

Issues: Group II Written Notice (failure to follow instructions), and Termination due to accumulation; Hearing Date: 02/28/18; Decision Issued: 03/01/18; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq. Case No. 11143; Outcome: Full Relief; **Administrative Review: Ruling request received 03/18/18; EEDR Ruling No. 2018-4694 issued on 04/19/18; Outcome: Remanded to AHO; Remand Decision issued 05/10/18; Outcome: Original decision affirmed; Attorney's Fee Addendum issued 05/17/18 awarding \$1,676.80.**



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11143

Hearing Date: February 28, 2018
Decision Issued: March 1, 2018

PROCEDURAL HISTORY

On November 3, 2017, Grievant was issued a Group II Written Notice of disciplinary action with removal for failure to follow instructions.

On November 30, 2017, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On December 18, 2017, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On February 28, 2018, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's 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?

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. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. 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 Psych Tech III at one of its facilities. She had been employed by the Agency since 2005. Grievant had prior active disciplinary action. On July 10, 2017, Grievant received a Group II Written Notice for failure to follow instructions.

Patient S was a patient at the Facility. He was sometimes aggressive and difficult to manage so the Agency placed him in a dayroom adjacent to the Unit where staff worked.

Grievant reported to the Charge Nurse. The Charge Nurse reported to the Unit Manager who reported to the RNC.

Grievant began working at the Unit in June 2017. She had a good relationship with Patient S when she first started providing services to him. At some point, the relationship worsened. Patient S would sometimes scratch, kick, and punch Grievant. Grievant did not like working with Patient S.

On October 17, 2017 at approximately 7:40 a.m., the Charge Nurse assigned Grievant to work with Patient S beginning at 11:30 a.m. Grievant did not want to work with Patient S that day. Grievant told the Charge Nurse that she was not going to work with Patient S because she had been assigned responsibility for Patient S more frequently than other staff. Grievant told the Charge Nurse she had been assigned to Patient S for three days and this day would make the fourth. The Charge Nurse said the assignment sheet was completed and if Grievant “refused to go, we would deal with that when the time came.”¹

Several minutes after speaking with the Charge Nurse, Grievant contacted the Unit Manager. Grievant told the Unit Manager she believed it was unfair to have Grievant sit with Patient S every evening back to back. The Unit Manager told Grievant another employee made the same complaint. The Unit Manager told Grievant that she would look into the matter and get back with Grievant.

Grievant left the Unit at 11 a.m. to take her lunch break. When she returned at approximately 11:25 a.m., she spoke with the Unit Manager. The Unit Manager told Grievant, “I already put someone else over there, so you do not have to sit [with Patient S].” At 11:30 a.m., Grievant performed other duties on the Unit. Grievant testified that if the Unit Manager had told her she had to sit with Patient S, she would have done so when her shift began at 11:30 a.m.

Each party was asked to submit a list of possible witnesses four work days before the hearing. The Unit Manager was employed by the Agency at the time of the hearing. Neither party listed the Unit Manager as a possible witness. The Unit Manager did not testify during the hearing.

CONCLUSIONS OF POLICY

The Agency alleged that Grievant failed to follow a supervisor’s instructions. Grievant told the Charge Nurse that she did not wish to be assigned responsibility for Patient S. The Charge Nurse rejected Grievant’s request and told her she had to perform the assignment. Grievant told the Charge Nurse she would not perform the assignment. Grievant expressed to the Unit Manager her objection to the assignment. The Unit Manager changed Grievant’s assignment. The Unit Manager had the authority to change employee assignments. At 11:30 a.m., Grievant was no longer assigned responsibility for Patient S. She did not act contrary to a supervisor’s instructions when she failed to work with the Patient S beginning at 11:30 a.m. on October 17, 2017. There is no basis for disciplinary action.

