

Issue: Group I Written Notice (failure to follow instructions); Hearing Date: 05/07/12;  
Decision Issued: 05/08/12; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.;  
Case No. 9800; Outcome: No Relief – Agency Upheld.



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 9800**

Hearing Date: May 7, 2012  
Decision Issued: May 8, 2012

**PROCEDURAL HISTORY**

On December 20, 2011, Grievant was issued a Group I Written Notice of disciplinary action for failure to follow a supervisor's instructions.

On January 5, 2012, 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 4, 2012, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 7, 2012, a hearing was held at the Agency's office.

**APPEARANCES**

Grievant  
Agency Party Designee  
Agency Advocate  
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?

### **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 as a Housekeeping Worker. She began working for the Agency in 2006. The purpose of her position is:

To maintain established levels of cleanliness and orderliness in an assigned area by the application of proper methods and materials. Perform routine assignments in accordance with pre-established patterns using set methods and techniques. Non-routine assignments requiring special treatment are outlined in detail and performed under close supervision.

One of Grievant's Core Responsibilities and Competencies is Floor Maintenance. The Measure for this Core Responsibility is:

Daily clean floors in assigned areas by sweeping, dust mopping, or wet mopping. This includes moving furniture to clean areas underneath and behind. Machine scrubs floor areas using floor scrubbing machines and wet capacity vacuum cleaners to pick up scrubbing solution and vacuums carpeted areas in accordance with established schedule. Twice a year or more often if needed, perform extensive floor maintenance, stripping and refinishing of floor areas and shampoo/extraction of carpeted floors.<sup>1</sup>

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<sup>1</sup> Agency Exhibit 6.

Agency employees refer to the scrubby machine as a “buffer”. The buffer consists of a brush that spins to polish the floor. An employee holds a handle that is attached to a poll connected to an engine that spends the brush to clean the floor. The employee moves the buffer back and forth to allow the brushes to spin over the floor.

Grievant had difficulty operating the buffer because of its weight. When she moved the buffer from side to side, she felt pain in her shoulder. On December 14, 2011, Grievant was not subject to the restrictions from a medical professional regarding her operation of the buffer.

On December 14, 2011, the Lead Worker was supervising Grievant’s work duties. The Lead Worker instructed Mr. J to clean the walls of a bathroom. The Lead Worker instructed Grievant to use the buffer to clean the floors of the bathroom. Grievant put liquid down on the floor in order to clean the floor. Grievant asked Mr. J if they could switch tasks. She indicated that she was afraid using the buffer would hurt her shoulder. Mr. J agreed to switch tasks even though neither employee had the authority to do so. The Lead Worker returned to the work area and observed Mr. J buffing the floor and Grievant cleaning the walls of the bathroom. She asked Mr. J why he was buffing the floor when she had instructed him to wash the walls. He told her that he and Grievant had switched tasks. After speaking with the Lead Worker, Grievant chose to leave the Facility. She went to a medical provider to obtain a note regarding her ability to operate the buffer. Grievant obtained a note from her medical provider indicating that she had a “right shoulder syndrome” and that she could not do “buffing work with machine due to shoulder pain.”<sup>2</sup>

## **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>3</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 is a Group II offense.<sup>4</sup> On December 14, 2011, the Lead Worker instructed Mr. J to wash the walls of the bathroom and instructed

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<sup>2</sup> On January 24, 2012, Grievant provided the Agency with a note from a medical professional indicating that she had “no medical impairments or disorders involving her shoulders that should impair her from doing the required work that she describes using a buffer. She had no pain on physical exam.” Agency Exhibit 2.

<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.

<sup>4</sup> See, Attachment A, DHRM Policy 1.60.

Grievant to clean the bathroom floor using the buffer. Grievant put down cleaning fluid on the floor but did not use the buffer to clean the floor. She asked Mr. J to switch tasks and Mr. J agreed to do so. Grievant failed to comply with the Lead Worker's instruction. She did not have the authority to change her assigned duties with another employee. The Agency has established that Grievant failed to comply with a supervisor's instruction thereby justifying the issuance of a Group II Written Notice. The Agency mitigated the disciplinary action to a Group I Written Notice.

Grievant argued that she was not trained regarding how to use the buffer. This argument does not affect the outcome of this case. Mr. J testified that Grievant knew how to use the buffer. Grievant had used the buffer during her career at the Facility since 2006. The buffer is a machine that can be operated properly without specialized training.

*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.

Grievant contends the disciplinary action should be mitigated because she was unable to perform the duties on December 14, 2011. Grievant presented a note dated December 14, 2011 from her medical professional stating that Grievant "had a right shoulder syndrome. She cannot do buffing work with machine due to shoulder pain. This is likely permanent. Further notice will be given if she is able to resume buffing work." To the extent Grievant's medical condition serves as a mitigating circumstance, an aggravating circumstance also exists. In October 2011, Grievant told the Housekeeping Supervisor that she was unable to operate the buffer. The Housekeeping Supervisor told her to obtain a note from a medical provider. Grievant did not obtain a note from her medical provider until the day she was instructed by the Lead Worker to buff the floor and then failed to do so. Grievant had ample time before December 14, 2011 to obtain a note from a medical provider so that the Agency could properly evaluate her work duties. At the time of the instruction from the Lead Worker, Grievant was not under any work restrictions. In light of the standard set forth in the

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<sup>5</sup> *Va. Code § 2.2-3005.*

Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the Group I Written Notice.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action 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  
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>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.