

Issue: Group II Written Notice (failure to follow instructions); Hearing Date: 11/29/11; Decision Issued: 12/14/11; Agency: DBHDS; AHO: Ternon Galloway Lee, Esq.; Case No. 9708; Outcome: No Relief – Agency Upheld.

DECISION OF HEARING OFFICER IN THE MATTER OF  
CASE NO. 9708

Hearing Date: November 29, 2011  
Decision Issued: December 14, 2011

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**SUMMARY OF DECISION**

The Agency had found Grievant violated the Standards of Conduct by failing to follow instructions and/or policy. It therefore issued Grievant a Group II Written Notice. I found for the Agency met its burden and upheld the Agency's discipline.

**PROCEDURAL HISTORY**

On August 5, 2011, the Agency issued Grievant a Group II Written Notice for failure to follow instructions and/or policy.

On August 25, 2011, Grievant timely filed a grievance to challenge the Agency's action. Grievant was dissatisfied with the Third Resolution Step's outcome and requested a hearing. On November 9, 2011, the Department of Employment Dispute Resolution ("EDR") assigned me as the hearing officer to this appeal. A Pre-Hearing Conference ("PHC") was held on November 14, 2011, and subsequently a scheduling order was issued.

I scheduled the hearing for November 29, 2011, the first date available between the parties. During the hearing, I admitted Hearing Officer exhibits one through thirteen; Agency Exhibits one through ten; and Grievant's exhibits one through ten.

At the hearing both parties were given the opportunity to make opening and closing statements, to call witnesses and to cross-examine witnesses called by the other party. Also during the proceeding, the Grievant was represented by her two advocates and the Agency was represented by its advocate.

**APPEARANCES**

Agency's Advocate  
Witnesses for Agency (2 witnesses)  
Grievant's Advocates (2)  
Grievant  
Witnesses for Grievant (3 witnesses including Grievant).

**ISSUE**

Was the Group II Written Notice warranted and appropriate under the circumstances?

## **BURDEN OF PROOF**

In disciplinary actions, the burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against 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 all the evidence presented, to include testimony and exhibits, and observing the demeanor of each witness, I make the following findings of fact:

1. Grievant has been employed for two years with the Agency/hospital. Her position is registered nurse (“RN”) and she works the 11:00 p.m. to 7:30 a.m. shift. (Testimony of Agency Witness A).
2. Agency Witness A is the day shift RN supervisor and she works the 7:00 a.m. to 3:00 p.m. shift. One of her duties is to preside over the morning report meeting which takes place from 7:00 a.m. to 7:30 a.m.<sup>1</sup> Thus, her authority includes taking corrective action when misconduct is observed during the morning report meeting (“meeting”). (Testimonies of Agency Witnesses A and B).
3. The meeting is conducted during the last 30 minutes of the outgoing shift and the first 30 minutes of the incoming shift. In grievant’s situation, this means the meeting takes place from 7:00 a.m. to 7:30 a.m. Approximately 16 employees attend this meeting. Patient information is exchanged during this time and staff assignments are made. (Testimonies of Agency Witnesses A and B).
4. During morning report meetings from February 4, 2011, to July 26, 2011, Grievant’s cellular phone (“cellphone”/ “mobile device”) rang on the following dates: February 4, February 14, June 16, July 17, July 22, and July 26. Grievant’s superior who presided over the meetings documented these occurrences on the dates they occurred.

After the February 4 ring from Grievant’s cellphone, Agency Witness A counseled Grievant and informed her that Grievant’s cellphone ringing during the meeting was unacceptable. Similarly she counseled Grievant in 2011 on February 14, June 16, and July 17, after Grievant’s mobile device rang during each of the meetings. (Testimony of Agency Witness A; A Exhs. 3, 5).

5. On July 22, 2011, during the morning report meeting, Grievant’s cellphone rang again. In consequence, on or about July 24, 2011, Grievant’s superior – Agency Witness A - presented Grievant with a written memorandum which stated the following:

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<sup>1</sup> A description of this meeting follows here.

On July 22<sup>nd</sup> 2011 during morning report your mobile device rang. You are in violation of HR 053-61 Personal Communication Devices. You have had multiple offenses and have received Multiple verbal warnings relative to these offenses. The last offense prior to this one was July 17<sup>th</sup> 2011. This behavior is unacceptable and below satisfactory work performance. Corrective action is that you will follow the Personal Communication Device Policy and have been provided with a copy. Any other violations of this policy will progress to further disciplinary action.

(A Exh. 3).

