COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11386

Hearing Date: September 11, 2019
Decision Issued: October 1, 2019

PROCEDURAL HISTORY

On May 16, 2019, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow policy. Grievant was removed from employment based on the accumulation of disciplinary action.

On July 18, 2019, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On June 18, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 11, 2019, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
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 Registered Nurse at one of its locations. Grievant's Employee Work Profile specified that, "All communications will be open, factual, clear, and respectful."[1] She began working for the Agency on March 25, 2016. Grievant had prior active disciplinary action. She received a Group II Written Notice on April 15, 2019 for failure to follow instructions and/or policy.

The Facility offered training to its physicians. This training was called Grand Rounds. Nursing staff were permitted but not required to attend Grand Rounds. Grand Rounds were conducted at the Facility once per month. Grand Rounds usually began at noon and lasted for approximately one hour. Employees who were unable to attend Grand Rounds could view online a recording of each session. The Grand Rounds on April 24, 2019 was entitled "Food for Thought: A Case Review for Eating Disorder" which was presented by Dr. S.

The Patient had a history of choking and needed to be observed more closely when she was eating her meals in the Dining Room.

Facility nursing employees were allowed 30 minutes for lunch. The general practice at the Facility was that if an employee could not perform his or her shift duties, the employee was obligated to ask another employee "cover" for that employee. Dr. M

[1] Agency Exhibit 5.

described the standard practice as, “before leaving a post, make sure your job will be done by someone else.” The general practice at the Facility was that if an employee wanted to take an extended lunch period, the employee had to obtain permission from the Nurse Coordinator.

On April 24, 2019, Grievant was assigned responsibility to “Monitor Dining Room during Meals.” This meant she was to be in the Dining Room during lunch to monitor patients who might need assistance. Lunch for patients began at noon.

Two Charge Nurses were working on April 24, 2019. Grievant reported to both Charge Nurses.

At 11:30 a.m., Charge Nurse K went to the Cafeteria where Grievant was working to relieve her so she could take her lunch break. Charge Nurse K relieved Grievant at 11:30 a.m. so that she could be back from lunch at noon. Grievant asked Charge Nurse K, “Can I go to Grand Rounds as part of my lunch.” Charge Nurse K said, “Yes.” Grievant did not ask Charge Nurse K to obtain “coverage” for Grievant. If Grievant had asked for coverage, Charge Nurse K would have assigned another employee in Grievant’s place for the noon meal.

Since Grand Rounds were not scheduled to begin until noon, Grievant went to Building P (where the Dining Room was located). At approximately 11:50 a.m., Grievant spoke with Charge Nurse A. Grievant said, “I’m going for Grand Rounds.” Charge Nurse A said, “Ok.” Grievant left and went to the Grand Rounds presentation.

At approximately noon, Charge Nurse K went to the Dining Room and began passing out food trays to patients. He was working in a room with a doorway that opened into the Dining Room.

Approximately five patients were in the Dining Room eating lunch.

Charge Nurse K gave the Patient a tray of food and the Patient took the tray to a table. She sat with her back to Charge Nurse K and began eating. Approximately ten minutes after noon, the Patient began choking on a bite of her food. Two other patients noticed the Patient choking and notified Charge Nurse K. Charge Nurse K entered the Dining Room, patted the Patient on her back, stood up the Patient and performed the Heimlich maneuver several times. The Patient stopped choking.

Grievant returned from Ground Rounds at approximately 1:15 p.m. She took a short break in the conference room to eat.

Agency managers learned that the Patient had choked on her food and began an investigation. The Agency realized Grievant was not at her post in the Dining Room beginning at noon. Agency managers believed that if Grievant had been at her post in the Dining Room she would have been in a position to see the Patient choking before the other patients realized the Patient was choking.

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."[2] 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."

DHRM Policy 1.25 requires employees to "Take breaks and lunch periods as authorized." Like other nursing staff, Grievant was authorized to take a 30 minute lunch break. Grievant was free to do what she wished during her lunch break including attending Grand Rounds. On April 24, 2019, Grievant was relieved of her post in the Café by Charge Nurse K so that Grievant could take her lunch break. Charge Nurse K expected Grievant to be at her post following her lunch break. Grievant asked Charge Nurse K if she could attend Grand Rounds and Charge Nurse K said Grievant could attend. Grievant told Charge Nurse A that Grievant was going to Grand Rounds and Charge Nurse A said "ok." Grievant did not ask Charge Nurse K or Charge Nurse A to obtain coverage for Grievant. Charge Nurse K and Charge Nurse A did not realize Grievant intended to exceed her allowed lunch period. Grievant was expected to be clear in her communications and should have informed her supervisors that she did not intend to report to her post in the Dining Room at the end of her lunch break. Grievant was expected to obtain coverage if she was unable to fill her post. She did not do so. Grievant assumed that her two supervisors would ask other employees to cover for Grievant. Grievant's expectation was unreasonable because the practice at the Facility was for employees to obtain coverage and not for supervisor's to automatically do so. To the extent Grievant assumed the two supervisors would provide coverage for her without her asking them to do so, she did so at her own risk.

