



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

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 11883**

Hearing Date: January 30, 2023  
Decision Issued: February 21, 2023

**PROCEDURAL HISTORY**

On April 20, 2022, Grievant was issued a Group II Written Notice of disciplinary action for lack of civility in the workplace.

On May 20, 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 she requested a hearing. On September 19, 2022, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 30, 2023, a hearing was held by remote conference.

**APPEARANCES**

Grievant  
Agency Party Designee  
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 Psychiatric Technician III at one of its locations. Grievant had prior active disciplinary action. She received a Group II Written Notice on December 31, 2020 for leaving the workplace without permission.

On March 20, 2022, Grievant was working at the Facility on the Floor where approximately 10 patients were located. The RNCA was in the Nursing Station. Tech W was also working. The Unit was in quarantine at the time. This meant that employees entering the Floor were required to wear personal protective equipment including masks and gowns.

The RNCA was taking her lunch break in the Nursing Station. Tech W was not in the Nursing Station. Grievant's Son called the telephone in the Nursing Station and asked to speak to Grievant. The RNCA told the Son to call back in 15 minutes since no one was able to relieve Grievant.

When Grievant came into the Nursing Station, the RNCA told Grievant that her son called 10 minutes ago and to call him back.

Grievant was concerned that anytime her Son called it would be because of an emergency and she wanted to be notified of the call so she could speak to him without delay. Grievant wanted the RNCA to stop her lunch break, put on her PPE, and enter the Floor to relieve Grievant so Grievant could take the telephone call. The RNCA could not have relieved Grievant because it would have been necessary for another Nurse to come to the Nursing Station to relieve the RNCA.

Grievant was standing a few feet away from the RNCA. Grievant raised her voice and began berating the RNCA for failing to notify Grievant immediately when her Son called. Grievant asked, "Why did you not come and get me!" The RNCA said she was on her lunch break. The RNCA did not raise her voice to Grievant. The RNCA apologized several times, but Grievant continued to berate the RNCA. Grievant continued to argue with the RNCA for at least ten minutes.

Tech W was at the medication cart near the Nursing Station. She was within ten feet of Grievant and the RNCA. Tech W heard the conversation and felt it was disturbing. Tech W did not intervene. She was surprised the conversation lasted for so long.

The RNCA notified the Agency that she was no longer comfortable working with Grievant and asked to be moved to another Ward or Building.

### **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>1</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."

Disruptive behavior is a Group I offense. On March 20, 2022, the RNCA did not immediately notify Grievant that her Son had called asking to speak with Grievant. Grievant became annoyed and raised her voice to the RNCA while demanding to know why the RNCA had not timely notified her of the telephone call. Grievant's behavior was disruptive to the workplace thereby justifying the issuance of a Group I Written Notice.

Grievant did not believe disciplinary action was warranted. The evidence showed that Grievant's behavior upset the RNCA and surprised Tech W and formed a basis for disciplinary action.

The Agency argued Grievant's behavior rose to the level of a Group II offense. This conclusion is not supported by the evidence. The RNCA falsely told the Agency that

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<sup>1</sup> The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

Grievant was cursing. The RNCA testified that Grievant was not using curse words but was using disrespectful and abusive words. The RNCA was not able to give examples of the words used. The RNCA testified Grievant kept saying, "give me the phone right away." Based on the evidence presented, the Agency has established that Grievant's behavior was disruptive because she raised her voice<sup>2</sup>, but it did not rise to the level of a Group II offense.

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 the disciplinary action.

## DECISION

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

## 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

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<sup>2</sup> Raising one's voice is a violation of DHRM Policy 2.35, Civility in the Workplace. Violating DHRM Policy 2.35 can be a Group I, II, or III offense depending on the severity. In this case, the severity of the offense rises to the level of a Group I offense.

<sup>3</sup> Va. Code § 2.2-3005.

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].

*/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.