



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

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 11733**

Hearing Date: January 21, 2022  
Decision Issued: February 10, 2022

**PROCEDURAL HISTORY**

On August 9, 2021, Grievant was issued a Group III Written Notice of disciplinary action with removal for unauthorized use of State property or records. Grievant was also issued a Group III Written Notice of disciplinary action with removal for falsifying records.

On August 17, 2021, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On September 7, 2021, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 21, 2022, a hearing was held by remote conference.

**APPEARANCES**

Grievant  
Grievant's Counsel  
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 Social Services employed Grievant as a Hotline Specialist at one of its locations. She began working for the Agency on July 25, 2018. Grievant acknowledged that she had access to confidential information and would not attempt to access data unrelated to her job duties. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant received calls relating to Adult Protective Services (APS) and Child Protective Services (CPS) complaints. Grievant would then enter information relating to those calls into the Agency's CPS database called OASIS or the Department of Aging and Rehabilitative Services' APS database called PeerPlace. The PeerPlace User Manual described PeerPlace as "a collaborative case management system." Grievant sometimes kept OASIS open on her computer even though she was working on an adult protective services call and keep PeerPlace open on her computer even though she was processing a child protective services complaint.

Grievant was required to complete a Shift Log to account for her work duties during her shift. She was expected to record:

- a. Logging into systems (log in no earlier than 5 minutes prior to your shift)

- b. Time spent on inbound calls
- c. Data entry
- d. Time spent on outbound calls
- e. Time spent waiting to receive calls
- f. Technical issues (list Help Desk ticket number)
- g. Meal breaks (30 minutes), regular breaks (no more than 15 minutes) and personal breaks (no more than 10 minutes).
  - Regular breaks are only for staff working eight (8) hours or more.
  - You should not take lunch/meal breaks towards the end of your shift.<sup>1</sup>

Grievant has a disability and as part of her accommodation, she was permitted to take breaks during the day without having to record on her Shift Log the times she took breaks.

Grievant's Mother resided within the jurisdiction of the City DSS. She was entitled to receive services from the City DSS. Grievant did not have any work related duties with respect to APS cases involving her Mother. Grievant was not authorized to review case information in PeerPlace about her Mother.

On July 27, 2021, Grievant reported on her shift log that she was in a CPS referral from 9:27 a.m. to 11:29 a.m.

Grievant had a CPS telephone call from 9:27 a.m. to 9:48 a.m.

Grievant accessed OASIS from 9:32 a.m. to 9:35 a.m. to enter a complaint.

Grievant completed a CPS referral at 11:24 a.m. and sent the local DSS information.

Grievant accessed PeerPlace from 10:51 a.m. until 11:56 a.m. and from 2:25 p.m. to 3:26 p.m. on July 27, 2021.

Grievant wrote on her Shift Log that she handled an APS case from 11:45 a.m. to 1:29 p.m. and an APS call from 2:01 p.m. to 3:25 p.m.

The InContact phone record showed Grievant made calls from 11:54 a.m. to 12:04 p.m. and 2:03 p.m. to 2:38 p.m.

Grievant had telephone calls with employees of the City DSS at 9:56 a.m., 10:12 a.m., and 11:39 a.m. to discuss Grievant's Mother.

Ms. R told Ms. H to contact Grievant regarding a long term care screening Grievant's Mother recently completed. Ms. H had not completed the screening but was the one who scheduled the screening. Ms. H called Grievant and explained the reasons

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<sup>1</sup> Agency Exhibit p. 78.

why a screening could result in denial of services. Grievant became upset and explained that she knew the policies since she worked for the State. Grievant said she had received the UAI<sup>2</sup> from Ms. R and did not believe all of her Mother's information was correctly provided. Grievant said there was no mention of the 2 APS cases that the City DSS "had on her mother and, per policy, if a client has an APS case, this information must be included in a UAI screening." Grievant told Ms. H Grievant had viewed this information in PeerPlace. Grievant's comment confused Ms. H because Ms. H was unaware that the Mother had any open APS cases with the City DSS. Ms. H logged into PeerPlace while speaking with Grievant to review the Mother's case information. Ms. H did not observe any APS case files in the Mother's case information. Ms. H transferred the call to Ms. S.

