

Issues: Group I Written Notice (unsatisfactory job performance), Group II Written Notice (failure to follow instructions), Group II Written Notice (failure to follow instructions), Suspension, Demotion and Pay Reduction; Hearing Date: 01/21/11; Decision Issued: 02/04/11; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 9486, 9487, 9488; Outcome: No Relief – Agency Upheld in Full; **Administrative Review:** **AHO Reconsideration Request received 02/18/11; Reconsideration Decision issued 02/22/11; Outcome: Original decision affirmed; Administrative Review:** **DHRM Ruling Request received 02/18/11; DHRM letter sent 03/11/11; Outcome: Declined to review.**



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 9486 / 9487 / 9488**

Hearing Date: January 21, 2011  
Decision Issued: February 4, 2011

**PROCEDURAL HISTORY**

On July 19, 2010, Grievant received a Group II Written Notice of disciplinary action with a one-day suspension for failure to follow a supervisor's instructions and comply with established policies and procedures. On July 28, 2010, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory job performance. On August 20, 2010, Grievant received a Group II Written Notice of disciplinary action with demotion and a disciplinary pay reduction for failure to follow a supervisor's instructions.

Grievant timely filed grievances to challenge the Agency's actions. The outcomes of the Third Resolution Steps were not satisfactory to the Grievant and he requested a hearing. On October 28, 2010, the EDR Director issued Ruling No. 2011-2800, 2011-2801, 2800-2802 consolidating the three grievances for a single hearing. On January 3, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 21, 2011, a hearing was held at the Agency's office.

**APPEARANCES**

Grievant

Grievant Representative  
Agency Party 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 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 Behavioral Health and Developmental Services employs Grievant at one of its Facilities. He has been employed by the Agency for over 20 years.

Grievant reported to the Team Leader. Ms. C, Ms. N, and Mr. S reported to Grievant.

Facility managers authorized two female and two male residents to stay two nights at the beach. Grievant and Mr. S, Ms. C and Ms. N were the staff assigned to provide services to the four clients during the trip. The Facility Director approved the trip with the following condition:

The four individuals all require 1:1 assistance, but not supervision. We propose to rent 2 hotel suites with two individuals and two staff in each suite. One staff will sleep in a room with two individuals. The other staff will sleep in the adjoining room without interruption.<sup>1</sup>

The Agency's objective was to ensure that at least one staff member received adequate sleep each night. This was especially important with respect to the employee who would be driving the Agency's vehicle from the hotel to the Facility at the end of the trip. The Agency considered this to be a safety rule.

The Team Leader discussed the proposed trip with Grievant. She discussed the Guidelines with Grievant regarding sleeping arrangements. The Team Leader also told Grievant to take the timesheets she had prepared for each employee and give those timesheets to the employees and asked them to record their hours of work on the timesheet.

On June 22, 2010, Grievant drove the staff and clients from the Facility to the hotel. When the group arrived at the hotel, Grievant and Mr. S took the two male residents to the hotel suite. Later in the evening, Mr. S and one male client went to the bedroom that was away from the ocean and went to sleep. Grievant and the other male client remained in the front bedroom towards the ocean. Grievant made no attempt to have both clients stay in one bedroom. He did not mention at any time to Mr. S that he wanted to have both male residents sleep in the same room. On June 23, 2010, Mr. S and one male client slept in one bedroom while Grievant and the other resident remained in the other bedroom. In contrast, the two female residents slept in one bedroom each night. One female employee remained with the two residents on the first night. The second female employee stayed with the two residents on the second night. On June 24, 2010, Ms. C drove the group from the hotel to the Facility. When Grievant completed his timesheet, he reported that he had worked 65 hours during the trip. Although Grievant did not remain awake at all times during that 65 hours, he did not have an eight-hour break in a room by himself so he could sleep without interruption.

Grievant did not give the timesheets to the three employees. Instead, he recorded the date and beginning and end of work times for each employee. When he returned to the Facility, he submitted the timesheets to be Agency's timekeeper. The timekeeper questioned several of the times listed. When Mr. S, Ms. C, and Ms. N were asked if the times reported on their timesheets were accurate, each employee said the times were incorrect.

On July 21, 2010, Agency managers discovered that the Grievant had written his last interdisciplinatory note on February 27, 2010. The Agency expected interdisciplinatory notes to be completed within the month following the service provided to the resident. Grievant suffered an injury and was unable to perform his normal work duties. He had had to be placed on "light duty". On July 27, 2010, Grievant was given a work plan

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

outlining his duties while he was on light duty. The Team Leader told Grievant to complete his remaining interdisciplinary notes and to let her know once he had completed his work because she intended to assign another task for him to complete.

On August 3, 2010, Grievant had completed his back log of interdisciplinary notes. He did not notify the Team Leader until August 11, 2011 that he had completed his work. On August 11, 2011, the Team Leader instructed Grievant to complete the interdisciplinary notes for the Team Leader and another supervisor. As of August 17, 2010, Grievant had not completed any of the interdisciplinary notes for the Team Leader or the other supervisor. The Team Leader met with Grievant and told him that the Agency was considering disciplinary action against him. When the Team Leader met with Grievant again on August 18, 2010, Grievant had completed all of the interdisciplinary notes for the Team Leader and the other supervisor.

### **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>2</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 acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.”

Failure to follow a supervisor's instructions is a Group II offense.<sup>3</sup>

Grievant was instructed by the Team Leader to give each employee a timesheet and let the employee record his or her time worked. Grievant did not give timesheets to the three employees. Instead he recorded their work hours based upon his estimate of when they began and ended their shifts. The Agency has presented sufficient evidence to show that Grievant failed to comply with a supervisor's instruction. The Agency mitigated the disciplinary action to a Group I offense. The Agency's action must be upheld.

Grievant argued that he was not instructed by the Team Leader to give timesheets to the three employees. Grievant argued that he asked the three employees when they began and when they ended their shifts and he recorded what they told him. Grievant's argument fails. The Team Leader's testimony was credible. There exists sufficient evidence to believe that the Team Leader instructed Grievant to distribute the timesheets to the three employees. None of the three employees supported Grievant's assertion that he contacted them to ask them their beginning and end work times. If

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<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.

<sup>3</sup> See, Attachment A, DHRM Policy 1.60.

Grievant had in fact asked each employee when he or she began and ended his or her shift, it is not likely all three employees would have later complained that the timesheets Grievant submitted were inaccurate.

Grievant argued that the Team Leader subsequently wrote an incorrect date on a timesheet. Whether the Team Leader made a typographical error has no bearing on whether Grievant failed to comply with a supervisor's instructions.

Grievant argued that the three employees failed to comply with the chain of command because they did not bring their concerns to him regarding inaccuracies with their time computations. Even if the three employees had address their concerns regarding their time with Grievant directly, the fact remains that Grievant failed to comply with the Team Leader's instructions to distribute the timesheets to the three employees.

Grievant was instructed by the Team Leader to have one employee remain in the room with two residents while the other employee slept alone in the adjacent bedroom. During both nights, Mr. S slept in the same room with one resident while Grievant stayed in the adjacent room with another resident. Grievant failed to comply with the Team Leader's instruction thereby justifying the issuance of a Group II Written Notice.

Grievant denied that he was instructed by the Team Leader regarding sleeping arrangements for staff. The Agency has presented sufficient evidence to show the Grievant received an instruction from the Team Leader regarding sleeping arrangements. The Team Leader's testimony was credible. The two female employees understood the Agency's expectations that one employee should sleep alone each night. The two female employees learned of the Agency's expectations independently of any comments from Grievant.

Grievant argued that he could not comply with the Team Leader's instruction because on the first night, one of the residents did not go to sleep in the evening but remained awake until 6:15 a.m. the following morning. Grievant argued that if he had put both residents in the same room, the resident who wanted to sleep would have been unable to do so. In addition, Grievant argued that because he was the "in-charge", he had discretion to determine the sleeping arrangements of the residents. Grievant's arguments fail. No credible evidence was presented that Grievant made any attempt to place both individuals in the same room.<sup>4</sup> Grievant did not discuss sleeping arrangements with Mr. S. Grievant relied upon an Agency document that he and the other three employees signed which stated "If you have any questions while on this trip please refer them to the individual designated as the in-charge employee on this form."

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<sup>4</sup> If Grievant had attempted to comply with the Team Leader's instruction by putting both residents in the same room but then found the arrangement unworkable, the argument regarding the need to deviate from the Team Leader's instruction would have carried more weight. Because Grievant made no attempt to comply with the Team Leader's instruction, his conclusion that the two male residents could not remain in the same room is not supported by the evidence.

This language does not authorize Grievant to alter the instructions from the Team Leader.

Grievant argued that he had to keep the two residents separate for safety reasons. One of the residents was a PICA individual. This meant he often attempted to consume inedible objects. The other resident liked to have small objects near him. This argument fails. Both individuals were non-ambulatory. They used wheelchairs. Once the PICA resident was in bed, he would not be able to obtain the other resident's objects if they were properly secured in a separate area of the room.

