

Issues: Group II Written Notice (unsatisfactory performance), Group II Written Notice (unauthorized use of State property), and Termination (due to accumulation); Hearing Date: 07/13/11; Decision Issued: 07/18/11; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 9586, 9587; Outcome: Partial Relief.



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 9586 9587**

Hearing Date: July 13, 2011  
Decision Issued: July 18, 2011

**PROCEDURAL HISTORY**

On January 12, 2011, Grievant was issued a Group II Written Notice of disciplinary action with removal for unsatisfactory performance. On January 12, 2011, Grievant was issued a Group II Written Notice of disciplinary action with removal for unauthorized use of state property.

On February 11, 2011, 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 April 25, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The Hearing Officer found just cause to extend the time frame for issuing a decision in this grievance due to the unavailability of a party. On July 13, 2011, a hearing was held at the Agency's office.

**APPEARANCES**

Grievant  
Grievant's Counsel  
Agency 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?
5. Whether the Agency retaliated against Grievant?

### **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 employed Grievant as a Residential Program Specialist at one of its Facilities. The purpose of her position was:

Serve as an integral member of the multi-disciplinary treatment team providing services to patients/residents adjudicated Not Guilty by Reason of Insanity. Under the direction of the Forensic Unit Shift Supervisors, responsible for carrying out the tasks necessary for the day to day unit functioning. Perform direct care of patients/residents in a respective manner according to individual treatment plans and the principles of recovery, while providing a safe environment. Assist in the implementation of policies and psychosocial rehabilitation and recovery program. May assist clinical staff in providing treatment activities to encourage independence, growth, and skill development. Participate in the treatment team's ongoing risk assessments for patients/residents adjudicated Not Guilty by Reason of Insanity to assist in determining their

readiness for increases in privilege/independence levels. May provide backup coverage for Forensic Unit Shift Supervisors as needed.<sup>1</sup>

She had been employed by the Agency for approximately 9 years prior to her removal effective January 12, 2011.

Grievant had prior active disciplinary action. On September 2, 2010, Grievant received a Group I Written Notice of disciplinary action for unsatisfactory performance for failing to follow a supervisor's instructions. On September 2, 2010, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow policy. A hearing was held on January 4, 2011 and a decision was issued on January 7, 2011 upholding the disciplinary actions.

With the exception of the facts giving rise to this grievance and the prior disciplinary action, Grievant's work performance was satisfactory to the Agency. Grievant received satisfactory performance evaluations. For example, she received an overall rating of Contributor on her 2009 annual performance evaluation.

One of Grievant's duties was to respond immediately to patients when they needed assistance. On December 20, 2010, Grievant was working and using her computer. A patient came to the window where Grievant was working and asked Grievant for assistance. Grievant heard the patient but ignored the patient. The Acting Supervisor, Ms. M, was standing near Grievant and heard the patient seek assistance from Grievant and observed Grievant ignore the patient. Ms. M went to the window and assisted that patient while Grievant continued to work on her computer. Grievant was printing off documents relating to sleep apnea, a condition she had. Ms. M later reported Grievant to a supervisor because Grievant was inattentive to the patient. Another employee also complained the Grievant was being inattentive to patients.

On January 10<sup>th</sup> at 5:10 p.m., the Supervisor, Unit Administrator, and Human Resource Officer met with Grievant to discuss the Agency's allegations against her. Grievant admitted to ignoring clients and stated that she did so purposefully because she was frustrated that other employees were not doing their fair share of the work.

Grievant asked the Facility Director if she could use the Agency's copy machines to make copies in preparation for her grievance scheduled on January 4, 2011. The Facility Director gave her permission to do so. In December 2010, Grievant used the Facility's copy machines to make copies of documents she intended to present at the January 4, 2011 hearing. She also made copies of personal documents such as a copy of a telephone bill and food recipes. The Facility permitted employees to store recipes on the Facility's intranet and permitted employees to view those recipes and print them using the Facility's printers.

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<sup>1</sup> Agency Exhibit 8.

## 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.”

### Group II Written Notice for Unsatisfactory Performance

Unsatisfactory work performance is a Group I offense.<sup>3</sup> Grievant was expected to respond immediately to patients needing assistance. On December 20, 2010, Grievant failed to respond to a patient who needed assistance. Grievant ignored the patient. On January 10, 2011, Grievant admitted that she sometimes ignored patients when she believed other employees were not doing their fair share of the work. Grievant’s work performance was unsatisfactory thereby justifying the issuance of disciplinary action. An agency may issue a Group II Written Notice if an employee has an active Group I Written Notice for the same offense. On September 2, 2010, Grievant received a Group I Written Notice for unsatisfactory work performance. Accordingly, the Agency may elevate the level of discipline in this grievance to a Group II Written Notice.