The Virginia General Assembly enacted *Va. Code § 2.2-3005.1(A)* providing, “In grievances challenging discharge, if the hearing officer finds that the employee has substantially prevailed on the merits of the grievance, the employee shall be entitled to

¹ Agency Exhibit 1.

recover reasonable attorneys' fees, unless special circumstances would make an award unjust." Grievant has substantially prevailed on the merits of the grievance because she is to be reinstated. There are no special circumstances making an award of attorney's fees unjust. Accordingly, Grievant's attorney is advised to submit an attorneys' fee petition to the Hearing Officer within 15 days of this Decision. The petition should be in accordance with the EDR Director's *Rules for Conducting Grievance Hearings*.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with removal is **rescinded**. The Agency is ordered to **reinstate** Grievant to Grievant's same position at the same facility prior to removal, or if the position is filled, to an equivalent position at the same facility. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal and credit for leave and seniority that the employee did not otherwise accrue.

APPEAL RIGHTS

You may request an administrative review by EEDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EEDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Equal Employment and Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

You must also provide a copy of your appeal to the other party and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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.^[1]

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

^[1] Agencies must request and receive prior approval from EEDR before filing a notice of appeal.



COMMONWEALTH of VIRGINIA
Office of Equal Employment and Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 11143-R

Reconsideration Decision Issued: May 10, 2018

RECONSIDERATION DECISION

EEDR Ruling 2018-4694 remanded this matter to the Hearing Officer.

New Evidence Standard

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.

The Agency's affidavit is a substitute for the Unit Manager's testimony that the Agency should have presented at the hearing, especially after the Hearing Officer questioned whether the Unit Manager would testify. Considering the affidavit of the Unit Manager or her testimony would not be appropriate because neither are newly discovered evidence. The Unit Manager's testimony existed at the time of the hearing. It was known to the Agency prior to the hearing.

The Agency's contention that it was surprised that it might need to have the Unit Manager testify is not supported by the evidence. The Agency submitted a statement from the Unit Manager in which the Unit Manager wrote:

On 10-17-17 [Grievant] was assigned to work with [Patient S] ... in which she stated to the charge nurse she wasn't going to do it because she had been going more than other staff. It was explained to her that he is a part of our unit as a whole and other staff (if no volunteers) go back to back as well.

The Unit Manager's statement does not refute Grievant's defense.

The Agency alleged it could not have known the Unit Manager's testimony would be relevant because Grievant did not identify the Unit Manager as a witness to her defense. Grievant is not obligated to inform the Agency of all of her defenses prior to the hearing. Grievant's grievance was drafted by an attorney who specifically avoided listing the details of any of Grievant's defenses.

The Agency alleges:

At no time did the Unit Manager advise the Grievant that it would be acceptable to refuse an assignment or that she was excused from this assignment.

The Agency's statement is untrue. In fact, the Unit Manager excused Grievant from performing the assignment after considering Grievant's request and assigning another employee to perform the task. The Unit Manager told Grievant she did not have to sit with Patient S. If the Agency's statement were true, surely the Unit Manager would have included such a statement in her one page handwritten discussion of Grievant instead of saying, "it was explained to her that he is a part of our unit as a whole and other staff (if no volunteers) go back to back as well." The Unit Manager's statement does not show a basis for disciplinary action.

It is not the responsibility of the Hearing Officer to advocate for the Agency or to permit "a second bite at the apple" when the Agency fails to present relevant evidence. The Hearing Officer does not provide employees with such privilege and will not do so for agencies. The Hearing Officer will neither reopen the case to permit the taking of additional evidence, nor consider the contents of the Agency's affidavit.

Original Hearing Decision

The EEDR ruling states:

Having thoroughly reviewed the hearing record, EEDR is unable to determine whether there is a factual basis for the hearing officer's conclusion that the disciplinary action was not warranted under the circumstances in this case. The fact that the responsibility for working with Patient S was reassigned to another employee does not, by itself, indicate that the grievant's actions cannot be considered a failure to follow

instructions. As the agency notes in its request for administrative review, it was obligated to ensure proper coverage of Patient S for safety reasons, and thus either the grievant or another employee was required to work with Patient S. Thus, the crux of the case is what the record evidence shows the grievant expressed to the Charge Nurse when given the assignment. If the record evidence indicates that the grievant was requesting a reassignment, the hearing officer's conclusion that the grievant's behavior did not constitute a failure to follow instructions may be an appropriate exercise of discretion in determining issues of disputed fact. If, however, the record evidence shows that the grievant communicated a refusal to work with Patient S and management was required to reassign other staff to perform the task, such conduct would properly be considered a failure to follow instructions justifying the issuance of a Group II Written Notice.