On July 27, 2010, the Team Leader instructed Grievant to complete his back log of interdisciplinary notes and inform her once he had completed that task. Grievant completed the task on August 3, 2010 but failed to notify the Team Leader that he had finished his work. Because Grievant did not timely notify the Team Leader that he had finished his work, the Team Leader had to choose a different task for Grievant to complete while on light duty. Grievant was instructed to complete the interdisciplinary notes for the Team Leader and another supervisor. Grievant did not work on the interdisciplinary notes as instructed. Only after the Team Leader discovered that Grievant was not performing his duties, did he quickly complete the task.<sup>5</sup> The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow a supervisor's instructions. Grievant failed to comply with the Team Leader's instruction to notify her when he had completed his work and he failed to comply with her instruction to complete the interdisciplinary notes for the Team Leader and another supervisor.

Grievant argued that he was performing work after August 3, 2010 and, thus, the Agency's assertion that he was not performing duties is unsupported. If the Hearing Officer assumes for the sake of argument that Grievant was performing duties after August 3, 2010, the fact remains that he was instructed to notify the Team Leader as soon as he finished his back log of interdisciplinary notes. Grievant finished the back log on August 3, 2010 but did not notify the Team Leader he had completed his assignment.

Upon the accumulation of two active Group II Written Notices, an Agency may demote an employee along with disciplinary pay reduction. Because Grievant has received two Group II Written Notices of disciplinary action, Grievant's demotion disciplinary pay reduction must be upheld.

*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

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<sup>5</sup> Grievant's ability to complete a Team Leader's and another supervisor's notes within a 24-hour period shows that Grievant could have made some progress completing the interdisciplinary notes between August 11, 2010 and August 17, 2010.

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 II Written Notice of disciplinary action with a one work day suspension for her to follow a supervisor's instructions is **upheld**. The Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action for unsatisfactory job performance is **upheld**. The Agency's issuance to Grievant of a Group II Written Notice of disciplinary action for failure to follow a supervisor's instructions is **upheld**. Grievant's demotion with a disciplinary pay reduction is **upheld** based upon the accumulation of disciplinary action.

## 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

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<sup>6</sup> Va. Code § 2.2-3005.



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  
600 East Main St. STE 301  
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].

*S/Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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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.



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case No: 9486 / 9487 / 9488-R**

Reconsideration Decision Issued: February 22, 2011

**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.

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. However, the fact that a party discovered the evidence after the hearing does not necessarily make it “newly discovered.” Rather, the party must show that:

- (1) the evidence is newly discovered since the date of the Hearing Decision;
- (2) due diligence on the part of the party seeking reconsideration to discover the new evidence has been exercised;
- (3) the evidence is not merely cumulative or impeaching;
- (4) the evidence is material; and
- (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the Hearing Decision to be amended.

Grievant seeks reconsideration of the original Hearing Decision. Grievant restates the arguments that he made during the hearing. He asserts what he considers to be the correct facts. He questions the credibility of several of the Agency’s witnesses. Grievant’s request for reconsideration restates evidence he presented or could have presented during the hearing.<sup>8</sup>

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<sup>8</sup> Grievant points out that he “worked every day in pain and on medication and not one time was a report from my supervisors or [the Agency] regarding the lack of performance/progress.” The Hearing Officer does not believe that Grievant’s pain or medication undermine his ability to properly inform the Supervisor

The Agency's witnesses were credible. Grievant's assertion of the events is not consistent with the most credible evidence presented to the Hearing Officer. Grievant has not identified any newly discovered evidence or any incorrect legal conclusions. He simply restates the arguments and evidence presented at the hearing. For this reason, the 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

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when he finished his work. Grievant had been instructed by the Supervisor to tell her when he had completed his work.

March 11, 2011

RE: **Grievance of [Grievant] v. Department of Behavioral Health and Developmental Services**  
Cases Nos. 9486, 9487 & 9488

Dear [Grievant]:

The agency head of the Department of Human Resource Management, Ms. Sara Redding Wilson, has directed that I respond to your request for an administrative review of the hearing officer's decision in the above referenced case. Please note that, pursuant to the Grievance Procedure Manual, §7.2(a), either party to the grievance may request an administrative review 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 (DHRM) to review the decision. You must refer to the specific policy and explain why you believe the decision is inconsistent with that policy.
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.

In each instance where a request is made to this Agency for an administrative review, the party making the request must identify with which human resource policy, either state or agency, the hearing decision is inconsistent. In the instant case, you have not identified any policy that the hearing officer violated when he made his decision to uphold the agency's disciplinary action. Rather, it appears that you are contesting what evidence the hearing officer considered, the credibility of the witnesses, the weight he accorded the testimony of the witnesses, and the conclusions he drew as a result of the assessment of the evidence and the witnesses' testimony. In summary, the issues you raise are evidentiary in nature and we have no authority to interfere with the application of this hearing decision. Therefore, we must respectfully decline to honor your request to conduct an administrative review.

Sincerely,

Ernest G. Spratley, Assistant Director  
Office of Equal Employment Services