Also because of Grievant's mobile device ringing on July 22, 2011 as noted above, Agency Witness A met with Grievant. During that conference, Grievant in effect informed Agency Witness A that Grievant was experiencing a family medical emergency and needed access to her cellphone so that she could respond to family if necessary. Agency Witness A's response was to suggest Grievant make a request to keep her cellphone on "vibrate." Agency Witness A instructed Grievant that the request needed to be made to Agency Witness B. Agency Witness B was Agency Witness A's supervisor and Grievant's superior as well. In addition, Grievant informed Agency Witness A that her mobile device was faulty; that is, it would sound when turned off or turn itself on after being placed in the off mode. Agency Witness A recommended Grievant not bring the malfunctioning cellphone to the morning report meeting. (Testimony of Agency Witness A; Testimony of Grievant; A Exh. 7; G Exh. 6).

6. On July 26, 2011, Grievant's cellphone rang again during the meeting. Grievant received a Group II Written Notice for this incident. The Written Notice described the conduct as follows:

FAILURE TO FOLLOW INSTRUCTIONS AND/OR POLICY,  
FAILURE TO COMPLY WITH POLICY PERSONAL  
COMMUNICATION DEVICES AND FAILURE TO FOLLOW  
SUPERVISOR DIRECTIVE

(A Exh. 1; Testimony of Agency Witness A; G Exh. 1).

7. Prior to the July 26, 2011 incident, Grievant had received a copy of the Personal Communication Devices policy referenced in the Written Notice. (A Exh. 3; Testimony of A Witness A).

8. Specifically, that policy, Agency policy Number HR 053-61, provides guidelines for using personal communication devices at work. It provides in pertinent part the following:

## Policy Statement

**Subject: Personal Communication Devices Usage Guidelines**

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**Policy: The usage of personal communication devices is not permitted in patient care areas or where patient-related information could be overheard. Personal calls should never interfere with the user's productivity or work performance, or with other employee's productivity or work performance. Usage is permitted within the guidelines provided below.**

**Definition:** Personal communication devices – includes all electronic devices with audio, text, video, receiving and/or transmitting capabilities.

**Procedures:**

- 1. Keep ringers on vibrate at all times.**
- 2. Do not use devices in patient care areas or where patient-related information could be overheard.**
3. Be considerate of others. Keep enough physical distance and speak softly so as not to disturb others.
- 4. Turn devices off during meetings or group gatherings such as training.**
5. Use cell phones only for important calls. What is an important call? Examples include: the school nurse calling to say a child is ill, a child calling to say he has arrived home from school safely, or personal emergencies that must be dealt with immediately. If in doubt whether a phone call is an emergency, let voice mail pick it up.
6. Only hands free options shall be used while driving state vehicles. If the conversation requires focused attention, pull to the side of the road to converse.

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(A Exh. 6).

9. Even though the above referenced policy prohibits staff from using personal

communication devices during meetings, staff has been observed using such devices. (Testimony of Agency Witness B; Testimony of Grievant Witness A).

10. Grievant presented a document described as a “Verizon Usage Detail” that purports to show telephone calls made to Grievant’s cellphone number from February 3, 2011, to July 26, 2011. (G Exh. 10).

11. Grievant attempted to have her faulty cellphone repaired and eventually had it replaced on or about September 19, 2011. (G Exh. 6; Testimony of Grievant).

### **DETERMINATIONS AND OPINION**

The General Assembly enacted the *Virginia Personnel Act, VA. Code §§2.2-2900 et seq.*, establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee’s ability to protect his/her rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 VA. 653, 656 (1989).

*Va. Code § 2.2-3000 (A)* sets forth the Commonwealth’s grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints... To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. GPM § 5.8.

To establish procedures on Standards of Conduct and Performances for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the *Code of Virginia*, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

On August 5, 2011, Agency management issued Grievant a Group II Written Notice which describes the offense as “FAILURE TO FOLLOW INSTRUCTIONS AND/OR POLICY, FAILURE TO COMPLY WITH POLICY PERSONAL COMMUNICATION DEVICES AND FAILURE TO FOLLOW SUPERVISOR DIRECTIVE.”

I examine the evidence to determine if the Agency has met its burden.

**I. Analysis of Issue before the Hearing Officer**

**A. Did the employee engage in the behavior described in the Group II Written Notice and did that behavior constitute misconduct?**

The Agency argues Grievant violated policy and her supervisor’s directive. It asserts that Grievant failed to follow her supervisor’s instruction to follow policy HR 053-61. This Agency policy- Personal Communication Devices Usage Guidelines - prohibits personal communication devices from being on during meetings. The Agency contends Grievant’s cellphone rang during the morning report meeting on July 26, 2011.

Specifically, the evidence shows that on several occasions prior to that date, Grievant’s cellphone rang during the morning report meeting. Each time, Grievant’s superior counseled her regarding the infraction. For instance, on February 4, 2011, February 14, 2011, June 16, 2011, and July 17, 2011, Grievant’s mobile device rang during the meeting. The evidence shows that on each of these days Grievant was verbally counseled by her superior, Agency Witness A, and reminded of applicable policy HR 053-61.

