COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11720

Hearing Date: November 3, 2021
Decision Issued: November 23, 2021

PROCEDURAL HISTORY

On June 3, 2021, Grievant was issued a Group III Written Notice of disciplinary action with removal for verbal abuse.

On July 1, 2021, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On July 19, 2021, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 3, 2021, a hearing was held by remote conference.

APPEARANCES

Grievant
Grievant's Counsel
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 an Emergency Response Team (ERT) Lead at the Facility. Grievant described her role as an ERT to be responsible for de-escalating patients to the point where they are compliant without having to use "physical means." She began working for the Agency on January 10, 2021. She previously worked with another State agency. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant took Therapeutic Options of Virginia training where she learned how to "engage physically" with patients and to do so as a last resort.

Grievant took Cultural Competence training on February 2, 2021 and Cultural Diversity training on March 1, 2021.

The Patient was a 42 year old African-American male admitted to the Facility on a temporary detention order because he was unable to care for himself and was a danger to others.

Nurse J was the Nurse Manager.

On May 12, 2021, Grievant was working as a Direct Service Associate at the Facility. She regularly worked as a member of the Emergency Response Team.

The Patient was alone in the Day Room. At approximately 6:48 p.m., the Patient pulled his pants down and yelled. At 6:50 p.m., the Patient went to his room. Several staff went to the Patient's room and stood in the open doorway of the Patient's room and talked to the Patient. The Patient looked out the room window as he gestured and talked to the staff. Staff walked away from the room and the Patient remained in the room. At 6:57 p.m., three staff went to the Patient's room. Additional staff went to the room.

A "code" was called over the radio indicating that staff were to report to the unit to assist with an emergency. The code meant that the Patient was in crisis and required an emergency response from staff.

Mr. H was working as an ERT on the evening shift and responded to the Patient's room. He knew that two days earlier the Patient had punched another patient in the face with enough force to break bones. At approximately 7 p.m., Mr. H called Grievant and asked for her assistance. Grievant had been his supervisor and he trusted Grievant. Mr. H told Grievant that the Patient was refusing his medication and that Mr. H did not feel safe and needed her assistance. Another ERT was working with Mr. H and Mr. H was unsure of that ERT's abilities since that ERT recently began working as an ERT.

Mr. H testified he had called the Patient "Sir" and the Patient told Mr. H, "Don't call me Sir."

Grievant obtained permission to leave her unit and go to the Patient's unit.

Grievant had not interacted with the Patient prior to May 12, 2021. She did not know the Patient's medical history.

Several staff were at the Patient's room. At approximately 7:03 p.m., Grievant and two other ERTs arrived at the Patient's room. Grievant walked past Nurse J without first inquiring about the Patient's status.

Grievant entered the room and said to the Patient, "Yo, Yo, what's up dawg?"[1] The Patient heard Grievant and became upset at her words. With a stern tone, the Patient told Grievant, "Don't talk to me like that. Speak professionally to me." Grievant's tone of voice along with her statement had upset the Patient. Grievant apologized to the Patient and did not repeat her behavior.

Staff obtained a doctor's order to inject the Patient with his medication since he refused to take his medication orally.

[1] The Patient wrote that Grievant used the word, "dawg". Grievant did not refer to the Patient as a "dog", an animal.

At 7:04 p.m., a restraint chair is brought into the Patient's room. At 7:08 p.m., staff placed the Patient in the chair. The Patient was injected with medication. At 7:13 p.m., staff rolled the chair holding the Patient out of the Patient's room.

Grievant referred to the Patient as "dawg" because she was attempting to build rapport with the Patient. She relied on her interpretation of cultural competency training and cultural diversity training to conclude she needed to communicate with the Patient using terms she believed he would consider culturally appropriate. Grievant described "dawg" as a term of endearment like "buddy", "dude", or "friend."

The term "dawg" was not routinely used by staff at the Facility to interact with patients.

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[2] 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
> - 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.

[2] See, Va. Code § 37.2-100 and 12 VAC 35-115-30.