Grievant argued that she had permission of two supervisors to attend the Grand Rounds and, thus, did not have to report to the Dining Room at noon. The evidence showed that Grievant had permission to attend the Grand Rounds but that permission did not include extending her lunch period to perform other activities.

Grievant argued that other employees were near the Dining Room and could have assumed Grievant's duties in her absence. Although Grievant's assertion is true, Facility supervisors did not assign those other employee's in Grievant's place because they did not know Grievant would not be reporting to her post at noon.

Grievant argued her absence from her post was excused by DHRM Policy 5.05 Employee Training and Development. Section D provides:

> The time that an employee spends at an approved training program during normal work hours shall be considered as part of the employee's normal

[2] The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

> work hours and shall not be charged to his or her accumulated leave or considered leave without pay.[3]

Grievant's argument misses the point. Whether Grievant was working while she was attending Grand Rounds was not the basis for the Agency's disciplinary action. The disciplinary action related to where Grievant was working and the evidence showed she was not working at her post at noon.

This is a difficult case. Grievant did not extend her lunch period and fail to report timely to her post because she was pursuing personal interests unrelated to her job. She was trying to improve her skills -- something every employee should do. The Agency could have corrected Grievant's behavior without issuing a Group II Written Notice and removing Grievant. Although the Hearing Officer may have acted differently if faced with the Agency's disciplinary choice, the Agency acted within the scope of its discretion.

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 …."[4] 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 is **upheld**. Grievant's removal is **upheld** based on the accumulation of disciplinary action.

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[3] In contrast, DHRM Policy 1.25 provides, "When employees are required to work during their lunch, that period shall be counted as time worked. When necessary to provide staffing for client or offender services and care, the lunch period shall be considered time worked." Grievant was not required to attend Grant Rounds.

[4] Va. Code § 2.2-3005.

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 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 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.[1]

[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

Carl Wilson Schmidt, Esq.
Hearing Officer

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

COMMONWEALTH of VIRGINIA

Office of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 11386-R

Reconsideration Decision Issued: December 18, 2019

RECONSIDERATION DECISION

On November 18, 2019, EDR issued Ruling 2020-5001 remanding this matter to the Hearing Officer.

Grievant was relieved from her post in the Café at 11:30 a.m. so that she could go on her lunch break. Her lunch break began at 11:30 a.m. Grievant was entitled to a lunch break not exceeding 30 minutes which was consistent with the lunch breaks for other employees at the Facility. Grievant's lunch break was scheduled to end at noon. Although Grievant's supervisors authorized Grievant to attend Grand Rounds, neither authorized Grievant to extend her lunch break past 30 minutes.[1] The Nurse Coordinator had the authority to extend Grievant's lunch period, but Grievant did not speak with the Nurse Coordinator. Both supervisors were in a position to remind Grievant of her obligation to report to her assigned post at noon.

At noon, Grievant was supposed to be at her post in the Dining Room. Instead, Grievant was attending Grand Rounds. A patient in the dining room choked. If Grievant had been at her assigned post at noon, she would have been able to respond immediately to the patient. Grievant went to the Dining Room at approximately 1:15 p.m. Thus, she extended her lunch period by at least one hour and fifteen minutes.

DHRM Policy 1.25 sets forth an agency's authority to set time periods for lunch breaks. DHRM Policy 1.25 requires employees to "Take breaks and lunch periods as authorized." DHRM Policy 1.60 establishes an expectation that employees report to work as scheduled (Grievant reported to work) and to seek approval in advance to change established work schedules (Grievant sought the approval of two supervisors).

[1] The supervisor considered their authorizations to be with the assumption of a 30 minute time authorization. Grievant considered their authorizations to be with the assumption of no time restriction.

Attachment A to DHRM Policy 1.60 lists "abuse of State time" as a Group I offense. Taking an extended lunch break without approval is best described as an abuse of State time and not as a failure to comply with policy.

Mitigating circumstances exist to reverse the Group I Written Notice for abuse of State time. First, Grievant extended her lunch period but did so for the purpose of receiving training that could improve her work performance. Second, Grievant at all times believed she had the approval of two supervisors to extend her lunch period to attend Grand Rounds. Third, both supervisors had the opportunity to remind Grievant to return to her post by noon, yet neither did so. There is no basis to issue Grievant disciplinary action for extending her lunch period.

