COMMONWEALTH OF VIRGINIA

Department Of Human Resource Management

Office of Employment Dispute Resolution

DECISION OF HEARING OFFICER

In re:

Case number: 12053

Hearing Date: February 27, 2024
Decision Issued: March 22, 2024

PROCEDURAL HISTORY

On December 6, 2023, Grievant was issued a Group III Written Notice of disciplinary action with termination for "assault[ing] a resident who was in the care of the [Agency]" in violation of the DHRM Policy 1.60, Standards of Conduct; the Agency's Administrative Procedure VOL I-1.2-01, Staff Code of Conduct; and DHRM Policy 2.35, Civility in the Workplace.

On December 6, 2023, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On December 18, 2023, the Office of Employment Dispute Resolution assigned this matter to the Hearing Officer. On February 27, 2024, a hearing was held at Agency offices near the Facility.

APPEARANCES

Grievant
Grievant's Advocate
Agency Counsel
Agency Party Designee
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Group III Written Notice of disciplinary action with termination?

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:

Prior to her dismissal, the Department of Juvenile Justice employed Grievant as a Juvenile Correction Specialist at one of its facilities. Grievant had worked for the Agency for almost 19 years. No evidence of prior active disciplinary action was introduced during the hearing.

As a Juvenile Correction Specialist, Grievant annually received "Handle with Care" training for self-defense and use of force with the Agency's juvenile residents.[1] Superintendent described the techniques that Grievant would have been taught and approved to use when a resident was entering her personal space. Superintendent testified that the Handle with Care training teaches appropriate techniques along the use of force continuum beginning with verbal prompts and including getting into a non-defensive posture when communicating with a resident.[2]

On the afternoon of November 28, 2023, Grievant was working on a Unit in the Facility.

Grievant testified that there were 14 residents on the Unit at that time. Residents would alternate spending time in their rooms and having group time in the common area.[3]

[1] Hearing recording at 28:02-28:45.
[2] Hearing recording at 23:41-26:27.
[3] Hearing recording at 1:21:30-1:23:50.

By 2:50 pm, there were approximately six residents in the common area of the Unit, and it was time for them to return to their rooms for a break period.

Grievant testified that she had instructed the residents to go to the doors leading into their rooms so that they could "go down" for the break period.[4] Grievant began the process of unlocking doors to enable residents to enter their assigned rooms.[5]

Resident X did not follow Grievant's instruction to go to his room.

As Grievant left the door of another resident's room, Grievant began to walk across the common area of the Unit. At approximately the same time, but from the opposite side of the Unit, Resident X began to walk across the common area toward Grievant.[6] Video footage shows Grievant and Resident X walking toward one another at approximately 2:51:44 pm. Grievant testified that as she and Resident X approached one another she was instructing him to go to his room.[7]

At approximately 2:51:47 pm, the video footage shows Resident X's left hand touch Grievant's right shoulder area appearing to push Grievant with Grievant turning toward her right side and taking a step backward. Resident X and Grievant continue to face each other and Resident X takes three steps backward away from Grievant as Grievant takes approximately three steps toward Resident X.

At approximately 2:51:51 pm, Grievant and Resident X each take a step toward each other and then Grievant turns to her left side and Resident X turns toward his right side and they both walk in the same direction for approximately two steps. At approximately 2:51:53 pm, Grievant appears to push Resident X initially with her right arm bent and then extending her right arm to push him in his upper chest and neck area. Resident X takes approximately three steps backward away from Grievant.

