



# ***COMMONWEALTH of VIRGINIA***

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

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

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

In re:

**Case Number: 11441**

Hearing Date: January 8, 2020  
Decision Issued: January 13, 2020

#### **PROCEDURAL HISTORY**

On August 22, 2019, Grievant was issued a Group II Written Notice of disciplinary action with removal for failure to follow instructions.

On September 9, 2019, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On October 21, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 8, 2020, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
Grievant's Representative  
Agency Party Designee  
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 Psych Tech at one of its facilities. She began working for the Agency in 2005. Grievant had prior active disciplinary action. Grievant received a Group II Written Notice on July 10, 2017 for failure to follow instructions.

Grievant reported to Ms. H who reported to Ms. G who reported to the Chief Nursing Executive.

On April 19, 2019, Grievant was working on the ward at the Facility. Ms. H was working in the Unit nursing station. Ms. G called to the phone in the nursing station. Ms. H called Grievant to come to the nursing station to take the call. Grievant refused to come to the nursing station to answer the phone. Grievant said she was working her post. Ms. H placed Ms. G on speakerphone while Grievant stood in the doorway of the nursing station. Ms. G asked Grievant if someone could take her place and for Grievant to come to Ms. G's office in another location. Ms. G said she needed to speak with Grievant. Grievant said, "No, you can come to me." Ms. G asked Grievant if she had a post. Ms. S overheard the conversation and said that she could sit at Grievant's post. Grievant went back to the ward and sat down as she held the observation paperwork. Ms. H would have assigned another employee to fill Grievant's post if Grievant had been willing to leave her post.

Ms. G came to the Unit and spoke with Grievant at approximately 1 p.m. Ms. G told Grievant, "I have received a supervisory direction that it is necessary for you to report to [Building H] no later than 1:20 p.m. and this is a supervisory direction from me to you. You are relieved of your duties until you are able to return from [Building H] and then you are to resume your assignment upon return." Grievant said, "Ok." The supervisory instruction to Ms. G came from the Chief Nursing Executive who wanted to meet with Grievant to discuss the relief requested by Grievant in a prior grievance.

At approximately 1:15 p.m., Ms. G told Ms. H that Grievant needed to be in Building H no later than 1:20 p.m. Ms. H went to the ward to remind Grievant to go to Building H. Grievant did not leave the ward.

The Agency issued Grievant a Group II Written Notice with removal dated May 2, 2019. Grievant was on short-term disability at that time and the Agency rescinded the notice until she returned to work. Grievant returned to work on August 19, 2019 and the Agency issued the Group II Written Notice with removal on August 22, 2019.

### **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>1</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."

Failure to follow a supervisor's instructions is a Group II offense.<sup>2</sup> On April 19, 2019, Grievant was instructed by a supervisor, Ms. G, to report to Ms. G's office. Grievant refused to do so. Grievant was instructed by Ms. G to report to Building H at 1:20 p.m. Ms. H reminded Grievant of the instruction. Grievant refused to do so. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow a supervisor's instructions.

Upon the accumulation of two Group II Written Notices, an agency may remove an employee. Grievant has accumulated two Group II Written Notices. Accordingly, Grievant's removal must be upheld.

Grievant argued she could not leave her post. The evidence showed that Ms. S offered to work in Grievant's place so that Grievant could leave her post. Ms. S went to lunch only after Grievant indicated she would not leave her post.

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<sup>1</sup> The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

<sup>2</sup> See, Attachment A, DHRM Policy 1.60.

Grievant argued that she did not want to meet with the Chief Nursing Executive without her representative being present. The instructions given to Grievant were lawful and ethical and within the scope of Grievant's employment duties. Grievant did not have the discretion to disregard the instructions simply to wait until her representative was available. Moreover, it is not clear that Grievant expressed to Ms. H or Ms. G the reason why Grievant refused to meet with the Chief Nursing Executive.

*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>3</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.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with removal is **upheld**.

## 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.

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<sup>3</sup> Va. Code § 2.2-3005.

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>[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.