



COMMONWEALTH OF VIRGINIA

Department Of Human Resource Management

Office of Employment Dispute Resolution

DECISION OF HEARING OFFICER

In re:

Case number:12154

Hearing Date: September 24, 2024

Decision Issued: November 8, 2024

PROCEDURAL HISTORY

On June 28, 2024, Grievant was issued a Group III Written Notice of disciplinary action with termination. In the written notice, the Agency described the nature of the offense as:

Violation of D.I.201: Reporting and Investigating Abuse and Neglect of Clients: Case 703-2024-0071. A preponderance of evidence exists to corroborate a substantiated finding of physical abuse of a patient when you forcibly grabbed a patient by the arm and made him pick up a piece of paper that he had dropped on the floor.¹

On July 16, 2024, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On July 29, 2024, the Office of Employment Dispute Resolution assigned this matter to the Hearing Officer. On September 24, 2024, a hearing was held at the Facility.

APPEARANCES

Grievant
Agency Advocate
Agency Party Designee
Witnesses

¹ Agency Ex. at 4.

ISSUES

1. Whether Grievant engaged in the behavior described in the Group III Written Notice of disciplinary action?
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 his dismissal, Grievant was a Psychiatric Technician III at a Department of Behavioral Health and Developmental Services Facility.² Grievant had worked at the Facility for more than 8 years and had worked for the State for more than 25 years.³ A prior evaluation of Grievant's work indicated that Grievant's work had been satisfactory to the Agency.⁴

The Employee Work Profile for Grievant's position included among Grievant's Core Responsibilities that he provide patient care and implement treatment plans, including interacting with assigned patients according to treatment plan to meet treatment plan goals, promote self-care whenever possible, and provide or assist patients to meet activities of daily life (ADLs), including basic hygiene, room maintenance, and clothes maintenance. One measure of this core responsibility, included that Grievant's position:

² Agency Ex. at 85-88.

³ Agency Ex. at 7.

⁴ Agency Ex. at 95-100.

assists patients with ADLs such as bathing, grooming, dressing, eating and laundry to the extent required based on patient functionality. Affords the patient the opportunity to do as much as possible for themselves and performs activities with the patient when they cannot. Follows policy regarding the care of patients who are incontinent and those who have difficulty with ambulation and/or are wheelchair bound.⁵

Another core responsibility for Grievant's position was to maintain a safe and therapeutic environment, including applying physical restraints to prevent a patient who presents an imminent danger to self/others from causing harm. The measures for this core responsibility included:

Interactions and activities with patients are consistent with the treatment plan, generally accepted psychiatric nursing principles and/or policies and procedures.

Utilizes therapeutic communication and role-modeling.

Uses TOVA techniques when intervening in dangerous patient behaviors and follows all expectations.⁶

Grievant had been trained on Therapeutic Options (previously Therapeutic Options of Virginia (TOVA)) and Therapeutic Communications.⁷ This training teaches Facility staff approved methods for managing aggressive behaviors, including methods for communicating with patients to understand patient needs and promote positive behaviors. Therapeutic Options Coordinator testified that the Therapeutic Options training teaches staff to physically intervene to control patients only in emergency situations, specifically when there is risk that the patient will harm themselves, harm others, or destroy state property.⁸

Patient X is a 54-year-old man who was admitted to the Facility in July 2023. Patient X's diagnosis at the time was schizoaffective disorder, bipolar type as well as intellectual disability. Patient X also had multiple chronic medical issues that contributed to delirium.⁹ Assistant Medical Director testified that by May 30, 2024, Patient X had become difficult to manage due to his symptoms. According to Medical Director, Patient X was impulsive, hyperactive, not sleeping or sleeping very little, and hypersexual. Patient X also experienced delirium and confusion.¹⁰

On May 30, 2024, Patient X was under an order for a 2:1 special observation status,¹¹ meaning that Patient X was required to be under constant observation by two

⁵ Agency Ex. at 86.

⁶ Agency Ex. at 86.

⁷ Agency Ex. at 22-28.

⁸ Hearing Recording at 43:40-47:50.

⁹ Hearing Recording at 9:20-11:00.