The Agency amended its Written Notice to inform Grievant that it also was disciplining her for failing to complete her assignment to monitor patients in the dining hall during meal times. At approximately 12:10 p.m., a patient eating in the dining room began choking. Grievant was not at her post. The Agency contends Grievant should be disciplined because she was obligated to be at her post at noon and failed to do so.

An agency's discipline is constrained by the terms of its Written Notice. In this case, the Agency presented evidence that Grievant's lunch period began at 11:30 a.m. and ended at noon. The Agency's Written Notice is contrary to its evidence. The Written Notice specifies Grievant "left her assigned area at 11:49 a.m. to have lunch." In other words, the Agency's Written Notice provides that Grievant's lunch period began at 11:49 a.m. instead of 11:30 a.m. Since Grievant had 30 minutes to complete her lunch period, she was authorized to be at lunch until 12:19 p.m. The Patient choked at approximately 12:10 p.m. which was prior to the end of Grievant's authorized lunch period. Thus, Grievant was not obligated to be at her post at noon since she was authorized to be on her lunch break at that time. There is no basis to take disciplinary action against Grievant for failing to be at her post at noon. The Group II Written Notice must be reversed with Grievant being reinstated.

The Virginia General Assembly enacted *Va. Code § 2.2-3005.1(A)* providing, "In grievances challenging discharge, if the hearing officer finds that the employee has substantially prevailed on the merits of the grievance, the employee shall be entitled to recover reasonable attorneys' fees, unless special circumstances would make an award unjust." Grievant has substantially prevailed on the merits of the grievance because he is to be reinstated. There are no special circumstances making an award of attorney's fees unjust. Accordingly, Grievant's attorney is advised to submit an attorneys' fee petition to the Hearing Officer within 15 days of this Decision. The petition should be in accordance with the EDR Director's *Rules for Conducting Grievance Hearings*.

RECONSIDERATION ORDER

The Group II Written Notice with removal is **rescinded**. The Agency is ordered to **reinstate** Grievant to Grievant's same position at the same facility prior to removal, or if

the position is filled, to an equivalent position at the same facility. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal. The Agency is directed to provide **back benefits** including health insurance and credit for leave and seniority that the employee did not otherwise accrue.

APPEAL RIGHTS

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

/s/ Carl Wilson Schmidt

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Carl Wilson Schmidt, Esq.
Hearing Officer

COMMONWEALTH of VIRGINIA
Department of Human Resource Management

ADDENDUM TO DECISION OF HEARING OFFICER

In re:

Case No: 11386-A

Addendum Issued: January 27, 2020

DISCUSSION

The grievance statute provides that for those issues qualified for a hearing, the Hearing Officer may order relief including reasonable attorneys' fees in grievances challenging discharge if the Hearing Officer finds that the employee "substantially prevailed" on the merits of the grievance, unless special circumstances would make an award unjust.[1] For an employee to "substantially prevail" in a discharge grievance, the Hearing Officer's decision must contain an order that the agency reinstate the employee to his or her former (or an objectively similar) position.[2]

To determine whether attorney's fees are reasonable, the Hearing Officer considers the time and effort expended by the attorney, the nature of the services rendered, the complexity of the services, the value of the services to the client, the results obtained, whether the fees incurred were consistent with those generally charged for similar services, and whether the services were necessary and appropriate.

Grievant's Counsel devoted 49.40 hours to representing Grievant. At the hourly rate of $131, Grievant is entitled to reimbursement in the amount of $6,471.40.

The petition also includes costs. The statute provides for the award of attorneys' fees, not costs. If the Legislature had intended to include costs, it would have included that term in the statute. Accordingly, the Hearing Officer has no authority to award costs.

[1] Va. Code § 2.2-3005.1(A).

[2] § 7.2(e) Department of Human Resource Management, *Grievance Procedure Manual*, effective August July 1, 2017. § VI(E) EEDR *Rules for Conducting Grievance Hearings*, effective July 1, 2017.

AWARD

The Grievant is awarded attorneys' fees in the amount of $6,471.40. The petition for costs is denied.

APPEAL RIGHTS

If neither party petitions the EDR Director for a ruling on the propriety of the fees addendum within 10 calendar days of its issuance, the hearing decision and its fees addendum may be appealed to the Circuit Court as a final hearing decision. Once the EDR Director issues a ruling on the propriety of the fees addendum, and if ordered by DHRM, the hearing officer has issued a revised fees addendum, the original hearing decision becomes "final" as described in §VII(B) of the *Rules* and may be appealed to the Circuit Court in accordance with §VII(C) of the *Rules* and §7.3(a) of the *Grievance Procedure Manual*. The fees addendum shall be considered part of the final decision. Final hearing decisions are not enforceable until the conclusion of any judicial appeals.

/s/ Carl Wilson Schmidt

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Carl Wilson Schmidt, Esq.
Hearing Officer