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.

Facility Policy 050-095 governs Ethical Behavior and requires staff to "[t]reat patients with dignity, respect, and courtesy."[3]

Facility Policy 450-047 governs Management of Aggressive and Abnormal Behavior and requires staff to, "[c]ontinue to maintain professional interactions with all patients and protect the dignity and the confidentiality of their treatment information."[4]

The Emergency Response Team Employee Handbook requires staff to "[r]emain professional when dealing with all staff and patients."[5]

The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for client abuse. Grievant knowingly and intentionally told the Patient "Yo, Yo, what's up dawg?" Grievant had not met the Patient before. Using "street lingo" with a patient could make that patient feel demeaned. She did not comply with her obligation to remain professional with patients. In this case, the Patient became upset by Grievant's words and asked her to speak to him professionally. The Agency has met its burden of proof. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

The Agency asserted that Grievant entered the room without first acknowledging Nurse J who was the person most informed about the Patient's circumstances. Grievant's behavior was not a violation of policy. The Agency alleged Grievant obstructed Nurse W who was trying to give the Patient medication. No credible evidence was presented to support this assertion.

Grievant argued she did not intend to be disrespectful to the Patient. Grievant argued no policy prohibited her from using "street" language. She argued that "dawg" did not mean the animal "dog" and was not demeaning. Grievant presented the definition of dawg as:

[3] Grievant Exhibit p. 30.

[4] Grievant Exhibit p. 38.

[5] Grievant Exhibit p. 44.

> Calling someone “dawg” is friendly in African-American urban slang. It's the rough equivalent of “brother” or “dude” and is used among men and boys specifically.[6]

The Agency had several policies requiring Grievant to interact professionally with staff. The Agency’s abuse policy did not require the Agency to show that Grievant intended to demean the Patient or to engage in verbal abuse. The Agency was only required that Grievant intended to speak to the Patient using words that could demean the Patient. The Agency has met this burden of proof.

The Hearing Officer agrees Grievant should receive some disciplinary action but does not agree with the Agency’s decision to remove Grievant. Grievant’s objective was to perform her job duties by building a rapport with the Patient. She was relying on her interpretation of training she received for cultural competency and diversity. The Patient understood that Grievant was not calling him a dog. Once the Patient indicated he did not like the terminology, Grievant did not repeat it. Grievant’s made a mistake but that mistake was not so egregious as to require the Agency to remove her from employment. The *Rules for Conducting Grievance Hearing* prohibit the Hearing Officer from substituting his judgment for that of the Agency once the Agency has met its burden of proof. Thus, the Hearing Officer will not modify the Agency’s disciplinary action. The Hearing Officer, however, recommends the Agency make Grievant eligible for immediate rehire.

Mitigation

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 ….”[7] 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

[6] Grievant Exhibit p. 50.

[7] Va. Code § 2.2-3005.

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]

[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.

COMMONWEALTH of VIRGINIA

Office of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 11720-R

Reconsideration Decision Issued: January 14, 2022

RECONSIDERATION DECISION

The Office of Employment Dispute Resolution issued Ruling 2022-5332 on January 13, 2022 remanding this matter to the Hearing Officer for further consideration. EDR wrote:

> It appears that the hearing officer adopted the agency's term "street lingo"[1] to refer to casual language that is considered overly familiar for the patient care setting and, thus, unprofessional. The record presents no dispute that the phrase "yo, yo, what's up dawg?" was not a professional greeting to the patient in the agency's care, and we find no basis to question the hearing officer's conclusions to the extent he found that the grievant knew she was required to speak to patients professionally. However, it is not apparent from the hearing decision or from the record what evidence was presented to establish that a greeting or informal address would rise to the level of patient "abuse" under agency policies *solely* on grounds that it uses overly familiar or colloquial terms. The hearing decision does not describe the record evidence supporting the determination that the grievant's language "could make that patient feel demeaned."
>
> For these reasons, and as further described below, EDR is remanding this matter for further consideration and elaboration of these findings by the hearing officer. The standard utilized to determine that the grievant had engaged in abuse through her use of colloquial language is not clear on

[1] The Hearing Officer did not adopt the Agency's term "street lingo". The Hearing Officer quoted language used by the Agency.

> review. The hearing officer suggests that it was the patient's reaction to the grievant's choice of words that rendered them demeaning. It is unclear whether the record evidence demonstrates that the agency utilizes a standard in which the patient's opinion is determinative as to whether abuse has occurred under agency policy. Further, if overly casual language "could make a patient feel demeaned," this logic could be interpreted as equating any unprofessional conduct toward a patient with abuse. EDR is unable to identify the evidence in the record that demonstrates the appropriate standard to apply for the hearing officer to determine that the grievant's use of a colloquial greeting to a patient could rise to the level of "abuse" under agency policies. (Original footnotes omitted). ***
>
> In this case, however, it is not clear from the agency's evidence or arguments that it would in fact equate mere informality with demeaning "abuse" under its policies. ***
>
> Therefore, we are unable to determine whether the agency failed more broadly to prove the full extent of the original charge listed on the Group III Written Notice based on the totality of the circumstances. The record is not clear as to whether the agency would have issued a Group III Written Notice with termination for abuse if the sole allegation was the use of colloquial language toward a patient.
>
> Accordingly, we must remand the hearing decision for reconsideration. Upon reconsideration, the hearing officer must address the evidence in the record that supports the grievant's use of colloquial language as abuse and the unclear issues further identified in detail above in this ruling. The hearing officer should also clarify whether, based on the evidence, the grievant committed any misconduct beyond merely addressing a patient with a colloquial phrase. If so, the hearing officer should make findings as to whether the totality of the sustained allegations merits the Group III Written Notice with termination issued by the agency, pursuant to DHRM Policy 1.60, *Standards of Conduct*. If applicable, the hearing officer should additionally evaluate what level of discipline may be upheld for the offense of unprofessional conduct under the circumstances. The hearing officer must, as always, consider relevant mitigating and aggravating circumstances as demonstrated by the parties.

The Hearing Officer has reviewed the evidence in light of EDR's ruling. Grievant only engaged in misconduct by saying to the Patient, "Yo, Yo, what's up dawg?" Unsatisfactory work performance is a Group I offense.[2] Her comments were unprofessional and inappropriate when addressing the Agency's patients. Based on the totality of the sustained evidence, Grievant's behavior rises to the level of a Group I offense for unsatisfactory work performance. Grievant did not intend to abuse the Patient.

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

Grievant and the Patient are African-American. Grievant believed she was recognizing the Patient's culture to build a relationship with the Patient. She believed she was following the Commonwealth's Diversity, Equity, and Inclusion training. Accordingly, the Group III Written Notice must be reduced to a Group I Written Notice with Grievant reinstated.

The Virginia General Assembly enacted *Va. Code § 2.2-3005.1(A)* providing, "In grievances challenging discharge, if the hearing officer finds that the employee has substantially prevailed on the merits of the grievance, the employee shall be entitled to recover reasonable attorneys' fees, unless special circumstances would make an award unjust." Grievant has substantially prevailed on the merits of the grievance because he is to be reinstated. There are no special circumstances making an award of attorney's fees unjust. Accordingly, Grievant's attorney is advised to submit an attorneys' fee petition to the Hearing Officer within 15 days of this Decision. The petition should be in accordance with the EDR Director's *Rules for Conducting Grievance Hearings*.

RECONSIDERATION ORDER

The Group III Written Notice of disciplinary action with removal is **reduced** to a Group I Written Notice. The Agency is ordered to **reinstate** Grievant to Grievant's same position at the same facility prior to removal, or if the position is filled, to an equivalent position at the same facility. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal. The Agency is directed to provide **back benefits** including health insurance and credit for leave and seniority that the employee did not otherwise accrue.

APPEAL RIGHTS

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

/s/ Carl Wilson Schmidt

_____

Carl Wilson Schmidt, Esq.
Hearing Officer