Resident X and Grievant are then facing each other. At approximately 2:51:55 pm, Grievant extends her right arm out straight in front of her with her palm facing toward Resident X and her fingers pointing toward the ceiling.[8] Grievant asserted in her response to the Agency dated December 4, 2023, that she "stuck out [her] right arm and explained to [Resident X] that if [she] could touch him he was [too] close to [her]."[9]

Resident X takes two steps toward Grievant with his head bowed and his arms hanging by his side, Grievant continues to hold her right arm extended toward Resident X. At approximately 2:51:57 pm, as Resident X takes a third step toward her, Grievant appears to lean towards him and begin to step forward as the left side of his face and neck area appear to come into contact with her extended right hand. Grievant's right arm appears to bend and then her right hand appears to push up into the left side of Resident X's face, pushing his face toward his right side and away from her. As Resident X is

[4] Hearing recording at 49:56-50:22.
[5] Hearing recording at 49:56-50:40.
[6] Hearing recording at 50:48-50:57.
[7] Hearing recording at 50:48-50:57.
[8] See Agency Ex. Rapid Eye Video View 1 and see Rapid Eye Video View 2.
[9] Agency Ex. at 4-5.

pushed away from Grievant, he takes a step to his right side and away from Grievant and raises his left hand to the lower left side of his face near his lip. Resident X continues to hold the lower left side of his face as he moves away from Grievant.[10]

The video footage showed Resident X enter his room at approximately 2:52:51 pm.[11]

The video footage showed Grievant approach the door to Resident X's room shortly after he entered it.[12] Grievant testified that she asked Resident X if he was okay and he said "yes."[13] Grievant testified that she told Resident X that they were going to have to work on his playing and that Resident X responded "I know [Grievant], I'm going to work on it."[14] Grievant testified that she went to Resident X's door for periodic checks and he never said anything more about the incident.[15]

Grievant did not submit an incident report regarding her interaction with Resident X. Grievant also did not submit a discipline report for Resident X engaging in horseplay.

On December 4, 2023, a security coordinator assigned to the Facility submitted an Institutional Incident Report noting that while reviewing Rapid Eye video footage of the Unit from November 28, 2023, he observed footage that showed an incident between Grievant and a resident. The resident observed on the video footage was determined to be Resident X.[16]

On December 4, 2023, Resident X was medically assessed by a nurse and no injuries were noted.[17]

Also on December 4, 2023, the Agency issued to Grievant a "Notice of Intent to Issue Disciplinary Action."[18] Grievant provided the Agency with a written response to the "Notice of Intent to Issue Disciplinary Action" on that same day.[19]

Special Agent investigated a separate incident that occurred when two residents secured a third resident in a room on the Unit on November 28, 2023.[20] Special Agent interviewed Grievant on December 5, 2023, regarding that separate incident. During the interview, Grievant mentioned her interaction with Resident X.[21]

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[10] See Agency Ex. Rapid Eye Video View 1 and see Rapid Eye Video View 2.
[11] See Agency Ex. Rapid Eye Video View 1 and see Rapid Eye Video View 2.
[12] See Agency Ex. Rapid Eye Video View 1 and see Rapid Eye Video View 2.
[13] Hearing Recording at 52:16-52:33.
[14] Hearing Recording at 52:33-52:50.
[15] Hearing Recording at 52:50-53:20.
[16] Agency Ex. at 52-56.
[17] Agency Ex. at 52, 59-60.
[18] Agency Ex. 1-3.
[19] Agency Ex. at 4-5.
[20] Hearing recording at 11:56-13:07.
[21] Hearing recording at 10:00-11:44. During the hearing, Grievant disputed Special Agent's characterization of Grievant's statements to Special Agent in the investigative report (Hearing recording at 10:00-11:44).

Special Agent also interviewed Resident X on December 5, 2023. Special Agent's summary of that interview noted that Resident X thought Grievant was "playing around" but that she slapped him and then pinched him because he was taking his time "going down." Special Agent's report noted that Resident X later clarified that Grievant did not slap him, but only pinched him.[22] Grievant denied "pinching" Resident X and suggested that Resident X's face pressing into her fingernail could have been perceived by Resident X as a "pinch."

Resident X also told Special Agent that after Resident X was secured in his room, Grievant came to the window in his door and asked if he was okay. According to Special Agent's summary of the interview with Resident X, Resident X also indicated that the incident caused bleeding to his lip.[23]

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action."[24] Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

The Agency has a Staff Code of Conduct that applies to all Agency employees and requires that all Agency employees "[t]reat clients humanely and in an appropriate manner. Verbal, corporal and physical abuse is prohibited."[25] The Staff Code of Conduct also requires that each employee "[c]onduct himself or herself and perform his or her duties in such a way as to set a good example for juveniles."[26]

The Department of Human Resources Management has issued Policy 2.35 (Civility in the Workplace)[27] which applies to all state executive branch employees, including employees of the Department of Juvenile Justice.

DHRM Policy 2.35 makes clear that

> [t]he Commonwealth strictly forbids harassment (including sexual harassment), bullying behaviors, and threatening or violent behaviors of employees, applicants for employment, customers, clients, contract workers, volunteers, and other third parties in the workplace.

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[22] Agency Ex. at 67-68.
[23] Agency Ex. at 67-68.
[24] The Department of Human Resources Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.
[25] Department of Juvenile Justice, Administrative Procedure: VOL I-1.2-01, V. B.c.
[26] Department of Juvenile Justice, Administrative Procedure: VOL I-1.2-01, V. B.f.
[27] See DHRM Policy 2.35 (Civility in the Workplace).

> Behaviors that undermine team cohesion, staff morale, individual self-worth, productivity, and safety are not acceptable.[28]

Prohibited Conduct/Behaviors under DHRM Policy 2.35 may include, but are not limited to:

- Injuring another person physically;
- Engaging in behavior that creates a reasonable fear of injury to another person;
- Threatening to damage or vandalize or intentionally damaging or vandalizing property;
- Making threats to injure another person;
- Assaultive behavior such as pushing, shoving, grabbing, hitting, kicking, or spitting toward another person; . . .
- Demonstrating behavior that is rude, inappropriate, discourteous, unprofessional, unethical, or dishonest;
- Behaving in a manner that displays a lack of regard for others and significantly distresses, disturbs, and/or offends others. ….[29]

Whether Grievant engaged in the behavior and whether the behavior constituted misconduct

There does not appear to be any dispute that at the time of the interaction between Grievant and Resident X, Resident X was "playing." Resident X was not violent or threatening toward Grievant or anyone else.

Superintendent testified that Grievant had no reason to engage with Resident X in the manner that she did on November 28, 2023. Grievant was not under any sort of threat from Resident X such that she was defending herself or someone else. Grievant was not cornered or backed up against a wall. Resident X was not striking her or threatening to strike her. Superintendent testified that pursuant to the Handle with Care training Grievant had received, Grievant should have used verbal prompts to de-escalate the situation, including instructing Resident X to move away from Grievant and warning Resident X of potential disciplinary action. Superintendent testified that when Grievant was communicating with Resident X, including instructing him to move away from her, Grievant should have positioned herself in a non-defensive posture to make herself a slimmer target and then, if necessary, Grievant could use her bent arm to deflect any aggressive behavior by Resident X. According to Superintendent, Grievant had not been trained nor authorized to use an extended arm to push or shove a resident. The only time Grievant was trained to use an extended arm was to block a punch from an angle.[30] Superintendent also testified that Grievant was not trained or authorized to use any method of physical intervention in a resident's face, except in the limited situation when using a specific method to release a bite.[31]

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[28] See DHRM Policy 2.35 (Civility in the Workplace).
[29] See DHRM Policy Guide – Civility in the Workplace, Policy 2.35 Prohibited Conduct/Behaviors.
[30] Hearing recording at 23:36-26:30, 44:25-45:06.
[31] Hearing recording at 26:30-28:00.

When Grievant and Resident X were walking beside one another, Resident X may have entered Grievant's personal space, but there is no evidence that he touched or struck her. Grievant asserted that she had been trained to understand that if she could touch a resident, the resident was too close to her. Grievant did not, however, testify or introduce evidence to suggest that if a resident was too close to her, the appropriate response was to physically push the resident away. No evidence was introduced that Grievant was required to physically engage with Resident X to protect herself or to address his behavior. Grievant did not step away from Resident X. At approximately 2:51:53 pm, when Grievant decided to physically engage with Resident X, she was not deflecting him with a bent arm and body, she was pushing him in his upper chest and neck area using her extended right arm.

