

Issues: Group II Written Notice with suspension (failure to follow instructions), and Group III Written Notice with termination (failure to follow instructions); Hearing Date: 11/09/12; Decision Issued: 02/13/13; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 9893; Outcome: Partial Relief.



# ***COMMONWEALTH of VIRGINIA***

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

### **OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

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

In re:

**Case Number: 9893**

Hearing Date: November 9, 2012

Decision Issued: February 13, 2013

#### **PROCEDURAL HISTORY**

On June 25, 2012, Grievant was issued a Group II Written Notice of disciplinary action with a four workday suspension for failure to follow a supervisor's instructions. On July 9, 2012, Grievant was sent a letter of termination. On July 24, 2012, Grievant filed a grievance to challenge the Group II Written Notice and the letter of termination. On August 17, 2012, Grievant was issued a Group III Written Notice of disciplinary action with removal for failure to follow a supervisor's instruction. The Group III Written Notice states that it was issued on July 9, 2012.

The Office of Employment Dispute Resolution (EDR) issued Ruling 2013-3430 on September 17, 2012 stating:

To the extent there is any disagreement later in this matter, the grievant's dismissal grievance will be presumed to challenge both the Group II and Group III Written Notices, the grievant's suspension, the grievant's termination, and any other issues intended to be challenged and included in the regular grievance submitted to the agency and/or the dismissal grievance submitted to EDR. In short, the hearing for the dismissal grievance will address all issues the grievant sought to challenge in both grievances.

On October 30, 2012, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 9, 2012, a hearing was held at the Agency's office.

## **APPEARANCES**

Grievant  
Grievant's Counsel  
Agency Party Designee  
Agency Advocate  
Witnesses

## **ISSUES**

1. Whether Grievant engaged in the behavior described in the Written Notices?
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 Corrections employed Grievant as a Regional Dental Hygienist. She had been employed by the Agency for approximately ten years prior to her removal effective July 9, 2012. The purpose of her position was to "provide regional dental hygiene care and other preventive care to adult offenders."<sup>1</sup> Some of Grievant's evaluations described her work as outstanding.

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

Grievant had prior active disciplinary action. On August 9, 2011, she received a Group III Written Notice for failure to follow supervisor's instructions and falsifying official State documents.

Grievant began working at the Facility where Dr. H worked on February 28, 2012. Dr. H instructed Grievant not to make any patient diagnosis or recommended treatments to patients. Dr. H was responsible for supervising Grievant's work when Grievant worked at the Facility.

Under the Agency's Dental Hygiene Program:

The institutional dentist will examine patients and determine the treatment that the dental hygienist will provide. The dentist must order the treatment in writing. The institution dentist is responsible for the quality of care rendered by the dental hygienist and he may examine the patient after the hygiene care is delivered by the dental hygienist and he may examine the patient after the hygiene care is delivered to insure that the treatment provided is adequate. The institutional dental staff is responsible for answering request forms, scheduling, pulling charts, assessing co-pay, sterilization and instrument accountability. The hygienist is responsible for chair side clean up, instrument security, delivery of instruments to sterilization area and maintaining their activity reports.<sup>2</sup>

On April 3, 2012, Dr. H reviewed patient records and concluded that Grievant was making treatment recommendations to patients. On April 5, 2012, Grievant met with Dr. H, Dr. F and, Dr. M. During the meeting, Dr. H presented to Grievant patient charts that Grievant had completed that showed that Grievant had made final diagnosis. Grievant admitted to discussing treatment plans with offenders. Dr. H instructed Grievant not to give patient's diagnosis or treatment plans. She was told she could do hygiene with oral hygiene instruction provided to patients.

On April 17, 2012, Grievant met with a patient. Grievant told the patient that she had a cavity and if she did not take care of the tooth, she would lose the tooth.