Ms. R said she was going to speak with the City DSS Director about what she had heard and then stepped out of Ms. H's office.

Ms. H entered Ms. R's office and listened to the conversation between Ms. R and Ms. S. Ms. H showed Ms. R that the Mother had two profiles in PeerPlace but Ms. H could not "by-pass" the case information without there being an active APS case. Ms. R told Ms. H to take her computer to the City DSS Director's office and show the City DSS Director what Ms. H had found.

Ms. H spoke with the City DSS Director. The City DSS Director said she was going to contact Ms. Ri, the Eastern Region Consultant with DARS. Ms. Ri accessed PeerPlace and did not find any APS cases for the Mother that the City DSS staff were unable to identify.

The City DSS Director spoke with Grievant at 11:39 a.m. The City DSS Director wrote a statement about that call:

Upon returning to the office from a City Department Head Meeting, I learned that [Grievant] contacted several Family Services staff including [Ms. S] who performed the screening, [Ms. H] who looked at information in the PeerPlace system while talking to [Grievant], and [Ms. R], the supervisor. Staff reported to me that they were unable to assist [Grievant] with her complaint. The complaint as reported to me by staff was that [Grievant] had not received a copy of the results of the screening and did not agree with the screening results denying her mother services. When staff tried to explain the process to request another screening for her mother, [Grievant] stated that the agency neglected to investigate an Adult Protective Services complaint received on her mother, and that such report was in PeerPlace. Staff went into PeerPlace and were unable to locate this report, and [Grievant] went into PeerPlace and was looking at the case at the same time as the worker to try and show the worker where the report was located.

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<sup>2</sup> Uniform Assessment Instrument.

I called [Grievant] at the number provided, identified myself, and asked how I could assist her. [Grievant] stated that her mother, [Mother] had a UAI screening on June 24, 2021 by [Ms. S] and [Ms. C]. She stated that she provided information from her mother's PCP stating that she is in the early stages of dementia. She stated that the UAI was done over the telephone with her mother, and that the letter from the PCP was never mentioned. [Grievant] stated that her mother did not know how to do any of her ADL's, IADL's and had a recent fall. She stated that her mother had an APS history and that she had an encounter number in PeerPlace. [Grievant] said the APS was not handled correctly and there are two encounter numbers. [Grievant] then stated that her mother is incontinent and lives alone and again stated that she submitted written documentation from the PCP.

She said that she never received the screening results letter which is dated July 9, 2021. She said that her mother is very resistant and will not live with her, does not know when she has medical appointments, had a rollator that she will not use, gets money from her bank account, and has had feces in both bathrooms. [Grievant] stated that she asked about the screening denial, and spoke with [Ms. H]. [Grievant] told me that she had interviewed with [City DSS] before and was offered a position. She also stated that she works at the state hotline.

I cautioned [Grievant] about looking at her mother's case in PeerPlace in her current position stating this can get her in trouble. She then told me that she did not look at her mother's case. [Grievant] stated that she used to be an investigator. She said that she did not disclose to staff that she worked at the hotline and approached the situation as a daughter. I again cautioned her on looking up information. She stated she is has Medical Power of Attorney over her mother. When asked if we had a copy of that, she informed me that we do not.<sup>3</sup>

The Agency attempted to verify that Grievant had accessed PeerPlace records regarding her Mother. On July 28, 2021, the Information Security Officer wrote:

Peerplace does not log a record when a user views a profile or performs a search. It does log a record when a modification is made to a profile, but no modifications were made to the profile in question by the user we discussed.

Following the Agency's investigation, it presented Grievant with Notices of Intent to issue disciplinary action. Grievant had adequate time and information to respond to those Notices.

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<sup>3</sup> The City DSS Director understood Grievant to be alleging the City DSS had not responded to two adult protective service complaints about Grievant's Mother. The City DSS Director testified she looked in PeerPlace for adult protective service complaint about Grievant's Mother and "there were zero" and "thus, nothing for us to respond to."

## CONCLUSIONS OF POLICY

The Agency issued Grievant a Group III Written Notice for misuse of PeerPlace and a Group III Written Notice for falsifying her Shift Log.

### Group III Written Notice - Unauthorized use of State property or records

The Agency alleged Grievant “accessed a system to review her mother’s case which is prohibited activity.” The Agency alleged Grievant acted contrary to the VDSS Information Resource Acceptable Use policy. The Written Notice states:

In summary, based on the information contained in her self-reported shift log, there is no work related reason for [Grievant] to have accessed PeerPlace between 10:51am and 11:44am. We have every reason to believe she accessed the system to review her mother’s case and based on the calls she made to [City DSS] and statement(s) made during those calls, she has admitted to “accessing PeerPlace to review” her mother’s record.

Although the Agency’s concerns about protecting confidential data are understandable, the Agency’s Group III Written Notice rests on Grievant’s alleged admission.

The Agency did not establish that Grievant improperly accessed PeerPlace for several reasons. First, user data from PeerPlace was limited. PeerPlace did not show that Grievant accessed her Mother’s case information. It is possible Grievant searched for her Mother’s name in PeerPlace. PeerPlace, however, was not able to record if Grievant searched in PeerPlace for her Mother’s name. PeerPlace only recorded a user modifying a record and Grievant did not modify any of her Mother’s records. There is no computer record showing Grievant accessed her Mother’s information in PeerPlace.

Second, the Agency alleged, “[d]uring her call with [City DSS Director] at approximately 11:39am, [Grievant] stated that she was accessing PeerPlace to review her mother’s record.” The evidence showed that Grievant did not admit to the City DSS Director that she used PeerPlace to look up information on her mother. The City DSS Director was told by Ms. H that Grievant told Ms. H that Grievant had used PeerPlace to look up information about Grievant’s Mother. Grievant told the City DSS Director that “she did not look at her mother’s case.” Grievant did not tell the City DSS Director that Grievant accessed PeerPlace to review her Mother’s information.

Third, Grievant told Ms. H that Grievant had accessed PeerPlace and observed that the City DSS had two open APS cases on Grievant’s Mother. The City DSS staff reviewed the Mother’s PeerPlace case information and there were no APS complaints for the City DSS to investigate. Since PeerPlace did not show that Grievant’s Mother had two

APS cases, it cannot be true that Grievant accessed the Mother's information in PeerPlace and observed that there were two open APS cases.<sup>4</sup> Grievant had sufficient experience with PeerPlace to recognize when an APS claim had been filed relating to a local DSS client. The only logical conclusion from Ms. H's testimony is that Grievant was untruthful to Ms. H when Grievant told Ms. H Grievant had accessed PeerPlace and observed two open cases. Although Grievant informed Ms. H that Grievant worked for the State, Grievant did not contact Ms. H in Grievant's capacity as an Agency employee. The Agency did not discipline Grievant for being untruthful to Ms. H.

The Group III Written Notice for accessing protected information must be reversed.

### Group III Written Notice – Falsification of Records

The Agency alleged:

The information [Grievant] self-reported on her shift log does not align with her actions on July 27, 2021. This is not a simple mistake. [Grievant accessed a system to review her mother's case which is prohibited activity. She falsely recorded activities on her shift log in an effort to conceal what she was actually doing.

The Agency has not established that Grievant attempted to conceal her activity. The Agency did not show that Grievant reviewed PeerPlace in order to review her Mother's case information. The Agency cannot establish that Grievant made incorrect entries in her Shift Log in order to conceal something that the Agency has not established actually occurred. The Agency established that Grievant's shift log was not completely accurate. This behavior rises to a Group I offense.

The Group III Written Notice must be reduced to a Group I Written Notice for unsatisfactory job performance.

### 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 accordance with rules established by the Department of Human Resource Management ...."<sup>5</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

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<sup>4</sup> In addition, PeerPlace did not give Grievant permission to assess complaints filed by other sources. For example, if local agency sent an APS complaint to the City DSS for investigation, Grievant would not be able to see that complaint when she accessed PeerPlace.

<sup>5</sup> Va. Code § 2.2-3005.

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 further the disciplinary actions.

### Attorney’s Fees

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*.

## **DECISION**

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group III Written Notice of disciplinary action with removal for unauthorized use of State property or records is **rescinded**. The Agency’s issuance to the Grievant of a Group III Written Notice of disciplinary action with removal for falsifying records is **reduced** to a Group I Written Notice. The Agency is ordered to **reinstate** Grievant to Grievant’s same position prior to removal, or if the position is filled, to an equivalent position. 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**

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>

[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.