

Issue: Group II Written Notice (failure to follow instructions); Hearing Date: 08/29/13;
Decision Issued: 09/16/13; Agency: DBHDS; AHO: Jane E. Schroeder, Esq.; Case
No.10150; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution
DIVISION OF HEARINGS

DECISION OF THE HEARING OFFICER

In the matter of Case Number 10150

Hearing Date: August 29, 2013

Decision Issued: September 16, 2013

PROCEDURAL HISTORY

The Grievant is employed as a Psych Tech II at the agency. On May 20, 2013, the Grievant was issued a Group II Written Notice for Offense Code 13: Failure to follow instructions and/or policy. Grievant initiated the Employee Grievance Procedure to dispute the allegations in the Written Notice. The grievance was not resolved during the management resolution steps and the grievance was subsequently qualified for hearing on July 9, 2013. On August 6, 2013, the hearing officer was assigned to hear the case.

The hearing was held on August 29, 2013. Seven witnesses testified. The agency's exhibits, identified as Agency's Exhibits A-N, and the Grievant's Exhibits, consisting of twenty-one unnumbered pages, were entered into evidence. The two-hour hearing was recorded on a digital recorder and stored on one compact disk.

APPEARANCES

Grievant

Agency's Advocate

Witnesses for Agency:

#1	Charge Nurse
#2	Registered Nurse II
#3	Nurse Unit Manager
#4	Chief Nurse Executive

Witness for Grievant:

#1	Co-worker #1
#2	Co-worker #2
#3	Grievant

ISSUE

Whether the Group II Written Notice issued on May 20, 2013 to the Grievant for violation of Offense Code 13: Failure to follow instructions and /or policy stemming from an incident alleged to occur on May 5, 2013 should be upheld, modified, or revoked. The Offense was described as follows, "On May 5, 2013, you were given an assignment to deploy to another

unit and you refused to follow this directive”.¹ No disciplinary action in addition to issuing the written notice was taken. The Grievant has requested that the Written Notice be removed from her personnel file.

BURDEN OF PROOF

In disciplinary actions and dismissals for unsatisfactory performance the burden of proof is on the Agency to show by a preponderance of the evidence that its action against the Grievant was warranted and appropriate under the circumstances. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. (Grievance Procedure Manual)

FINDINGS OF FACT

1. The Grievant is employed as a Psych Tech II at the agency. She has a relative who works in another unit of the hospital. The Grievant has been informed by Human Resources (HR) that she should not work in the other unit if her relative is working there that day.²
2. A charge nurse is responsible to review staff assignments, make changes in assignments when needed, and inform the staff of the changes.³
3. On May 5, 2013, the charge nurse in the Grievant’s unit had to make changes in the staff assignments, due to the need for Psych Techs in another unit for constant coverage of a patient in seclusion. Because of the difficulty of the assignment, she chose to break the assignment down, and gave each Psych Tech one hour at the assignment.⁴
4. When the charge nurse informed the Grievant which hour the Grievant was assigned, the Grievant said she would not go. The Grievant told the charge nurse that she could not go to the other unit because her relative worked there. The charge nurse then informed the Grievant that the Grievant’s relative was not working that day. The Grievant still refused to go to the other unit.⁵
5. The Charge Nurse then made changes to the schedule and informed another Psych Tech that she had to make the changes because the Grievant had refused to go to the other unit.⁶
6. The Grievant overheard the Charge Nurse talking to the other Psych Tech. She became angry and went into the chart room and yelled at the Charge Nurse, “You talk too much... you blab,” and accused the Charge Nurse of gossiping about the Grievant to the other Psych Tech, and trying to get the Grievant fired. The Grievant again refused to go to the other unit. This exchange was witnessed by Registered Nurse II and others in the chart room.⁷

¹Agency Exhibit M.

²Testimony of Grievant and undisputed by Charge Nurse.

³ Agency Exhibit B, p. 1.

⁴ Testimony of Charge Nurse.

⁵ Testimony of Grievant and Charge Nurse.

⁶ Testimony of Grievant and Charge Nurse.

⁷ Testimony of Grievant, Charge Nurse, and Registered Nurse II.

7. The next day, the Charge Nurse and the Registered Nurse II both reported the Grievant's refusal to the Nurse Unit Manager.⁸

APPLICABLE LAW AND OPINION

The Virginia Personnel Act, VA Code § 2.2-2900 et. seq., establishes the procedures and policies applicable to employment in Virginia. It includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provisions for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid government interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653,656 (1989).

VA Code § 2.2-3000(A) provides:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints. To that end, employees shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management. To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employee disputes that may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

The Department of Human Resource Management has produced a Policies and Procedures Manual which include policies 1.60 and 1.80:

Policy Number 1.60: Standards of Conduct.

Policy 1.60: Standards of Conduct provides a set of rules governing the professional conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

Attachment A of the Standards of Conduct provides that Group II offenses include acts of misconduct of a more serious nature that significantly impact agency operations. This level is appropriate for offenses such as failure to follow supervisor's instructions or comply with written policy; violation of a safety rule, leaving work without permission, failure to report to work without proper notice; unauthorized use or misuse of state property; refusal to work overtime.⁹

The Agency has shown by a preponderance of the evidence that the Grievant failed to follow instructions when she refused to work on another unit for one hour at the direction of the Charge Nurse. The Grievant's valid concern that the supervising personnel did not properly protect her privacy regarding her misconduct and subsequent grievance does not alter the fact

⁸ Testimony of Charge Nurse, Registered Nurse II and Nurse Unit Manager

⁹ Agency Exhibit A: Standards of Conduct, Attachment A, p. 21.

that the Grievant did not agree to work on the other unit even when the Grievant had been informed that her relative was not working on the other unit at the time.

The Agency was correct in issuing a Group II Written Notice. The Agency has the option of suspension of up to 10 workdays for the first Group II Offense. The Agency considered the Grievant's personnel file, years of service, and performance in mitigation before deciding to issue a Group II Written Notice with no suspension of time from work.

DECISION

The Group II Written Notice issued to the Grievant on May 20, 2013 is upheld. The Hearing Officer finds that the mitigation considered by the agency in determining the disciplinary action was appropriate in this case.

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 14th St., 12th 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 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 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.¹⁰

[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].

September 16, 2013

Jane E. Schroeder, Hearing Officer

¹⁰ Agencies must request and receive prior approval from EDR before filing a notice of appeal.