

Issue: Group I Written Notice (failure to follow instructions); Hearing Date: 06/18/07; Decision Issued: 06/19/07; Agency: DMHMRSAS; AHO: Carl Wilson Schmidt, Esq.; Case No. 8613; Outcome: Agency Upheld in Full; **Administrative Review: HO Reconsideration Request received 06/25/07; Reconsideration Decision issued 07/11/07; Outcome: Original decision affirmed; Administrative Review: EDR Ruling Request received 06/25/07; EDR Ruling No 2008-1730 issued 08/29/07; Outcome: HO's decision affirmed.**



***COMMONWEALTH of VIRGINIA***  
***Department of Employment Dispute Resolution***

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8613**

Hearing Date: June 18, 2007  
Decision Issued: June 19, 2007

**PROCEDURAL HISTORY**

On February 5, 2007, Grievant was issued a Group I Written Notice of disciplinary action for failure to follow supervisor's instructions. On February 23, 2007, 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 May 21, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 18, 2007, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Agency Party Designee  
Agency Advocate  
Witnesses

**ISSUE**

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. 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 Mental Health Mental Retardation and Substance Abuse Services employs Grievant as a Social Worker at one of its facilities. The purpose of her position is:

To facilitate communication between clients, their relatives/correspondents, guardians, and community representative; to participate in the development of the individual program plan and to provide social services to assigned caseload to include advocacy. HIPPA Level Two Access - Complete Access to PHI only for clients served/assigned. Utilization of information will be in accordance with HIPPA regulations regarding use limitation, disclosure and request of PHI.<sup>1</sup>

Grievant and three other social workers report to the Supervisor. Grievant has been employed by the Commonwealth for approximately 32 years. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

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<sup>1</sup> Agency Exhibit 4.

Grievant and Social Worker H were responsible for providing services to clients in a particular unit. The Supervisor wanted Grievant to provide services to these clients when Social Worker H was away and for Social Worker H to cover for Grievant when Grievant was away. The Supervisor sent emails to her staff explaining this procedure. However, some of the staff, including Grievant, did not understand the Supervisor's wishes.

On January 25, 2007, Social Worker H went to a building where training was to take place. This building was away from the unit where the clients resided. Grievant also wished to attend the training. At 8:03 a.m. Grievant called the Supervisor as a courtesy and told the Supervisor that Grievant and Social Worker H would be attending the training that day. The Supervisor told Grievant that Grievant and the Social Worker H could not attend training on the same day. The conversation ended.

At approximately 8:35 a.m., the Supervisor called the training Instructor and asked him to tell Grievant to return to the unit. The Instructor assumed the Supervisor had called because an emergency existed at the unit. The Instructor told Grievant to return to the unit because there was an emergency there. Grievant left the training building and returned to the unit. She spoke with other staff to determine if an emergency existed. She concluded no emergency existed so she returned to the training building. The Supervisor learned that Grievant had returned to the training building. The Supervisor called the Instructor a second time at approximately 8:50 a.m. She asked the Instructor to hand the telephone to Grievant. The Instructor took Grievant the telephone so that Grievant could speak with the Supervisor. The Supervisor told Grievant to return and stay at the unit. Grievant said that she did not need to do so. Grievant remained at the training until the training was completed.<sup>2</sup>

## CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force." DHRM § 1.60(V)(B).<sup>3</sup> Group II offenses "include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal." DHRM § 1.60(V)(B)(2). Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal." DHRM § 1.60(V)(B)(3).

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<sup>2</sup> Grievant testified that she returned to the unit a second time. After determining for a second time that an emergency did not exist, Grievant returned to the training and completed it. In any event, Grievant did not remain at the unit as instructed by the Supervisor.

<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.

“Failure to follow a supervisor’s instructions” is a Group II offense.<sup>4</sup> The Supervisor instructed Grievant to leave the training and return to Unit 3 and remain there. Grievant disregarded that instruction and completed the training. The Agency has presented sufficient evidence to support its issuance of a Group I Written Notice.

Grievant argues that it was not necessary for her to leave training and return to Unit 3 because two other social workers remained at Unit 3 and could cover for Grievant and Social Worker H who were in training.<sup>5</sup> If the Hearing Officer assumes for the sake of argument that Grievant's assertion is correct, it merely shows that the Supervisor's judgment was wrong. Employees are expected to carry out the instructions of their supervisors even if those instructions reflect poor decision-making by supervisors. Grievant was instructed to return to Unit 3 and should have done so even if returning to Unit 3 was unnecessary. Any confusion resulting from prior emails was resolved by the Supervisor's instruction to return to Unit 3.

*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 Employment Dispute Resolution....”<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.

## DECISION

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

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<sup>4</sup> DHRM § 1.60(V)(B)(2)(a).

<sup>5</sup> Prior to June 2006, two social workers worked in unit three and two social workers work in unit four. In June 2006, the two buildings were merged into one unit called Unit 3. Although the four social workers became a team, the two social workers formerly working in the former unit three continue to provide care to clients in the former unit three and the two social workers formally working in unit four continued to provide care to the patients in the former unit four.

<sup>6</sup> *Va. Code § 2.2-3005*.

## APPEAL RIGHTS

You may file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

Director  
Department of Employment Dispute Resolution  
830 East Main St. STE 400  
Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must give a copy of all of your appeals to the other party and to the EDR Director. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for review have been decided.

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>7</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>7</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

*S/Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer



**COMMONWEALTH of VIRGINIA**  
**Department of Employment Dispute Resolution**

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case No: 8613-R**

Reconsideration Decision Issued: July 11, 2007

**RECONSIDERATION DECISION**

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. “[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis ...” to grant the request.<sup>8</sup>

Grievant contends that the Hearing Decision contains an incorrect legal conclusion. She fails to cite any legal authority supporting her argument. Grievant's argument fails. The Hearing Decision contains no errors of law.

Grievant recites numerous facts that are either irrelevant or unproven. Grievant was disciplined for failing to return to her unit when instructed to do so by the Supervisor. Many of the facts Grievant cites are not related to the instruction she received from her Supervisor. For example, Grievant points out that no emergency existed at the unit when she returned there. The Supervisor's instruction did not depend on the existence of an emergency at the unit. Grievant should have complied with the Supervisor's instruction regardless of whether an emergency existed at the time of the Supervisor's instruction.

Grievant argues the other Social Worker should have been disciplined because she left the unit and went to the training as well. Grievant argues it is unfair for the Agency to discipline her but not discipline the other Social Worker. Grievant's argument fails because the Supervisor did not speak with the other Social Worker and tell that employee to return to unit. The Agency has not engaged in the inconsistent application of disciplinary action.

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<sup>8</sup> Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the hearing ended.



Grievant's request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. For this reason, Grievant's request for reconsideration is **denied**.

### **APPEAL RIGHTS**

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

#### Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

*S/Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer