

Issue: Group I Written Notice (unsatisfactory performance); Hearing Date: 11/30/17;  
Decision Issued: 12/20/17; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.;  
Case No. 11105; Outcome: Full Relief.



# **COMMONWEALTH of VIRGINIA**

## ***Department of Human Resource Management***

### **OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION**

#### **DECISION OF HEARING OFFICER**

In re:

**Case Number: 11105**

Hearing Date: November 30, 2017  
Decision Issued: December 20, 2017

#### **PROCEDURAL HISTORY**

On June 14, 2017, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory performance.

On July 10, 2017, 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 October 23, 2017, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On November 30, 2017, 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 a Therapist Supervisor. Grievant had prior active disciplinary action. She received a Group I Written Notice on June 17, 2016 for unsatisfactory performance. She received a Group II Written Notice on June 17, 2016 for failure to follow policy.

Grievant's duties included finding housing for residents leaving the Agency and placed in various communities. She worked with several landlords, including the Landlord and Mr. W. She sometimes had to coordinate services with other State agencies including the Department of Corrections and the Office of the Attorney General.

### **CONCLUSIONS OF POLICY**

The Agency alleged the Facility Director sent Grievant an email notifying her that the Landlord required at least two individuals to move at the same time into a home in order to obtain necessary staff and that the Landlord needed two weeks' notice before any resident was admitted. The Agency alleged, "[Grievant] was **directed** to work within the specifications, but she did not. \*\*\* While [Grievant's] account is different, by her own account she gave [Landlord] two days short of two weeks' notice, which was not following the **directive** given to [Grievant] by [Facility Director]." (Emphasis added).

On April 27, 2017, the Facility Director sent Grievant an email regarding the Landlord and stating, in part:

She said that she told you that she cannot open a new home with just one person, so when she takes [Mr. M] she will also need to take someone else at the same time. \*\*\* In brief, it is difficult for her to staff a home with just one resident. It works much better for two residents to come when opening a home and then, once the home is established, she can accept one at a time. \*\*\*

She is confused by email that you sent regarding the “coming Thursday” – she does not know if that is next Thursday or what. Also she needs more time to help prepare to receive someone (especially when she is opening up the house). Simply put, she cannot hire staff in a week’s time. She said that she told you in the past that she needs at least a two weeks’ notice to prepare.

The Facility Director’s email does not contain a directive to Grievant for her to comply with the Landlord’s request. The Facility Director restated the Landlord’s request but did not tell Grievant that she had to comply with that request. In addition, Grievant testified that she spoke with the Landlord and “worked out” the admission of a resident on May 9, 2017 which was one day short of two weeks. The Landlord accepted the placement. The Agency has not established a basis for disciplinary action regarding this allegation.

The Agency alleged that the Landlord reported to the Agency that Grievant was crying during a phone call with the Landlord, that Grievant informed the Landlord that Grievant had been reprimanded because of the Landlord’s complaint, and that Grievant informed the Landlord that the Landlord should have contacted Grievant instead of Grievant’s supervisors. The Agency alleged Grievant’s behavior jeopardized the Agency’s relationship with an important stakeholder.

Grievant denied the Agency’s allegations regarding her interaction with the Landlord. The Landlord did not testify during the hearing. Grievant presented evidence showing that the Landlord may have made material misrepresentations to the Agency that undermined the Landlord’s credibility. The Agency’s record is not otherwise sufficient to support this allegation. The Agency has not presented sufficient evidence to support this allegation.

The Agency alleged that Grievant told Mr. W that she did not know if she could work with the Landlord. Mr. W then told the Landlord of Grievant’s comments. Grievant’s comment about the Landlord potentially jeopardized the Agency’s relationship with “two important stakeholders”, according to the Agency. Neither Mr. W, nor the Landlord testified at the hearing. The Agency continued its relationship with Mr.

W and the Landlord. The Agency's record is not otherwise sufficient to support this allegation. The Agency has not presented sufficient evidence to support this allegation.

The Agency alleged that the Assistant Attorney General asked Grievant on March 6, 2017 to contact the proposed placement facility for a specific resident to find out what factors might affect the placement. The Assistant Attorney General told Grievant that she would agree to placement at a facility if Grievant could find out this information and provide contact information. The Assistant Attorney General asked Grievant by telephone and by email on May 6, 2017 but did not receive a response from Grievant, according to the Agency. On May 25<sup>th</sup> 2017, the Assistant Attorney General obtained contact information from Probation and Parole and learned of the placement facility's limitations without assistance from Grievant. The Agency asserted that Grievant's response to the Assistant Attorney General was unsatisfactory.

The Assistant Attorney General did not testify during the hearing. The Agency's record is not otherwise sufficient to support the allegation. The Agency has not presented sufficient evidence to support is allegation.

The Agency has not presented sufficient evidence to support the issuance of a Group I Written Notice.

### **DECISION**

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

### **APPEAL RIGHTS**

You may request an administrative review by EEDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EEDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Equal Employment and 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 EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR 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 EEDR before filing a notice of appeal.