



**COMMONWEALTH of VIRGINIA**  
*Department of Human Resource Management*

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 11505**

Hearing Date: May 27, 2020  
Decision Issued: June 16, 2020

**PROCEDURAL HISTORY**

On February 26, 2020, Grievant was issued a Group III Written Notice of disciplinary action with removal for client abuse.

On March 9, 2020, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On March 18, 2020, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 27, 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 Direct Service Associate II at one of its facilities. He had been employed by the Agency for approximately two years. Grievant had prior active disciplinary action as discussed below.

The Resident was a 58 year old woman admitted to the Facility on December 10, 2019 with a diagnosis of schizophrenic disorder. The Resident was known to be verbally abusive but not known to be a spitter. She was cognitively impaired.

On January 14, 2020, Grievant was in a one to one relationship with the Resident. He was to remain within a few feet of the Resident at all times.

The Resident was in her bed and Grievant was near her. The Resident was being verbally abusive while she laid in bed. The Resident threatened to spit on Grievant. The Resident rose from her bed with a gesture to suggest she was going to spit on Grievant. Grievant draped her blanket over his hand. He placed the blanket and his hand over the Resident's face to stop her from spitting on him. His hand hit her bottom lip with sufficient force to cause the lip to bleed. The Resident's lip cracked and began to bleed.

At approximately 4:10 a.m., the Nurse came into the room. She was holding a cup of ice in her hand that the Resident had asked for approximately five minutes earlier. The

Nurse wanted to give the cup of ice to the Resident. She observed the blanket over the Resident's face. She removed the blanket from the Resident's face and observed that the Resident's lower lip was bloody and there was a bloody spot on the Resident's lower jaw. The Resident was awake.

Grievant was standing by the Resident's bedside when the Nurse walked into the room. The Nurse questioned Grievant as to how and when the Resident's lip became bloody. Grievant told the Nurse the Resident was trying to spit on him and he was trying to guard himself with his hands placed in front of the Resident's face.

The AOD concluded that the Resident's injury was not consistent with someone having dry lips.

Grievant was subjected to a drug screen. He tested positive for Marijuana Oral Fluid. Grievant received a Group III Written Notice with a 15 workday suspension for failing the drug test. Grievant's return to work was contingent on the outcome of the client abuse investigation.

On October 9, 2019, Grievant received a Group I Written Notice relating to attendance.

## **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<sup>1</sup> 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

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<sup>1</sup> 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.

The Agency has not presented sufficient evidence to show that Grievant engaged in client abuse. The only employee who witnessed the alleged abuse was Grievant. Grievant asserted that he wrapped the bed blanket on his hand and placed his hand towards the Resident's face to block her spitting. The Resident moved her face too close to Grievant's hand causing Grievant's palm and her face to have contact. That contact resulted in the Resident's injury. Grievant's action was not an "[a]ssault or battery." It appears that the Agency believed Grievant forcefully placed his hand on the Resident's face, but there is not sufficient evidence to support that conclusion.

"[U]nsatisfactory work performance" is a Group I offense.<sup>2</sup> In order to prove unsatisfactory work performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

Although there is not sufficient evidence to show that Grievant engaged in client abuse, there is sufficient evidence to show that Grievant's work performance was unsatisfactory. Facility employees did not receive training suggesting they should use a resident's bedsheet to wrap their hands and then place their hands near a resident's face. An employee who feared being spit on could distance him or herself from the resident. In this case, if Grievant had time to wrap his hand in a blanket, he likely had time to distance himself from the Resident so that she could not spit on him. By placing his hand so close to the Resident's face, it enabled her to hit his palm with her face thereby causing injury. Accordingly, the Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.

Upon the accumulation of an active Group III Written Notice, any additional disciplinary action forms a basis for removal. Grievant had a prior active Group III Written

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<sup>2</sup> See Attachment A, DHRM Policy 1.60.

Notice and has now accumulated a Group I Written Notice. Accordingly, the Agency's decision to remove Grievant must be upheld.

Grievant asserted his actions were proper and he had the right to defend himself. The Agency, however, has presented sufficient evidence that Grievant's behavior created a sufficient risk of injury to the Resident that disciplinary action is appropriate.

*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 ..."<sup>3</sup> 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 further 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 is **reduced** to a Group I Written Notice. Grievant's removal is **upheld** based on the accumulation of disciplinary action.

## 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 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto:EDR@dhrm.virginia.gov), or by fax to (804) 786-1606.

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<sup>3</sup> Va. Code § 2.2-3005.

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.<sup>[1]</sup>

[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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>[1]</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.