

Issues: Two Group I Written Notices (abusive/inappropriate language, excessive absence); Hearing Date: 10/26/07; Decision Issued: 11/02/07; Agency: DMHMRSAS; AHO: Carl Wilson Schmidt, Esq.; Case No. 8696/8697; Outcome: No Relief, Agency Upheld in Full.



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8696 / 8697**

Hearing Date: October 26, 2007  
Decision Issued: November 2, 2007

**PROCEDURAL HISTORY**

On February 5, 2007, Grievant was issued a Group I Written Notice of disciplinary action for using unprofessional and non-therapeutic language in the presence of the client. On February 26, 2007, Grievant timely filed a grievance to challenge the Agency's action.

On February 7, 2007, Grievant was issued a Group I Written Notice of disciplinary action for accumulation of unplanned leave. On March 1, 2007, Grievant timely filed a grievance to challenge the Agency's action.

The outcomes of the Third Resolution Steps of these grievances were not satisfactory to the Grievant and she requested hearings. On August 28, 2007, the Department of Employment Dispute Resolution issued Ruling No. 2008-1781, 2008-1782 consolidating the two grievances for a single hearing. On September 26, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 26, 2007, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant

Grievant's Counsel  
Agency Representative  
Witnesses

## **ISSUES**

1. Whether Grievant engaged in the behavior described in the Written Notices?
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 actions, 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 License Practical Nurse at one of its facilities. As part of her duties, Grievant provided services to patients residing at the facility.

An employee allegedly slapped a patient while the employee and others were placing the patient in restraints. That employee was subsequently reported for client abuse. This created tension among staff working in the building.

On November 29, 2006, Grievant was working in the day room of a building passing out medication. Grievant approached to Ms. M and accused her of reporting the employee who allegedly slapped the patient. Ms. M said she was not present when the abuse occurred. Grievant turned away and began speaking to Mr. W. Mr. W had

entered the day room from the day room porch. Grievant told him "I am f--king mad at you too. Now that you have found some new pu--y, you are forgetting who your friends are, but so you know, when he was at work yesterday your home boy was f--king that pu--y too." Ms. M tried several times to get Grievant to stop because the Patient was seated a few feet away and was listening to the conversation. At one point, Ms. M got between Grievant and Mr. W and asked him to leave the unit. Mr. W left and the conflict ended.

On December 6, 2006, the Supervisor met with Grievant to counsel Grievant regarding unplanned leave. The Supervisor informed Grievant that Grievant had accumulated a total of 130.3 hours of unplanned leave. Grievant was advised that additional unplanned leave would result in the issuance of a Group I Written Notice. They developed a Plan of Correction wherein Grievant was encouraged to volunteer for overtime work and to report to work as scheduled.<sup>1</sup>

On January 26, 2007, Grievant was scheduled to work 16 hours. She did not come to work as scheduled thereby accumulating unplanned leave.

### **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."<sup>2</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." Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal."

#### Unplanned Leave

Policy Number 053-19 sets forth the Agency's expectation for employee attendance. Under this policy, "unplanned leave" is defined as "Time an employee is scheduled to work but is absent without a signed leave slip approved in advance (no later than the end of the employee's last work shift the proceeding day of absence)." "At the accumulation of 65 hours of unplanned leave, the employee may be issued a Group I Written Notice, after an audit is done by Human Resource staff."

On December 6, 2006, Grievant was counseled that she had accumulated a total of 130.3 hours of unplanned leave. She was told by the Supervisor that another occurrence of unplanned leave would result in the issuance of a Group I Written Notice.

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<sup>1</sup> Agency Exhibit 3.

<sup>2</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 scheduled to work on January 26, 2007. She did not work as scheduled. She did not provide a signed leave slip approved in advance. The Agency's Human Resource staff conducted an audit and concluded that as of January 26, 2007 Grievant had accumulated 110.8 hours of unplanned leave. Accordingly, the Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.

