

Issue: Group II Written Notice (disruptive behavior); Hearing Date: 05/24/19;
Decision Issued: 06/13/19; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.;
Case No. 11321; Outcome: Partial Relief.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11321

Hearing Date: May 24, 2019
Decision Issued: June 13, 2019

PROCEDURAL HISTORY

On December 3, 2018, Grievant was issued a Group II Written Notice of disciplinary action for disruptive behavior.

On December 13, 2018, 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 February 19, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 24, 2019, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency's 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 an RN Nursing Supervisor at one of its facilities. He had been working at the Facility for approximately three and a half years. No evidence of prior active disciplinary action was introduced during the hearing.

Ms. K worked as a Certified Nursing Assistant at the Facility. She had been employed by the Agency for approximately 2 years. She had a good working relationship with Grievant. Grievant valued Ms. K's work performance and enjoyed her personality and friendship. Ms. K had not been to work for several weeks.

On November 20, 2018 at approximately 5:30 p.m., Grievant was in the Hallway of the Unit. He stopped to speak with someone and then continued walking down the hallway. Ms. K entered the opposite end of the hallway and began walking towards Grievant. When they were approximately 15 to 20 feet apart, Grievant observed Ms. K and raised and fully extended his arms and hands above his head to express his pleasure at seeing Ms. K. Grievant's exclaimed, "Yes, [Ms. K's first name]! There's my girl." Ms. K recognized that Grievant was excited to see that she had returned to work.

Grievant continued walking towards Ms. K as Ms. K continued walking towards Grievant. At least one or two residents were in the hallway as Grievant and Ms. K approached each other. Grievant lowered his arms and began to reach for Ms. K's

waist. Ms. K raised her arms and hands. Grievant grasped Ms. K around her waist as Ms. K grasped Grievant behind his neck as they hugged one another. Grievant lifted Ms. K so that her feet were approximately 10 to 15 inches above the floor. Ms. K held on to Grievant with her arms on Grievant's shoulders. Grievant turned in a circle as he held Ms. K. Once Grievant was facing his original direction, he put Ms. K on the ground and released his embrace as she released her embrace. They continue talking as they walked out of the hallway.

Ms. K was not offended by Grievant's behavior. Grievant's behavior did not embarrass her or have any negative effect on her. She did not believe her safety was in danger at any time.

The Agency expected staff to display a professional demeanor while working and to maintain appropriate "boundaries" between staff. The Agency, however, did not have a policy prohibiting contact among employees. The Agency did not consider shaking hands or hugging to be always prohibited conduct. Sometimes a manager might pat another employee on the back and congratulate the employee for the employee's good work.

Agency managers believed that Grievant's behavior could affect the Agency's operations. For example, Grievant's behavior may have affected adversely the perceptions of male residents towards Ms. K and undermined her ability to provide treatment to male residents.

Grievant watched the video of the incident during a due process meeting and was asked what he thought of what he observed. Grievant said his behavior was inappropriate.

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."¹ 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.² Grievant's behavior on November 20, 2018 was disruptive because he lifted Ms. K off the ground, turned in a circle as she held on to him. His behavior was not consistent with the professionalism and staff

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

² See, Attachment A, DHRM Policy 1.60.

boundaries expected of employees working in the Unit. His behavior could have undermined Ms. K's ability to interact and work with residents in the Unit. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.

Grievant argued that his behavior did not rise to the level of disciplinary action. Although the Agency could have adequately addressed Grievant's behavior by issuing a counseling memorandum, the Agency chose to take disciplinary action. The Agency has presented sufficient evidence to show Grievant's behavior was disruptive.

The Agency issued Grievant a Group II Written Notice. In rare circumstances, a Group I may constitute a Group II where the agency can show that a particular offense had an unusual and truly material adverse impact on the agency. Should any such elevated disciplinary action be challenged through the grievance procedure, management will be required to establish its legitimate, material business reason(s) for elevating the discipline above the levels set forth in the table above. The Agency has not presented sufficient evidence to support the elevation of the Group I Written Notice to a Group II Written Notice. Grievant's behavior did not have a materially adverse impact on the Agency.

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"³ 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 further 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.

³ *Va. Code § 2.2-3005.*

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.^[1]

[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

Carl Wilson Schmidt, Esq.
Hearing Officer

^[1] Agencies must request and receive prior approval from EDR before filing a notice of appeal.