On June 20, 2012, Grievant met with a patient and provided the patient with a graphic and elaborate explanation of periodontal disease. Without any prior discussion with Dr. H, Grievant diagnosed the patient with Periodontal Disease and Bone Loss. When Dr. H examined the patient, Dr. H concluded that the patient had Advanced Periodontitis, severe mobility, and excessive gingival inflammation with enlargement. Dr. H told the patient that action needed to be taken immediately to remove the patient's teeth. The patient told Dr. H that Grievant had told her that she could keep her teeth for another ten years. Dr. H was unable to convince the patient to vary from Grievant's assertion.

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<sup>2</sup> Agency Exhibit 1.

## CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three groups, according to the severity of the behavior. Group I offenses “include types of behavior less severe in nature, but [which] require correction in the interest of maintaining a productive and well-managed work force.”<sup>3</sup> Group II offenses “include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal.”<sup>4</sup> Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”<sup>5</sup>

“[F]ailure to follow a supervisor’s instructions, perform assigned work, or otherwise comply with applicable established written policy” is a Group II offense.<sup>6</sup>

### Group II Written Notice

On April 17, 2012, Grievant advised a patient that she had a cavity and if she did not take care of it she would lose the tooth. Grievant’s comments amounted to a diagnosis and were contrary to the instruction she received from Dr. H. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice with a four workday suspension.

### Group III Written Notice

On June 20, 2012, Grievant provided a patient with a diagnosis of Periodontal Disease and Bone Loss and told the patient she should be able to keep her teeth for another ten years. Grievant’s comments amounted to a diagnosis and were contrary to the instruction she received from Dr. H. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice. No basis exists to elevate the Group II Written Notice to a Group III Written Notice and, thus, the Group III Written Notice must be reduced to a Group II Written Notice.

Grievant has an active Group III Written Notice. With two additional Written Notices, there exists a basis to uphold the Agency’s decision to remove Grievant from employment based on the accumulation of disciplinary action.

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<sup>3</sup> Virginia Department of Corrections Operating Procedure 135.1(X)(A).

<sup>4</sup> Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

<sup>5</sup> Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

<sup>6</sup> Virginia Department of Corrections Operating Procedure 135.1(XI)(B)(1).

Grievant argued that she did not discuss a treatment plan for a patient. The Agency presented sufficient evidence to support its disciplinary action. Dr. H's testimony was credible and supports the issuance of the disciplinary action.

Grievant argued that Dr. H should not be believed because she had been disciplined by the Board of Dentistry. Whether Dr. H was disciplined by the Board of Dentistry relates to the quality of the dental services she provided to offenders. The credibility of Dr. H's testimony did not relate to the quality of the dental care she provided to offenders.

Grievant argued that her comments to offenders were permitted under State regulation defining the scope of her license. The authority granted to Grievant by the Board of Dentistry shows the maximum level of service she could provide. The Agency was within its managerial discretion to limit Grievant's authority more narrowly than the authority permitted by State regulation. The Agency did so in this case. Grievant was obligated to comply with Dr. H's instructions.

Grievant presented evidence from another dentist who considered the quality of Grievant's work to be good and that the dentist benefited from Grievant's opinions regarding treatment. The quality of Grievant's care was not at issue. The basis for disciplinary action was Grievant's failure to comply with the instructions of Dr. H. Dr. H had the authority to instruct Grievant regarding her work performance when Dr. H was supervising Grievant. Although Grievant was experienced and, in many instances, capable of providing diagnoses, she had been instructed by Dr. H to refrain from doing so.

*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>7</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.

Grievant argued that she was denied procedural due process. To the extent the Agency denied Grievant procedural due process, that defect has been cured by the

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<sup>7</sup> *Va. Code § 2.2-3005.*

EDR Ruling and through the hearing process. Grievant had the opportunity to hear the Agency's case against her and present any defenses she wished to those allegations.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with a four workday suspension is **upheld**. The issuance to the Grievant of a Group III Written Notice is **reduced** to a Group II Written Notice. Grievant's removal is **upheld** based on the accumulation of disciplinary action.

## 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 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

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR 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:

Office of Employment 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 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 provide a copy of all of your appeals to the other party, EDR, 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.

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>8</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>8</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.