

Issue: Group III Written Notice with Termination (HIPAA violation); Hearing Date: 02/04/19;  
Decision Issued: 02/20/19; Agency: DBHDS; AHO: Sondra K. Alan, Esq.; Case No. 11302;  
Outcome: No Relief - Agency Upheld.

DECISION OF HEARING OFFICER  
IN RE: CASE NO. 11301  
HEARING DATE: February 4, 2019  
DECISION ISSUED: February 20, 2019

PROCEDURAL HISTORY

Grievant was issued a Written Notice. There was no notice date on the form. Grievant was issued a Group III with termination for her breach of confidentiality. Grievant signed the Written Notice on November 7, 2018.<sup>1</sup> The date of the incident was listed as October 29, 2018. It would appear from evidence the incident actually occurred in December 2017 and was reported in October 2018. Grievant timely filed for a hearing on November 28, 2018.<sup>2</sup>

The matter was appointed to a Hearing Officer on December 27, 2018. A prehearing conference was set for January 10, 2019. The hearing was scheduled for February 4, 2019.

APPEARANCES

Agency Advocate  
Agency Representative  
3 Agency Witnesses

Grievant did not appear.

ISSUES

1) Whether grievant violated policies: 54 (HIPAA violation); 13 (failure to follow instructions and/or policy); 37 (disruptive behavior)<sup>3</sup>; CHPP16.30 (confidentiality of photographs....)<sup>4</sup>; CHPP 16.10 (confidentiality of identifying information)<sup>5</sup>; and CHPP 06.104 (use of .... personal cell phones....)<sup>6</sup>.

2) Whether a Group III discipline with termination was appropriate and free of unlawful discrimination.

---

<sup>1</sup> Agency Exhibit 1 Written Notice

<sup>2</sup> Agency Exhibit 2 Grievance Form A

<sup>3</sup> Agency Exhibit 1 Attachment to Written Notice

<sup>4</sup> Agency Exhibit 5

<sup>5</sup> Agency Exhibit 6

<sup>6</sup> Agency Exhibit 7

## 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 actions against the Grievant were 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. Grievant has the burden of proving any affirmative defenses raised by Grievant. GPM §5.8.

## APPLICABLE POLICY

This hearing is held in compliance with Virginia Code § 2.2-3000 et seq the Rules for Conducting Grievances effective July 1, 2012 and the Grievance Procedure Manual (GPM) effective July 1, 2017

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “includes acts of minor misconduct that require formal disciplinary action.” Group II offenses “include acts of misconduct of a more serious and/or repeat nature that requires formal disciplinary action.” Group III offenses “include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.” More than one (1) active Group II offense may be combined to warrant termination.<sup>7</sup>

## FINDING OF FACTS

After reviewing the evidence presented and observing the demeanor of each witness the Hearing Officer makes the following findings of fact:

In December of 2017 Grievant took a “selfie” photograph with her personal cell phone during her employment hours. The photograph included a patient laying asleep in the background of the picture. The photograph was published by Grievant in text form to another person with the texts “I’m with this guy I haven’t had a break but he did go to sleep” “I didn’t send you this lol”.<sup>8</sup> In October of 2018 a person (presumably the person to whom the text was originally sent) notified the Agency by email that such a photograph had been sent to her. The Human Rights Advocate received the email with the photograph and forwarded it to her superiors.<sup>9</sup>

A Risk Analysis was completed and was signed by the HIPAA Compliance Officer.<sup>10</sup> Based on the factual information, a decision was made to issue a Group III notice with Termination. Grievant responded with two written statements.<sup>11</sup> Thereafter, the Written Notice was issued and Grievant was terminated on November 7, 2018.<sup>12</sup>

---

<sup>7</sup> Agency Exhibit 13 Standards of Conduct effective 4/16/08

<sup>8</sup> Agency Exhibit 1 Photograph & Text

<sup>9</sup> Agency Exhibit 2 Email Texts

<sup>10</sup> Agency Exhibit 4 Risk Chart

<sup>11</sup> Agency Exhibit 12 Grievant Statements

<sup>12</sup> Agency Exhibit 10 Written Notice

Agency entered evidence of Grievant being aware of conduct expected of her.<sup>13</sup> The Agency entered evidence of policies relied on from which to determine the gravity of the behavior.<sup>14</sup> Standards of Conduct policy was entered from which the decision was made to issue a Group III discipline. Grievant filed Grievance form A on November 28, 2018 to request a hearing.<sup>15</sup>

In addition to these facts, Grievant and Agency were encouraged by the Hearing Office to discuss settlement prior to the hearing date. Grievant announced an agreement had been reached. However, Agent's Advocate stated Grievant's interpretation of settlement overstated that to which the parties had agreed. The scheduled Hearing date remained. Grievant announced she would not attend the hearing. These emails are attached as evidence regarding the proceedings.<sup>16</sup>

### OPINION

Grievant clearly used her personal cell phone during working hours. (Contra CHPP 06.104). Grievant clearly breached the confidentiality of identifying information by including a photograph of a patient without permission (Contra CHPP 16.10). Grievant clearly published the photograph (Contra CHPP 16.30). Her behavior was not found to be "disruptive" (policy 37). However, there were several breaches of her expected conduct, all of which were serious<sup>17</sup>: unethical conduct, neglect of duty and violation of policy and HIPAA law. No evidence of lawfully protected discrimination was presented. No mitigating circumstances were found.

### DECISION

For the reasons state herein, Agency's issuance to Grievant of a Group III Written Notice with termination is UPHELD.

---

<sup>13</sup> Agency Exhibit 8 Orientation Checklist

<sup>14</sup> Agency Exhibits 5, 6, 7

<sup>15</sup> Agency Exhibit 10 Written Notice

<sup>16</sup> Hearing Officer Exhibit A

<sup>17</sup> Agency Exhibit 13 Standards of Conduct effective 4/16/08 Page 9

## 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

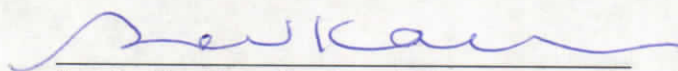
Or send by e-mail to [EDR@dhrm.virginia.gov](mailto:EDR@dhrm.virginia.gov) , or by fax to (804) 786-1606.

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>18</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].



Sondra K. Alan, Hearing Officer

---

<sup>18</sup> Agencies must request and receive prior approval from EEDR before filing a notice of appeal.