Also, on July 22, 2011, Grievant’s cellphone rang during the morning report meeting. Subsequent to this occurrence and before July 26, 2011, Grievant was again counseled verbally by her supervisor. In addition Grievant received from her supervisor a written memorandum that (i) instructed Grievant to comply with the policy regarding personal communication devices, (ii) reminded Grievant that she had received a copy of the policy, and (iii) warned her that any further violation of the policy would result in further disciplinary action. Despite this warning, on July 26, 2011, Grievant’s cellphone rang again during the meeting.

Bearing in mind the above, I find Grievant engaged in the conduct described in the written notice; the conduct violated Agency policy and instructions from Grievant’s superior.

Having made this finding I am cognizant of Grievant’s assertions that she was not counseled by her superior and her cellphone did not ring during the meetings. The evidence does not support Grievant’s claims.

For example, Grievant’s letter dated July 27, 2011, to her superior, Agency Witness A, demonstrates Grievant acknowledges her cellphone sounded during meetings and she

had prior conversations with her superior concerning this. In pertinent part Grievant's letter reads:

In response to the Notice I received on 07-27-11 regarding my mobile device with "multiple offenses: I had on more than one instance informed you that the disturbances from my phone were not intentional, careless or an attempt to violate the policy of 053-61. The mobile device would have been place (sic) on vibration if it was functioning properly.

What is more, Agency Witness A testified that she heard Grievant's cellphone ring during the meetings on the dates referenced above and verbally counseled Grievant after each occurrence in February 2011; June 2011; and July 17, 22, 2011. Further, the Agency provided testimony and documentation showing that Agency Witness A documented the violations on the days they occurred. I note that Agency Witness A's testimony is corroborated by Agency Witness B who is Agency Witness A's supervisor. Agency Witness B testified that prior to the July 26, 2011, incident Agency Witness A had informed him on two other occasions that Grievant's mobile device was "going off" during the morning report meeting. I had the opportunity to observe these witnesses and find their testimony credible.

I also note that Grievant's own witness, Grievant Witness A, testified that she had heard Grievant's cell telephone "chirp" on two occasions during morning report meetings. This witness' testimony supports the Agency's assertion that Grievant's cellphone did sound during the meeting. Whether this noise was described as a "chirp" or a "ring," the sound indicates Grievant's cellphone was not off during the meeting as required by the policy cited here.<sup>2</sup>

Considering the above and all of the evidence, I find the Agency has shown by a preponderance of the evidence that Grievant failed to follow instructions and/or policy and her behavior constituted misconduct.

**B. Was the Agency's Discipline consistent with law and policy?**

Failing to follow a supervisor's instruction/policy is a Group II offense under the Standards of Conduct Policy No. 1.60. Having already found Grievant engaged in a Group II Offense, I find the Agency's discipline consistent with policy.

Grievant contends the Agency was over zealous in its discipline and singled her out for punishment. To support her argument, Grievant presented witness testimony of Grievant Witnesses A and B to support her position that others used electronic/communication devices during morning report meetings and were not

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<sup>2</sup> Grievant Witness B's testimony established that she did not attend the morning report meetings which Grievant attended. Thus, Grievant Witness B was not in a position to corroborate Grievant's claims.



disciplined. I note Agency Witness B testified that others had used such devices during the morning meetings, were given verbal warnings, and then ceased violating the policy. He testified Grievant differed in that she was repeatedly counseled, received a written letter of counsel, and literally a few days after verbal and written counseling, violated the policy again. Thus, he testified she received the Group II Written Notice. Other evidence of record previously discussed here supports Agency Witness B's testimony regarding why Grievant received a Group II Written Notice. Hence, I find his testimony credible and assign great weight to it.

Thus, I find Grievant's discipline was consistent with law or policy.

## II. Mitigation

Under statute, hearing officers have the power and duty to "[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Employment Dispute Resolution."<sup>3</sup> EDR's *Rules for Conducting Grievance Hearings* provides that "a hearing officer is not a 'super-personnel officer'" therefore, "in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy."<sup>4</sup> More specifically, the *Rules* provide that in disciplinary grievances, if the hearing officer finds that:

- (i) the employee engaged in the behavior described in the Written Notice,
- (ii) the behavior constituted misconduct, and
- (iii) the agency's discipline was consistent with law and Policy, the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.<sup>5</sup>

Thus the issue of mitigation is only reached by a hearing officer if he or she first makes the three findings listed above. Further, if those findings are made, a hearing officer must uphold the discipline if it is within the limits of reasonableness.

I have found the Grievant engaged in the behavior described in the Written Notice, that behavior constituted misconduct, and the Agency's discipline was consistent with law and policy. A focus on whether the discipline was reasonable is now undertaken.

Grievant contends that she does not deserve a Group II and articulates several arguments to support her contention. First, she argues the hospital's documentation is inadequate to show Grievant was verbally counseled before she was issued the Group II. She then contends the Agency's discipline is an act of overzealousness. I have already

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<sup>3</sup> Va. Code Section 2.2-3005 (c )(6)

<sup>4</sup> *Rules for Conducting Grievance Hearings* VI(A)

<sup>5</sup> *Rules for Conducting Grievance Hearing* VI(B)

found Grievant was counseled several times before being issued the Group II. I note Agency Witness A testified that in 2011 from February to July, when Geivant's mobile device rang during the meetings, she documented the occurrences on the days they happened and verbally counseled Grievant. The Agency presented notes to this effect. As noted earlier here, Grievant's own letter to Agency Witness A indicates Grievant had received counseling before the July 26, 2011 incident. The evidence shows that Grievant failed to correct her behavior after receiving the verbal and written counseling. Accordingly, the Agency's discipline does not constitute overzealousness.

Second, Grievant argues that her cellphone log from February to July 2011 does not show telephone calls were placed to her cellphone number during the meeting times. But Grievant admits that at least from June 2011 to September 19, 2011, her cellphone was not working properly. The faultiness would cause her cellphone to turn itself on while in the off mode. This resulted in the cellphone ringing and/or chirping. Accordingly, I find it reasonable to conclude that if the cellphone was faulty, the cellphone log may not accurately reflect when Grievant's cellphone number was dialed. This is particularly applicable for the period June 2011, to July 26, 2011, since Grievant admitted that from June 2011, to September 19, 2011, her cellphone was not functioning properly.

Third, she argues that even if the telephone rang, she did not intend for it to do so as her cellphone was dysfunctional and would turn itself on automatically. Further, Grievant expressed a need to be aware of incoming calls on her cellphone due to a family medical emergency. However, I note applicable policy dictated that personal communication devices must be off during meetings. Grievant knew hers was faulty. For this reason Grievant's supervisor had recommended she not bring the cellphone to the meeting. Grievant elected to do so anyway and thus assumed the risk of violating policy if it turned itself on and rang.<sup>6</sup>

Fourth, Grievant argues she was singled out. For the reason previously discussed here, I find the evidence does not support this claim.

Considering Grievant's arguments and all the evidence, I am guided by the Rules for Conducting Grievance Hearings. They require a Hearing Officer to give deference to the Agency's consideration and assessment of any mitigating and aggravating circumstances. Under these rules, only if under the record evidence, the Agency's discipline exceeds the limits of reasonableness is a Hearing Officer permitted to mitigate the discipline.<sup>7</sup>

The evidence shows that in issuing the Group II Written Notice, the Agency expressed that Grievant's conduct was aggravated by her receipt of a written warning less than a week before the July 26, 2011 incident. Further, Grievant was aware her cell device was malfunctioning and had interrupted the morning report meeting several times before. Yet she chose to bring the malfunctioning cellphone in the report meeting

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<sup>6</sup> I do note that Grievant presented evidence establishing that she attempted to have her cellphone repaired and eventually received a replacement cellphone on or about September 19, 2011.

<sup>7</sup> *Id.*

knowing it may disrupt the meeting again.

Grievant's desire to be readily aware of her family situation by way of cellphone is understandable. However, Agency policy designed in part to prevent interruptions during the morning report meeting where pertinent patient information is being exchanged can not be ignored.

I have considered Grievant's arguments and all evidence presented, to include evidence that Grievant attempted to have her mobile device repaired/replaced. Further, I have considered all other evidence and find no reason to disregard the Agency's assessment regarding mitigating the discipline. Thus, I find the Agency's discipline did not exceed reasonableness.

### **DECISION**

Hence, for the reasons noted here, the Agency's discipline is upheld.

### **APPEAL RIGHTS**

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

**Administrative Review:** This review is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision.

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.

2. **A challenge that the hearing decisions is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Request should be sent to the Director of the Department of Human Resources Management, 101 N. 14<sup>th</sup> Street, 12<sup>th</sup> floor Richmond, VA 23219 or faxed to (804) 371-7401.

3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure that the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decisions so that it complied with the grievance procedure. Requests should be sent to the EDR Director, Main Street Centre, 600 East Main, Suite 301, Richmond, VA 23219 or faxed to (804)786-0111.

A party may make more than one type of request for review. All requests for

review must be made in writing, and received by the administrative reviewer, within **15 calendar** days of the **date of the original hearing decision**. (Note: the 15-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days). A copy of each appeal must be provided to the other party.

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 final decisions, a party may appeal on the ground 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 Directory before filing a notice of appeal.

ENTERED this 14<sup>th</sup> day of December, 2011.

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Ternon Galloway Lee, Hearing Officer

cc: Agency Attorney Advocate  
Agency Representative  
Grievant  
EDR's Hearings Program Director