



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

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 11932**

Hearing Date: May 15, 2023  
Decision Issued: July 3, 2023

**PROCEDURAL HISTORY**

On December 1, 2022, Grievant was issued a Group II Written Notice of disciplinary action for refusing to accept an on-call provider assignment.

On December 7, 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 February 21, 2023, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 15, 2023, 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 employs Grievant as a Nurse Practitioner at one of its facilities. She received favorable annual performance evaluations. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant worked at a Facility requiring 24-hour coverage every day of the year. The Facility assigned a primary and back up Medical Officer of the Day (MOD) for each 12-hour shift over the weekend. The primary MOD was expected to address patient issues and was not allowed to leave the Facility grounds during a shift. The back up MOD was expected to be available to report to the Facility if needed. Grievant's employee work profile requires that she "[p]articipates on the MOD on-call coverage as assigned."

The Facility assigned MOD on-call duties on a rotating basis. Each time a provider was assigned as the primary MOD, the provider received a score of 2. Each time a provider was assigned as the back up MOD, the provider received a score of 1. Providers with the lowest overall cumulative score were typically selected first for on-call MOD duties when the need arose.

Grievant was out of work and on short-term disability beginning on June 22, 2022. Grievant's treating physician authorized her to return to work without restrictions on October 31, 2022.

Grievant was not scheduled to work on November 4, 2022. She had an important family event scheduled for November 5, 2022 and did not want to work the 8 a.m. to 8 p.m. shift.

COVID19 was "rampant" at the Facility. On November 4, 2022, three of the four MOD's called out sick. The Medical Director sent an email to staff asking for volunteers to work. Employees volunteered, but there remained one shift unstaffed. The Medical Director looked to see who had taken the fewest calls and it was Grievant.

Grievant had not taken calls for over four months while she was on short-term disability leave. She had the lowest number of MOD primary and on-call assignments for the year with the exception of an employee who had resigned and was no longer available.

The Medical Director assigned Grievant to work a shift on Saturday November 5, 2022. Grievant was offered to choose the a.m. or p.m. shift.<sup>1</sup> Grievant was notified of her obligation to be on-call during that time. The Medical Director informed Grievant, "we are in desperate need of help. I would not have assigned you a call, but 3 MODs are ill and out of commission for this weekend." Grievant replied, "I will not be able to do any shifts this weekend. \*\*\* I will not allow you to endanger my health."<sup>2</sup> Because Grievant refused to follow the Medical Director's instruction, the Medical Director had to call other providers and eventually was able to find someone to cover the shift.

## 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>3</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

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<sup>1</sup> Agency Exhibit p. 42.

<sup>2</sup> Agency Exhibit p. 21.

<sup>3</sup> The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.”

Group II offenses include failure to follow a supervisor’s instructions.<sup>4</sup> Grievant was instructed by the Medical Director to accept an MOD on-call assignment on November 5, 2022. Grievant refused that instruction. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

Grievant argued that the Agency’s application of its on-call shift policy was unfair and discriminatory. For example, Grievant was on short-term disability for over four months. She was not assigned to be the MOD during that time. On November 4, 2022, the Medical Director calculated Grievant’s low score based on zero assignments for approximately four months. Grievant argued that doing so punished her for being on short-term disability. Grievant asserted that the Medical Director should have ranked employees by excluding the four months Grievant was absent from work. If the Medical Director had properly excluded those four months for all employees, Grievant argued that she would not have been one of the employees to be selected.

Grievant’s argument is not persuasive. Although including the four-month period into the calculation caused Grievant’s score to be lower than it otherwise would have been, the Hearing Officer cannot conclude the Agency unfairly discriminated against Grievant because of her disability. Grievant was returned to work full time without restriction on October 31, 2022. That meant she was able to work as an on-call MOD. The Medical Director instructed Grievant to report to work only in response to an emergency circumstance of having three of four scheduled MODs become sick. To the extent Grievant was treated differently because she had been absent for four months on disability, that treatment was not sufficiently material to conclude that the Agency discriminated against her because of her disability. The Agency’s scoring procedure was a reasonable approach to rotating the burden of being MOD on the weekends. The Hearing Officer does not believe the Medical Director targeted Grievant for harsher treatment under the Facility’s selection practice.

*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>5</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

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<sup>4</sup> See, Attachment A, DHRM Policy 1.60.

<sup>5</sup> *Va. Code § 2.2-3005.*

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 **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>

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

[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