



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

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 11880**

Hearing Date: January 11, 2023  
Decision Issued: January 31, 2023

**PROCEDURAL HISTORY**

On June 14, 2022, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow policy.

On July 8, 2022, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On September 6, 2022, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 11, 2023, a hearing was held by remote conference.

**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 employs Grievant as a Registered Nurse at one of its locations. Grievant earned a Bachelor's of Nursing at a Virginia University. He began working as a CVICU Nurse at a Hospital. He then began working for the Agency on February 10, 2020.

Grievant's education included learning how to draw blood and he was licensed by the Commonwealth of Virginia to do so. He drew blood from patients prior to joining the Agency.

The Facility did not allow its nurses to draw blood from patients. The Facility used the services of phlebotomists working for private contractors to draw blood from patients at the Facility. Facility nurses were not trained that they should draw blood of Facility patients. Grievant's employee work profile did not include drawing blood as one of his duties.

On May 7, 2022, a Patient at the Facility was subject to a "lab over objection" order. When the Patient was informed of this order, he became irate, agitated, and began cursing at staff. A distress alarm was activated and staff began arriving at the Patient's location. Grievant spoke with the Patient in order to try to de-escalate the situation. Grievant was able to get the Patient to leave the room. Staff placed the Patient in the

Emergency Restraint Chair. The Patient would not let the Phlebotomist draw his blood. The Patient was confused. The Phlebotomist handed Grievant the needle and Grievant drew blood from the Patient.<sup>1</sup>

## 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.”<sup>2</sup> 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.”<sup>3</sup>

Facility Policy M-31 governed Medical Diagnostic Testing and Consultations. It is a policy showing how nurses are to comply with nursing procedures. The purpose of the policy was to “outline procedures required for obtaining medical diagnostic and consultative services for individuals.”<sup>4</sup> This policy provided that laboratory services were provided by a private Vendor and the “phlebotomist shall draw blood and obtain other specimens in the laboratory room or on the unit when the individual is unable to leave the room.”

Failure to follow a supervisor’s instructions is a Group II offense.<sup>5</sup> Under the Facility’s policy, phlebotomists were authorized to draw blood from patients. Grievant was not trained or authorized by the Agency to draw blood. On May 7, 2022, Grievant drew blood contrary to the Agency’s policy thereby justifying the issuance of a Group II Written Notice.

Grievant argued that he had the training and experience to draw blood and the Patient had the right to refuse and the right to express his preference for treatment. Grievant argued that he had no history of violation, no enforcement history, and no awareness of the rule or consequences. Grievant argued that the Joint Commission required that the Agency provide the services patients need. Grievant argued that Virginia law required that the Agency permit him to draw blood when necessary.

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<sup>1</sup> Many of these facts were contained in Grievant’s written statements. He did not testify to support these facts. They are included because the Agency did not contest them.

<sup>2</sup> The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

<sup>3</sup> Agency Exhibit p. 15.

<sup>4</sup> Agency Exhibit p. 13.

<sup>5</sup> See, Attachment A, DHRM Policy 1.60.

Grievant had the legal capacity and ability to draw blood from patients. He had done so when he worked at other facilities. Having the capacity to draw blood does not mean Grievant was permitted to draw blood by the Facility. Facility managers had the authority to limit the tasks performed by employees. Facility managers had the discretion to reduce the duties of employees to less than the duties for which they were authorized by law to perform. In this case, Grievant did not violate any law or regulation by drawing the Patient's blood. Grievant, however, acted contrary to the Facility's practice and policy thereby justifying the issuance of disciplinary action. The Facility did not violate State law or regulations by restricting the duties of its employees to less than those duties permitted by law.

Grievant argued that he acted in the heat of the moment for the safety of the Patient. The Agency denied that Grievant faced a medical emergency requiring him to draw the Patient's blood. Grievant did not testify or present testimony from anyone who witnessed the incident. The evidence is not sufficient for the Hearing Officer to conclude that Grievant had no choice but to draw the patient's blood.

Grievant submitted examples of policies where nurses were able to collect specimens from patients. Those policies did not apply to drawing blood.

Grievant asserted the Agency discriminated against him based on his "country of origin, race, and reverse gender." No credible evidence was presented to support this allegation. The Hearing Officer believes the Agency took disciplinary action because it believed Grievant had violated policy.

*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>6</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 the disciplinary action.

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<sup>6</sup> Va. Code § 2.2-3005.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action 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 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.

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].

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

*/s/ Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer