



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

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 11728**

Hearing Date: November 29, 2021  
Decision Issued: December 20, 2021

**PROCEDURAL HISTORY**

On June 7, 2021, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow policy.

Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On August 23, 2021, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 29, 2021, a hearing was held by remote conference.

**APPEARANCES**

Grievant  
Agency 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 employs Grievant as a Direct Service Associate II at one of its facilities. Grievant had prior active disciplinary action. On October 9, 2019, Grievant received a Group I Written Notice for poor attendance.

During every shift, one or more staff were required to walk through the Facility and check on the status of each patient every 15 minutes. Staff carried computer tables to record their observations of patients. The checks were called Q15 checks.

Grievant was scheduled to work on April 8, 2021 from 7 a.m. to 11:30 p.m. She had been mandated to work an additional shift.

On April 8, 2021, Grievant was assigned responsibility to conduct Q15 checks from 9 p.m. through 11:15 p.m. She took a computer tablet from the nursing office and began conducting her Q15 checks at 9 p.m.

Grievant walked down the Facility hallway at 10:06 p.m. She did not look into all of the patient's rooms to determine their status. At approximately 10:30 p.m., Grievant was seated in a chair. She did not perform the 10:30 p.m. check. At approximately 10:45 p.m., Grievant was not in the hallway performing checks. She did not perform the 10:45 p.m.

check. At approximately 11 p.m., Grievant was not in the hallway performing checks. She did not perform the 11 p.m. check.

At 11:12 p.m., Grievant left her work area and headed for home. Grievant did not perform the 11:15 p.m. check.

### 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 policy is a Group II offense.<sup>2</sup> Policy 280-033 governed Patient Observation/Monitoring and required staff to monitor patients at the Facility every 15 minutes. On April 8, 2021, Grievant was assigned responsibility to conduct Q15 checks from 9 p.m. until 11:15 p.m. Grievant did not perform the checks at 10:15 p.m., 10:30 p.m., 10:45 p.m., 11:00 p.m. and 11:15 p.m. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow policy.

Grievant argued she was “only human” and that she told the day shift nurse she was leaving at 11 p.m. She argued she was an otherwise good employee. The Agency presented evidence showing Grievant was obligated to perform Q15 and failed to do so. Grievant did not present evidence showing that she was authorized to leave before the end of her shift.

Grievant argued the tablet was not working properly. The evidence showed that if Grievant’s tablet stopped working, she could have obtained another tablet or used paper forms to complete the checks.

*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

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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.

<sup>3</sup> *Va. Code § 2.2-3005.*

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**.

## 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 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>

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

[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