The factual basis for the Original Hearing Decision is clear and summarized by EEDR as follows:

In the hearing decision, the hearing officer found that the "Grievant told the Charge Nurse she was not going to work with Patient S" The hearing officer further stated that, after initially receiving her assignment from the Charge Nurse, the grievant then "expressed to the Unit Manager her objection to the assignment. The Unit Manager changed Grievant's assignment. The Unit Manager had the authority to change employee assignments. At 11:30 a.m., Grievant was no longer assigned responsibility for Patient S." As a result, the hearing officer concluded that the grievant "did not act contrary to a supervisor's instructions when she failed to work with the Patient S beginning at 11:30 a.m. on October 17, 2017," and, as a result, there was "no basis for disciplinary action."

The burden of proof is on the Agency to show that Grievant should receive disciplinary action. The burden is not on the Grievant to show that there was no possible basis for disciplinary action. Asserting that reassigning Patient S to another employee meant Grievant failed to comply with instructions is to shift the burden of proof to Grievant to explain why the transfer was made. Grievant is not obligated to explain why the Unit Manager reassigned Grievant (even though Grievant provided such proof). It is the Agency's burden to show that the reassignment was only because Grievant refused to perform the assignment. The Agency has not met this burden of proof primarily because it failed to have the Unit Manager testify.

The evidence showed that Grievant complained to the Unit Manager about the assignment. The Unit Manager did not immediately tell Grievant she had to perform the assignment. If the Unit Manager did not wish to consider Grievant's concern, she would have told Grievant to comply with the assignment. Instead the Unit Manager told Grievant she would get back with Grievant. This evidence shows the Unit Manager wanted to think about Grievant's request. After thinking about Grievant's request, the

Unit Manager decided to assign another employee to sit with Patient S. In other words as clearly stated in the Original Decision, “[t]he Unit Manager changed Grievant’s assignment.” An employee cannot be disciplined for failing to complete an assignment that no longer exists. Grievant’s testimony that she would have performed the assignment if the Unit Manager had told her to do so shows that Grievant would have complied with the assignment if the Unit Manager had so requested instead of changing the assignment. There is no evidence to show that the Unit Manager made the reassignment under duress or because she had no choice. In other words, no credible evidence was presented showing the Unit Manager was “required to reassign other staff to perform the task.” It would be the Agency’s burden to show that the Unit Manager was forced to make the reassignment or had no choice but to make the reassignment and the Agency has not done so.

A key consideration in this grievance is time. At the time of 7:40 a.m., Grievant told the Charge Nurse she would not sit with Patient S at the time of 11:30 a.m.² Grievant’s refusal alone did not form a basis for disciplinary action because her obligation to perform the assignment did not arise until 11:30 a.m. This conclusion is confirmed by the Charge Nurse’s statement, “I told her that the assignment sheet was completed and that if she refused to go, we would deal with that when the **time** comes.”³ (Emphasis added). At the time of 11:30 a.m., Grievant’s obligation to sit with Patient S no longer existed. The Unit Manager overruled the Charge Nurse’s instruction and the Unit Manager had the authority to do so. Grievant did not fail to comply with the instruction of sitting with Patient S because at the time of 11:30 a.m. that instruction no longer existed. Grievant did not fail to perform work because that work was scheduled to begin only at the time of 11:30 a.m.

