



**COMMONWEALTH of VIRGINIA**  
*Department of Human Resource Management*

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 11366 / 11367**

Hearing Date: August 14, 2019

Decision Issued: October 9, 2019

**PROCEDURAL HISTORY**

On March 1, 2019, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow instructions and/or policy, disruptive behavior, workplace violence, and workplace harassment. On March 1, 2019, Grievant received a Group I Written Notice for failure to follow instructions and/or policy, workplace violence, and workplace harassment.

Grievant timely filed a grievance to challenge the Agency's actions. The outcomes of the Third Resolution Step were not satisfactory to the Grievant and she requested a hearing. On May 3, 2019, the Office of Employment Dispute Resolution issued Ruling No. 2019-4922 consolidating the two grievances for a single hearing. On May 29, 2019, EDR assigned this appeal to the Hearing Officer. On August 14, 2019, a hearing was held at the Agency's office.

**APPEARANCES**

Grievant  
Agency Representative  
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. 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 employs Grievant as a DSA II at one of its facilities. She has been employed by the Agency for approximately 16 years. No evidence of prior active disciplinary action was introduced during the hearing.

Active treatment is a concept found in Medicaid regulations which describes the responsibility of each staff member to provide quality services and appropriate interactions in all settings at all times. Active treatment applies to formal and informal interactions and directs that all staff members interact with individuals in a manner which is consistent with training objectives, is age-appropriate, and treats all with dignity. Staff members are assigned to conduct education/training and other services in day activity centers. Staff must perform services professionally and cooperatively.

On April 9, 2018, Grievant received verbal counseling that:

No loud, abusive, or threatening communication is permitted. Each staff member should interact with other staff members pleasantly and positively and demonstrate a continuous focus on active treatment and services.<sup>1</sup>

On February 4, 2019, Grievant was working with a client in the Day Support Program. The Art Instructor conducted an Art class as part of the Facility's therapeutic treatment program. The Art Instructor paired staff with individuals and they participated in the class instruction to make art projects. An objective for the program was for individuals to benefit from interacting with staff and to learn to handle and manipulate project materials.

Grievant walked into the Art class and observed the Art Instructor's planned project for the individuals. Grievant was not cooperative. Grievant complained, "Are we going to do this again?" The Art Instructor asked Grievant to sit between two individuals and work with them on an art project. Grievant said she "could not work with two people." The Art Instructor offered to let Grievant work on another activity but said she "could not do that." In order to avoid conflict, the Art Instructor gave Grievant some markers and a clip board to work with Client L. The Art Instructor told Grievant, Grievant could help Client L grasp the marker and Grievant could move the clip board as Client L marked the page.

Grievant was concerned about the quality of assistance provided by Ms. W. Grievant asked other employees what Ms. W did on their shifts. Grievant called Ms. A outside of work hours and asked if Ms. W was "pulling her weight" on Ms. A's shift. Ms. W learned of the telephone call and became upset by Grievant's claim.<sup>2</sup>

## **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>3</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."

### Group II Written Notice

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<sup>1</sup> Agency Exhibit 11.

<sup>2</sup> The Hearing Officer cannot determine the merits of Grievant's comment about Ms. W. It may be the case that Ms. W was not "pulling her weight" when working with Grievant or it may be the case that Ms. W was performing adequately and Grievant's claim was false.

<sup>3</sup> The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

Failure to follow instructions is a Group II offense. On April 9, 2018, Grievant was instructed:

Each staff member should interact with other staff members pleasantly and positively and demonstrate a continuous focus on active treatment and services.

On February 4, 2019, Grievant complained and objected to the how the Art Instructor was conducting her class for residents. Grievant was not positive regarding the class and demonstrated a negative attitude towards the class and the individuals' ability to implement the treatment program. Grievant did not interact pleasantly and positively with the Art Instructor. Grievant was unnecessarily argumentative and did so in front of individuals. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow instructions.<sup>4</sup>

Grievant did not engage in harassment, bullying, or workplace violence.

### Group I Written Notice

Much of the Agency's evidence regarding the Group I Written Notice was unclear and disjointed. It is difficult for the Hearing Officer to conclude who said what to whom as well as the tone and intent of those conversations. Grievant's complaint to Ms. A that Ms. W was not pulling her weight is not sufficiently material to support disciplinary action.<sup>5</sup> It is not unusual for employees to discuss other employees and the work performed by other employees including criticizing other employees. There is no reason for the Hearing Officer to believe that Grievant's conduct towards Ms. W was so severe or pervasive and persistent to conclude that Grievant was bullying Ms. W under DHRM Policy 2.35. The Agency's Instruction 4102 is largely aspirational in nature. To the extent the Instruction refers to disruptive behaviors, Grievant did not engage in any of those behaviors. The policy refers to "intimidating and disruptive behaviors" as including "overt actions, such as verbal outburst and physical threats, as well as passive activities such as refusing to perform assigned tasks or interfering with someone being able to complete his/her assigned duties. The policy prohibits "disrespectful language" such as "name calling, racial/ethnic jokes, etc."<sup>6</sup> The Group I Written Notice must be reversed.

### Mitigation

*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

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<sup>4</sup> Grievant did not engage in workplace violence. Grievant did not violate DHRM Policy 2.35 governing Civility in the Workplace.

<sup>5</sup> Grievant's comment was not made directly to Ms. W and, thus, Grievant was not interacting with Ms. W at the time of her comment.

<sup>6</sup> The Hearing Officer does not believe Grievant referred to Ms. W as "lazy."

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 Group II Written Notice.

## DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group II Written Notice of disciplinary action is **upheld**. The Agency’s issuance to the Grievant of a Group I Written Notice of disciplinary action is **rescinded**.

## APPEAL RIGHTS

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

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 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

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<sup>7</sup> Va. Code § 2.2-3005.

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