Grievant argued that the Agency was prohibited by the Family Medical Leave Act from disciplining her for her absence on January 26, 2007. On March 27, 2007, Grievant requested an intermittent leave schedule after the Agency presented her with a form entitled "Request for Family or Medical Leave".<sup>3</sup>

The difficulty with Grievant's argument is that when she was asked during the hearing why she was absent on January 26, 2007, Grievant responded that she did not know. Unless Grievant can show that her absence was directly related to a reason protected under the Family Medical Leave Act, she has not presented sufficient evidence to show that the Agency violated the Act. For example, if an employee does not come to work because his or her car was inoperable on the day in question, the protections of the Family Medical Leave Act are not triggered. In this case, Grievant has not established a connection between her absence on January 26, 2007 and the Family Medical Leave Act. Grievant's defense fails.

Grievant argued that when the Supervisor met with Grievant on December 6, 2006, the Supervisor incorrectly represented that Grievant had accumulated 130.3 hours of unplanned leave. Grievant intends the amount of unplanned leave was substantially less and that the Supervisor's records were inadequate. This argument fails, however. The Agency's Human Resource staff audited Grievant's leave records and concluded Grievant had accumulated 110.8 hours of unplanned leave as of January 26, 2007. This amount remains well above the 65 hours of unplanned leave tolerated by the Agency's policy. In other words, although the Supervisor's records may not have been accurate, there is no reason to believe Grievant's actual number of hours of unplanned leave was fewer than 65. There is no basis to change the disciplinary action against Grievant.

#### Unprofessional and Non-therapeutic Language

Agency Policy RI 050-20 governs, "Staff and Patient Interaction". "Behaviors considered to be INAPPROPRIATE and unacceptable in a professional interaction between hospital staff or patients ...." This behavior includes, using "profanity, vulgarity, and/or abusive language with anyone at any time while working".<sup>4</sup>

On November 29, 2006, Grievant engaged in an argument with a coworker within close proximity of a patient. Grievant used profanity and vulgarity that was heard by the

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<sup>3</sup> Grievant Exhibit 8.

<sup>4</sup> Agency Exhibit 10.

coworker and was overheard by a patient. Grievant knew or should have known that the patient could overhear her statements. Grievant's behavior was an inappropriate interaction with a staff member contrary to Agency Policy RI 050-20. Failure to comply with established written policy is a Group II offense. The Agency reduced the disciplinary action to a Group I Written Notice. That action must be upheld.

Grievant denied making the offensive statements. She argued that Ms. M and Mr. W were untruthful about what she said. Grievant presented substantial evidence to show that Ms. M had a motive to seek revenge against Grievant. Grievant and Ms. M had significant workplace and personal disputes. Two or three years earlier, Grievant and Ms. M had obtained court restraining orders against each other.

Despite the conflict between Grievant and Ms. M, the Agency has presented sufficient evidence to show that Grievant made the offensive statements. Although portions of Ms. M's testimony were not credible, her testimony regarding Grievant's statement was credible. Ms. M did not independently report Grievant's comments to the Agency. An Agency investigator contacted her to obtain information about a patient allegation. If Ms. M had desired to retaliate against Grievant, Ms. M could have reported Grievant immediately regardless of whether a patient complained to the Agency. Although Mr. W did not testify because he was no longer employed by the Agency at the time of the hearing, Mr. W's statements to the Agency's investigator are consistent with Ms. M's testimony. Grievant testified that she and Mr. W were friends. She has presented no credible reason why Mr. W would be untruthful to the Agency's investigator. In addition, Grievant has not presented any evidence to suggest that Ms. M and Mr. W conspired to make false statements about Grievant. The Agency has presented sufficient evidence to prove its assertion that Grievant made offensive statements in front of a patient.

### Mitigation

*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>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 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.

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<sup>5</sup> *Va. Code § 2.2-3005.*

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action for accumulation of unplanned leave is **upheld**. The Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action for unprofessional and non-therapeutic language is **upheld**.

## 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>6</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>6</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.