Grievant testified that she raised her concerns with the Unit Manager shortly after speaking with the Charge Nurse. The Unit Manager said she would get back with Grievant. Grievant made an effort to speak with the Unit Manager again. If Grievant had already concluded she would refuse to perform the assignment regardless of the Unit Manager’s opinion, Grievant would not have attempted to contact the Unit Manager. When Grievant spoke with the Unit Manager at approximately 11:25 a.m., the Unit Manager told Grievant “you don’t have to sit” with Patient S because she had already put someone else over there. In other words, the Unit Manager had already granted Grievant’s request and assigned another employee to sit with Patient S. The Unit Manager did not assign another employee **after** 11:30 a.m. in response to Grievant’s failure to sit with Patient S. Grievant testified if the Unit Manager had not

² EEDR statement that “[t]hus, the crux of the case is what the record evidence shows the grievant expressed to the Charge Nurse when given the assignment” is misplaced. The crux of the case is what was Grievant’s obligation at 11:30 a.m. If she had an obligation to perform at 11:30 a.m. and failed to do so there would be a basis for disciplinary action. Since she did not have any obligation to perform at 11:30 a.m., the Agency has not established a basis for disciplinary action. The fact that Grievant told the Charge Nurse (at 7:40 a.m.) she would not perform the assignment (at 11:30 a.m.) does not, by itself, indicate Grievant “[f]ailed to follow a supervisor’s instructions.”

³ Agency Exhibit 1.

asked another employee to sit with Patient S, Grievant would have worked with Patient S.

The EEDR ruling states:

The fact that the responsibility for working with Patient S was reassigned to another employee does not, by itself, indicate that the grievant's actions cannot be considered a failure to follow instructions.

As stated in the Original Decision, the Hearing Officer did not consider one fact by itself when concluding the disciplinary action should be reversed. All of the facts showing why the assignment was changed show that there is no basis for disciplinary action.

The Original Hearing Decision contained all of the relevant facts and explained why the disciplinary action was not appropriate. The Agency has not met its burden of proof.

For this reason, the Hearing Officer will not amend the Original Hearing Decision. Grievant is entitled to any additional attorney's fees associated with this remand decision.

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 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

Carl Wilson Schmidt, Esq.
Hearing Officer



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION
ADDENDUM TO DECISION OF HEARING OFFICER

In re:

Case No: 11143-A

Addendum Issued: May 17, 2018

DISCUSSION

The grievance statute provides that for those issues qualified for a hearing, the Hearing Officer may order relief including reasonable attorneys' fees in grievances challenging discharge if the Hearing Officer finds that the employee "substantially prevailed" on the merits of the grievance, unless special circumstances would make an award unjust.⁴ For an employee to "substantially prevail" in a discharge grievance, the Hearing Officer's decision must contain an order that the agency reinstate the employee to his or her former (or an objectively similar) position.⁵

To determine whether attorney's fees are reasonable, the Hearing Officer considers the time and effort expended by the attorney, the nature of the services rendered, the complexity of the services, the value of the services to the client, the results obtained, whether the fees incurred were consistent with those generally charged for similar services, and whether the services were necessary and appropriate.

Grievant's Attorney devoted 12.8 hours to representing Grievant. This amount of time is reasonable and shall be awarded at the rate of \$131 per hour.

Grievant requested reimbursement for another attorney she paid prior to the attorney who represented her at the hearing. These fees are disallowed because that prior attorney did not submit an affidavit supporting his fees.

The Agency is obligated to provide Grievant with health insurance coverage as if she had not been removed from employment.

⁴ Va. Code § 2.2-3005.1(A).

⁵ § 7.2(e) Department of Human Resource Management, *Grievance Procedure Manual*, effective August July 1, 2017. § VI(E) EEDR *Rules for Conducting Grievance Hearings*, effective July 1, 2017.

AWARD

Grievant is awarded attorneys' fees in the amount of \$1,676.80.

APPEAL RIGHTS

If neither party petitions EEDR for a ruling on the propriety of the fees addendum within 10 calendar days of its issuance, the hearing decision and its fees addendum may be appealed to the Circuit Court as a final hearing decision. Once EEDR issues a ruling on the propriety of the fees addendum, and if ordered by EEDR, the hearing officer has issued a revised fees addendum, the original hearing decision becomes "final" as described in §VII(B) of the *Rules* and may be appealed to the Circuit Court in accordance with §VII(C) of the *Rules* and §7.3(a) of the *Grievance Procedure Manual*. The fees addendum shall be considered part of the final decision. Final hearing decisions are not enforceable until the conclusion of any judicial appeals.

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer