

Issues: Group II Written Notice (failure to follow instructions/policy), and Termination due to accumulation; Hearing Date: 11/08/18; Decision Issued: 01/22/19; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 11266; Outcome: No Relief – Agency Upheld.



# ***COMMONWEALTH of VIRGINIA***

## ***Department of Human Resource Management***

### **OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION**

#### **DECISION OF HEARING OFFICER**

In re:

**Case Number: 11266**

Hearing Date: November 8, 2018  
Decision Issued: January 22, 2019

#### **PROCEDURAL HISTORY**

On August 1, 2018, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow policy or instructions. She was removed from employment based on the accumulation of disciplinary action.

On August 29, 2018, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On September 18, 2018, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On November 8, 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 Human Service Care Specialist at one of its facilities. She had been employed by the Agency for approximately 18 years. The purpose of her position was:

To facilitate and co-facilitate active treatment with adults with serious mental illness. To plan and facilitate evening, weekend, and holiday activities and special events. To document clients attendance and progress according to hospital and department policy. To provide assistance in aspects of the day to day operations of the Rehab Services Department. To provide quality services in line with hospital and departmental missions, policies and procedures.<sup>1</sup>

Grievant had prior active disciplinary action. On June 26, 2017, Grievant received a Group III with a 15 workday suspension for violation of policy 1.05, Alcohol and Other Drugs.

On October 11, 2016, grievant signed a Conflict of Interest and Code of Conduct statement:

I understand that personal cell phones are not allowed in any area that provides direct care to the patient's or individual served at [Facility].

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<sup>1</sup> Agency Exhibit 4.

Personal cell phone usage is also prohibited while on duty and providing direct care to the patient's or individuals at any facility off campus.<sup>2</sup>

The Facility has a Treatment Mall where patients receive daily treatment. They travel from other parts of the Facility by bus to the Treatment Mall. Patients walk through a sally port and enter the Treatment Mall Lobby. They then walk to other rooms in the Treatment Mall. The Treatment Mall Lobby has an elevator accessible by patients and staff.

The Treatment Mall Lobby is considered a "patient area." Employees are permitted to use their cell phones when patients are not in the Lobby. If patients are in the Lobby, employees are prohibited from using cell phones. Three administrative offices are located near the Lobby. Employees working in the Lobby could put their cell phones in the administrative offices.

Agency Managers considered a wireless earpiece connected to a cell phone to be the same as a cell phone by itself and when worn in one's ear to be in use.

Grievant reported to Supervisor T who reported to Supervisor R. Supervisor T's first day of work in the Unit was July 10, 2018.

On July 10, 2018, Grievant and Ms. P were in the Lobby. Supervisor R approached them and asked if either of them wanted to work the weekend shift of another employee. Ms. P said she could work Saturday. Grievant said she had to check with her part-time job to see if she was scheduled to work for them.<sup>3</sup> Grievant used her personal cell phone to contact her part-time employer. She used her wireless earpiece to speak with the part-time employer.

On July 10, 2018, Grievant was in the Lobby using her cell phone. At least ten Patients were also in the Lobby. Supervisor R approached Grievant. Supervisor T joined Supervisor R.<sup>4</sup> After the patients left the Lobby, Supervisor R told Grievant that she should not be using her cell phone and should not have it with her earpiece when working with patients. Supervisor R asked Grievant to put the phone away and remove her earpiece. Grievant replied that she only had the phone out to call her part-time job to see if she could work for the Agency on the following weekend and because her daughter was in labor. Grievant did not remove the earpiece or put the phone away. Supervisor R again told Grievant that the phone should not be out in front of patients. Supervisor R and Supervisor T left the Lobby and went upstairs. Grievant did not remove her earpiece or put her cell phone away prior to Supervisor R and Supervisor T turning away to go upstairs.

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<sup>2</sup> Agency Exhibit 4.

<sup>3</sup> Grievant was scheduled to work at her part-time job on July 14, 2018 and July 15, 2018.

<sup>4</sup> Ms. P was not present when Supervisor R accompanied by Superintendent T spoke with Grievant.

## 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>5</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.”

Policy Number HR – 40 governs Communication Device Usage (personal and state issued devices). Section IV(D) states:

Personal cell phone usage is strictly prohibited in any settings in which individuals and/or patients are receiving services or receiving care. No cell phone calls may be placed or received. No text messages may be placed or received. The same rules apply while on duty at an alternate worksite:

- Pulled to another location to provide patient care within the facility.
- While monitoring a patient at another facility on the [location].
- While monitoring a patient off-site at facilities such as [Facilities] staff may store their personal cell phones in the lockers located in each patient care building. In the civil buildings that is inside their break room; and building [number] it is outside the secure unit in the locker room.

Section E provides:

Personal cell phone usage is only allowed away from an area in which patients are receiving care. Personal cell phone usage must be limited to scheduled break times or when staff is off duty.<sup>6</sup>

Failure to follow policy and a supervisor’s instructions is a Group II offense.<sup>7</sup> On July 10, 2018, Grievant was using her cell phone while patients were in the Lobby. Her actions were contrary to the Agency’s policy. When Supervisor R instructed Grievant to put her cell phone away, Grievant did not do so until after Supervisor R and Supervisor T left the Lobby. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow policy and instructions. Grievant had prior active disciplinary action consisting of an active Group III Written Notice. An employee with an existing active Group III Written Notice may be removed from

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<sup>5</sup> The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

<sup>6</sup> Agency Exhibit 5.

<sup>7</sup> See, Attachment A, DHRM Policy 1.60.

employment upon the accumulation of any additional disciplinary action. Accordingly, Grievant's removal must be upheld.

Grievant argued that she was not speaking on her cell phone while patients were in the Lobby and did not refuse to put her cell phone away. The Agency has presented sufficient evidence to support its allegations. Supervisor R's testimony was credible. Supervisor T's testimony showed that Supervisor R had to tell Grievant twice to put away her cell phone which is consistent with Supervisor R's testimony that Grievant did not put her cell phone away when he asked her to do so. None of the witnesses testified that Grievant said "Okay" or used similar words to acknowledge that she intended to put her cell phone away.

Grievant argued that she and Supervisor R had a history of conflict and that his actions against her were motivated by that conflict. It is clear that Grievant and Supervisor R did not work well together and did not like each other. It is not clear that Supervisor R acted in order to retaliate against Grievant for her prior complaints about him. Supervisor R reported Grievant's behavior because he believed she had acted contrary to Agency policy and refused to comply with his instruction. There is no basis to reverse the disciplinary action because of Supervisor R's dislike of Grievant.

Grievant argued that she was making calls during her lunch break in order to benefit the Agency's staffing needs. The time and purpose of Grievant's cell phone call did not matter if patients were in the Lobby when she was making her calls. Employees were not permitted to use their cell phones while patients were in the Lobby regardless of whether the employees were taking the lunch breaks.

*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 Human Resource Management ...."<sup>8</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 removal is **upheld**.

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<sup>8</sup> *Va. Code § 2.2-3005.*

## 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 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto: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.<sup>[1]</sup>

[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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>[1]</sup> Agencies must request and receive prior approval from EEDR before filing a notice of appeal.