Moments later when Grievant extended her right arm with her palm facing Resident X, Resident X was not moving toward her and there is no evidence to suggest that he was threatening her. As Resident X began moving toward her, Grievant kept her arm extended and again physically engaged with Resident X in a manner that was inconsistent with her training. When Grievant pushed Resident X away from her, she again used an extended arm this time pushing Resident X in his upper neck and face area.

Grievant asserted that she did not slap or punch Resident X or otherwise intend to harm him.[32] A slap or a punch is not required for physical contact to rise to the level of misconduct, especially in a situation such as this where Grievant was in a position of authority over the juvenile residents in her care and had been trained in appropriate methods for physical intervention with those residents if necessary.

Grievant argued that Resident X's "playing" and entering her personal space caused the physical interaction between them and that after she raised her arm to demonstrate how far Resident X should be from her, Resident X continued to play causing her right hand "to mush" him on the left side of his face.[33] Grievant's argument is not persuasive because Grievant chose the manner in which she engaged with Resident X when he was "playing." Resident X's behavior did not require Grievant to physically engage with Resident X in a manner that was inconsistent with her training and that included extending her arm to push Resident X away from her, once in the upper chest and neck area and then a second time in the upper neck and lower face area such that Resident X's head turned and Grievant's fingernail pressed into his left upper lip.

Grievant argued that Grievant was effectively working alone to manage the Unit and its residents which made it difficult for her to use the approved physical intervention methods.[34] There was no evidence of a threat, emergency, or other situation on the Unit or with Resident X that required Grievant to physically engage with Resident X at that time or in the manner she did.

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[32] Hearing recording at 59:22-59:31.
[33] Agency Ex. at 4-5.
[34] Hearing recording at 59:47-59:54, 1:08:22-1:08:40.

The Agency has proved by a preponderance of the evidence that Grievant engaged in misconduct when she pushed Resident X.

Whether the Agency's discipline was consistent with law and policy

Group III offenses include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination. This level is appropriate for offenses that, for example, endanger others in the workplace, constitute illegal or unethical conduct; indicate significant neglect of duty; result in disruption of the workplace; or other serious violations of policies, procedures, or laws.[35]

Violation of DHRM Policy 2.35 (Civility in the Workplace) may be a Group I, Group II, or Group III offense depending upon the nature of the violation.

Grievant argued that the penalty in this case is too harsh because this is a first offense, and she had no intent to hurt or harm Resident X.

Given the nature of the offense as well as Grievant's role in the care of Resident X as well as the value the Agency places on its staff setting a good example for the juveniles in its care, the Agency has proved by a preponderance of the evidence that the discipline is consistent with law and policy.

Due Process

During the hearing, the Grievant questioned the short length of time during which the Agency conducted its investigation and decided to terminate Grievant's employment. The Agency appeared to have become aware of the incident involving Grievant and Resident X on December 3, 2024. The Agency issued a "Notice of Due Process" to Grievant on December 4, 2023. The Agency Interviewed Resident X and Grievant on December 5, 2023. The Agency issued the Group III Written Notice of disciplinary action with termination to Grievant on December 6, 2023. The Report of Investigative Findings from the Agency's Bureau of Investigative Operations was dated January 22, 2024, and described the incident between Grievant and Resident X, as well as another incident that occurred on the Unit around the same time. Grievant essentially argued that the Agency's investigation into the matter was rushed, insufficient and did not properly consider Grievant's response and description of the incident. Grievant essentially argued that the Agency did not afford her with sufficient due process. The hearing process cures any such deficiency. Grievant had the opportunity to present her evidence and arguments during the hearing.

Mitigation

Virginia Code § 2.2-3005.1 authorizes hearing officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation

[35] See DHRM Policy 1.60, Standards of Conduct.

must be "in accordance with rules established by the Department of Human Resource Management…."[36] 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 Grievant of a Group III Written Notice with termination 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.

[36] Va. Code § 2.2-3005.

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.[37]

Angela Jenkins

Angela Jenkins, Esq.
Hearing Officer

[37] 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.