Upon the accumulation of two active Group II Written Notices, an agency may remove an employee. Grievant has accumulated two active Group II Written Notices. The Agency’s decision to remove Grievant must be upheld.

### Group II Written Notice for Unauthorized Use of State Property

The Agency contends that Grievant used Facility property without authorization because she routinely printed documents for her own personal use using the State printer, ink, and paper. The Agency contends that Grievant took these actions while she was “on the clock” and, thus her behavior constituted an abuse of State time.

Grievance Procedure Manuals § 8.8 provides:

Grievances are official business. Therefore, in processing grievances, parties and state employee representatives of parties may make reasonable use of agency office equipment including computers, copiers, fax machines, and telephones.

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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.

Section 8.8 granted Grievant the authority to make reasonable use of agency office equipment including copiers. In addition, Grievant obtained permission from the Facility Director to use the Facility's copiers. Grievance hearings are official state business. This means that although Grievant may not have been "on the clock" with respect to her patient duties, she was engaged in State business and cannot be disciplined for abuse of State time. The Facility's policy permitted employees to use Facility copiers for personal use.<sup>4</sup> Thus, Grievant was authorized to make copies of a telephone bill and to print off recipes from the Facility's intranet. The Agency argued that Grievant's use of the copiers was excessive because she used many pages of paper. Grievant argued that she used many pages of paper to prepare exhibits for her hearing scheduled on January 4, 2011. It would not be unexpected for Grievant to need to make many copies in order to prepare for her prior grievance hearing. The Agency's case rests on the assumption that Grievant made too many copies for personal use rather than for her grievance. There is insufficient evidence for the Hearing Officer to determine whether Grievant made too many copies for personal use. The Agency has not met its burden of proof to show the Grievant engaged in behavior giving rise to disciplinary action. Accordingly, the Group II Written Notice for unauthorized use of State property and abuse of State time must be reversed.

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.

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;<sup>6</sup> (2) suffered a

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<sup>4</sup> Facility Policy 1112(FI) 02 – 09 provides:

Personal copying will be allowed at the rate of five cents per copy. Copies must be purchased in lots of 20 and a staff member will track his personal use by the honor system. Copies may be purchased in advance by paying the Cashier or after the fact.

<sup>5</sup> Va. Code § 2.2-3005.

<sup>6</sup> See Va. Code § 2.2-3004(A)(v) and (vi). The following activities are protected activities under the grievance procedure: participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the

materially adverse action<sup>7</sup>; and (3) a causal link exists between the adverse action and the protected activity; in other words, management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, retaliation is not established unless the Grievant's evidence shows by a preponderance of the evidence that the Agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual.<sup>8</sup>

Grievant engaged in protected activity by filing a grievance challenging disciplinary action. Grievant suffered a materially adverse action because she received disciplinary action with removal. Grievant has not established a connection between her protected activity and the materially adverse action. The Agency took disciplinary action against Grievant because Agency managers believed that Grievant engaged in behavior that should be addressed under the Standards of Conduct. The Agency did not take disciplinary action against Grievant as a pretext for retaliation.

Grievant argued that in a previous hearing in January 2011, the Unit Administrator testified that Grievant's work performance was satisfactory during the time period after August 2010 when, in fact, Grievant had engaged in behavior the Unit Administrator considered inappropriate in December 2010. To the extent Grievant's assertion is true, it is insufficient to establish that the Unit Administrator intended to retaliate against Grievant.

Grievant argued that the Agency failed to provide her with procedural due process because the Agency failed to afford her sufficient time to respond to its allegations against her. To the extent the Agency failed to provide Grievant with sufficient time to present her defenses to the Agency, the Agency's failure to do so is not a basis to change the outcome of this grievance. Grievant had the opportunity to present at the hearing any defenses or evidence that Grievant would otherwise have presented to Agency managers prior to her removal. The Step Process and Hearing Process have cured any defects in the procedural due process afforded by the Agency.

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General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

<sup>7</sup> On July 19, 2006, in Ruling Nos., 2005-1064, 2006-1169, and 2006-1283, the EDR Director adopted the "materially adverse" standard for qualification decisions based on retaliation. A materially adverse action is an action which well might have dissuaded a reasonable worker from engaging in a protected activity.

<sup>8</sup> This framework is established by the EDR Director. See, EDR Ruling No. 2007-1530, Page 5, (Feb. 2, 2007) and EDR Ruling No. 2007-1561 and 1587, Page 5, (June 25, 2007).

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action for unsatisfactory work performance is **upheld**. The Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action for unauthorized use of State property is **rescinded**. Grievant's removal is **upheld** based upon the accumulation of disciplinary action. Grievant's request for relief from retaliation is **denied**.

## 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  
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>9</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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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>9</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.