¹⁰ Hearing Recording at 9:20-11:00.

¹¹ Hearing Recording at 11:00-14:20.

staff who were assigned to observe and assist Patient X.¹² Grievant was assigned as one of the dedicated staff to observe and assist Patient X on that date.¹³

At approximately 3:54:00 a.m., Grievant was on duty in a Facility dayroom with Patient X. Video from the dayroom showed that in addition to Grievant and Patient X, there appeared to be four other individuals in the dayroom. At least one other individual in the room was a Facility employee. Patient X is seated on a sofa and there appeared to be another individual seated on the sofa. Grievant is seated in a chair that appears to be more than six feet behind the sofa. At approximately 3:54:14 a.m., Patient X stands up and walks to his right (generally away from Grievant) and then toward a table that was to the right and behind the sofa where Patient X had been seated. Patient X picks up what appear to be papers from the table. Patient X then turns to his right and begins to walk in a direction away from the table so that he is walking back behind where he had been seated on the sofa. Grievant stands up from his chair. The video shows that as Patient X is walking away from the table, he drops at least one piece of paper on the floor. After dropping the paper, Patient X continues to walk away from the table. Grievant walks toward Patient X. When Grievant approaches Patient X they are facing one another, and Patient X appears to hand the remaining paper (or papers) to Grievant. Grievant then appears to point over Patient X's left shoulder toward the paper that Patient X dropped on the floor. Grievant, with his left hand, then appears to take a hold of Patient X's right arm above the elbow and appears to try to turn Patient X toward Patient X's left. Patient X does not immediately move in the direction that Grievant appears to try to steer him. It appears that as Grievant is holding on to Patient X's right arm he also is pushing Patient X's right arm in the direction he wants Patient X to go, such that Patient X takes a sidestep toward the table (and the paper on the floor), but still is facing toward Grievant and away from the direction that Grievant is trying to direct him. With Grievant still holding Patient X's right arm and moving toward the paper on the floor, Patient X turns his body toward the direction that Grievant wants him to go but is still facing Grievant and they take a few steps toward the paper with Grievant still holding Patient X by the arm and directing Patient X's movement toward the paper. At approximately 3:54:36 a.m., Grievant and Patient X have stopped near where the paper lies on the floor and Grievant appears to try to get Patient X to bend down toward the paper on the floor. Grievant adjusts his grip on Patient X's arm by taking his left hand and moving it from above Patient X's elbow to below the elbow such that Grievant's left hand is gripping the top of Patient X's right forearm. Patient X appears to try to twist his right arm to his left and shrug his right shoulder to try to get his arm out of Grievant's grip, but Grievant continues to hold on to Patient X's forearm. Grievant bends down toward the floor still holding and taking Patient X's arm down toward the paper on the floor until Patient X picks up the paper. Grievant takes the paper from Patient X and releases Patient X's arm. Grievant places the papers back on the table. Grievant then points toward where Patient X had been seated on the sofa and Patient X steps away from Grievant and walks toward the sofa and sits down. Grievant then returns to the chair where he had been seated and sits down.¹⁴

¹² Agency Ex. at 149-158.

¹³ Agency Ex. at 149-158.

¹⁴ Agency Ex. 7, Dayroom camera video footage, May 30, 2024, at 3:54:00 a.m.-3:55:10 a.m.

The other psychiatric technician assigned to work with Patient X on May 30, 2024, reported Grievant's interactions with Patient X to a nurse who reported the incident to the nursing unit manager who reported the incident to Facility management. The Agency began an investigation of the incident. On June 5, 2024, the Agency's Investigator issued his investigative report recommending a finding of "substantiated for physical abuse."¹⁵

CONCLUSIONS OF POLICY

The Agency has a responsibility to the public to provide its clients with a safe and secure environment. It has no tolerance for acts of abuse or neglect and these acts are punished severely. The Agency has adopted Departmental Instruction ("DI") 201, Reporting and Investigating Abuse and Neglect of Individuals Receiving Services in Department Facilities,¹⁶ to establish policies, procedures, and responsibilities for reporting, responding to, and investigating allegations of abuse and neglect at Agency facilities. The Facility has adopted Policy RTS-15c, Patient Abuse, Reporting and Investigation of Allegations¹⁷ which defines patient abuse and neglect according to DI 201 and establishes the requirement for reporting and investigating alleged patient abuse and/or neglect that may have occurred at the Facility.

Pursuant to these policies, "abuse" is defined as:

Any act or failure to act by an employee or other person responsible for the care of an individual in a facility operated by the Agency 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 an individual receiving care or treatment for mental illness, developmental disability, or substance abuse. Examples of abuse include acts such as:

1. Rape, sexual assault, or other criminal sexual behavior;
2. Assault or battery;
3. Use of language that demeans, threatens, intimidates or humiliates the individual;
4. Misuse or misappropriation of the individual's assets, goods or property;
5. Use of excessive force when placing an individual in physical or mechanical restraint;
6. Use of physical or mechanical restraints on an individual that is not in compliance with federal and state laws, regulations, and policies, professionally accepted standards of practice or with his individualized services plan; and
7. Use of restrictive or intensive services or denial of services to punish an individual or that is not consistent with his individualized services plan.¹⁸

¹⁵ Agency Ex. at 8-17.

¹⁶ Agency Ex. at 109-121.

¹⁷ Agency Ex. at 101-108.

¹⁸ See Agency Ex. at 101-102 and 109-111.

Policy RTS-15c makes clear that “[t]hose not complying with [DI-201] and this policy may be terminated from employment.”¹⁹

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

For the Agency to meet its burden of proof in this case, it must show that (1) Grievant engaged in an act that he performed knowingly, recklessly, or intentionally and (2) Grievant’s act caused or might have caused physical or psychological harm to Patient X. It is not necessary for the Agency to show that Grievant intended to abuse a patient – 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 Patient X has been injured by the Grievant’s intentional act. All the Agency must show is that Grievant might have caused physical or psychological harm to the Patient X.

Agency witnesses credibly testified that Facility staff, including Grievant, were trained not to physically intervene with patients in order to control behavior unless they were faced with an emergency situation where a patient was engaging in behavior that would cause harm to himself or others or would destroy property. On May 30, 2024, at the time of the interaction between Grievant and Patient X, Patient X was not aggressive, and he was not engaging in behavior that would cause harm to himself or to others. Patient X also was not destroying property. Patient X did not engage in behavior that would have authorized Grievant to physically control or restrain Patient X or otherwise physically intervene with Patient X. Nevertheless, Grievant physically intervened with Patient X to force Patient X to pick up a piece of paper from the floor. In doing so, Grievant could have caused injury to Patient X as he gripped Patient X’s arm and pulled it downward so that Grievant and Patient X both bent down toward the floor.

Grievant testified regarding his belief that Facility patients, like Patient X, should be rehabilitated while they are at the Facility so that they are better prepared to take care of themselves when they leave the Facility. Grievant testified that Patient X was capable of performing some aspects of his care, including picking up paper that he had dropped on the floor. Grievant asserted that he did not force Patient X to pick up the paper, but rather that he guided and assisted Patient X with picking up the paper in a therapeutic manner. As support for this assertion, Grievant stated that Patient X did not resist Grievant’s efforts and specifically that Patient X did not communicate to Grievant not to touch him or otherwise communicate to Grievant to stop.²⁰

Assistant Medical Director, however, testified that on May 30, 2024, Patient X would not have been capable of being taught or of learning. Medical Director also testified that efforts and interventions to teach Patient X to take care of himself or clean up after himself would not be appropriate for Patient X and such efforts may actually be counter-therapeutic and would cause frustration to Patient X that could lead to a worsening agitation and worsening behaviors on his part.²¹

¹⁹ Agency Ex. at 102.

²⁰ Hearing Recording at 2:02:38-2:09:07.

²¹ Hearing Recording at 14:20-15:28.

Chief Nurse and Therapeutic Options Coordinator both credibly testified that Facility staff are trained to only intervene physically to control a patient when it's required to prevent harm to the patient, others or prevent destruction of property and then to do so in accordance with Therapeutic Options training. Both witnesses testified that staff are trained to first communicate with patients to address behavior. Staff may assist a patient to accomplish a task when a patient indicates that they want to perform a task and want assistance, but the staff are to communicate with the patient to understand what they are trying to accomplish and what assistance they need. Such assistance may include demonstrating how to accomplish the task, or providing support in accomplishing the task, for example, using a specific approved technique to support a patient walking when they are unsteady. In this instance, Grievant could have verbally encouraged Patient X to pick up the paper. If Patient X did not want to pick up the paper or was not interested in picking up the paper, then that would be the end of the effort to encourage Patient X to pick up the paper. If Patient X expressed a desire to pick up the paper but did not understand how to pick up the paper, then, according to the credible testimony of the Agency witnesses, the appropriate response consistent with training would have been for Grievant to demonstrate how to pick up paper himself, by modeling the behavior himself, but not by physically moving Patient X to pick up the paper.²²

The video of the incident did not include audio, so there was no way for this Hearing Officer to determine what, if any, verbal communications Grievant and Patient X may have had. The video, however, showed that it was Grievant, not Patient X, who initiated the effort for Patient X to pick up the paper by first taking hold of Patient X's arm to turn him and steer him back toward the paper. The video also showed that when Grievant and Patient X reached the paper, Patient X was not looking at the paper or trying to pick up the paper, he was looking at Grievant. And when Grievant tried to move Patient X's arm toward the floor, Patient X appeared to try to twist his arm away from Grievant and shrug his shoulder in an attempt to remove his arm from Grievant's grip. Although Patient X's effort to remove his arm from Grievant's grip was unsuccessful, it does show that he was resisting Grievant's efforts to control him and to pick up the paper.

Although Grievant may not have intended harm to Patient X and may, as he stated, have intended to teach Patient X to clean up after himself, when Grievant gripped Patient X's arm to control and restrict Patient X's movement, Grievant was physically restraining Patient X without the authority to do so and his actions might have caused physical or psychological harm to Patient X. The Agency has met its burden of proving that Grievant engaged in misconduct that meets the Agency's definition of abuse.

Whether the Agency's discipline was consistent with law and 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."²³ Group II offenses "include acts of misconduct of a more serious

²² Hearing Recording at 53:30-57:46, 1:08:03-1:11:47, 1:14:02-1:22:02, 1:30:21-1:36:14.

²³ The Department of Human Resources Management ("DHRM") has issued DHRM Policy 1.60 setting forth Standards of Conduct for State employees.

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."

Group III offenses include serious violations of policy as well as safety or health infractions that may endanger someone. In this case, Grievant's actions were a serious violation of policy that might have caused physical or psychological harm to Patient X. The Agency's issuance of a Group III Written Notice with termination was consistent with law and policy.

Mitigation

As a mitigating factor, the Agency considered Grievant's years of service, satisfactory performance evaluation, and good time and attendance record.

Grievant argued that the Agency inappropriately considered aggravating factors in deciding not to mitigate the discipline. Specifically, Facility Director testified that she determined mitigation was inappropriate in this case due to previous investigations regarding abuse and neglect by Grievant where the abuse or neglect was unsubstantiated but where there were "administrative findings."²⁴ There was no evidence that Grievant had been counseled or disciplined with respect to these prior administrative findings or that the administrative findings were sufficiently similar to Grievant's behavior in this case to suggest a pattern of repeat behavior. There was limited information as to why or how the Agency determined that the administrative findings should be considered as aggravating factors in this case, and it is not clear to this Hearing Officer that it was appropriate for the Agency to do so.

Even in the absence of aggravating factors, however, the issuance of a Group III Written Notice in this case does not exceed the limits of reasonableness. Virginia 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...."²⁵ 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.

²⁴ Hearing Recording at 1:49:30-1:50:53, 2:29:11-2:32:14.

²⁵ Va. Code § 2.2-3005.

DECISION

For the reasons stated herein, the Agency's issuance to Grievant of 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.

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.²⁶

Angela Jenkins

Angela Jenkins, Esq.
Hearing Officer

²⁶ 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.