, Attachment A, DHRM Policy 1.60.

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**.

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

³ Va. Code § 2.2-3005.

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.