



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

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 11654**

Hearing Date: June 17, 2021

Decision Issued: July 8, 2021

**PROCEDURAL HISTORY**

On November 10, 2020, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory performance.

On December 10, 2020, 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 March 1, 2021, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 17, 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 employed Grievant as a Registered Nurse Supervisor at one of its facilities. She began working for the Agency in October 2009. She left the Agency in March 2021. No evidence of prior active disciplinary action was introduced during the hearing.

On June 12, 2020, Grievant received a Plan of Correction requiring Grievant to clearly communicate responsibilities and expectations for each employee she supervised.

On September 25, 2020, residents in the Unit began eating their meals. Several of the residents were "medically fragile" and were at risk of choking. Facility Policy 500-001 required, "All patients must remain in the dining area while eating meals and snacks and must be monitored by licensed nursing staff for the duration of the meal or snack. At no time should patients eat alone." No staff were present monitoring the residents. Grievant was responsible for ensuring residents were being monitored. Grievant was in the nursing supervisor's office while the residents were eating.

Grievant supervised Ms. R. Ms. R was not initially scheduled to work on October 5, 2020. On September 30, 2020, the Supervisor sent Grievant an email regarding adjustments to the schedules of four evening shift staff. One of the adjustments was for Ms. R's schedule to be changed so that she would work on October 5, 2020. Grievant

initially “glanced” at the email but did not take the matter any further. The adjustment was indicated on a staffing worksheet of which Grievant was aware. Grievant did not notify Ms. R that she was expected to report to work on October 5, 2020. Ms. R did not report to work on October 5, 2020 which caused the shift to be understaffed.

On October 17, 2020, Grievant observed DSA R taking Resident B into his room to complete activities of daily living. DSA R had three residents to monitor on a fifteen minute check. Grievant did not question DSA R as to why he was assisting Resident B with activities of daily living when he was supposed to be performing 15 minute checks.

### **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.”

“[U]nsatisfactory work performance” is a Group I offense.<sup>2</sup> In order to prove unsatisfactory work performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice. Grievant failed to ensure that staff were monitoring residents while they ate. Grievant failed to inform Ms. R that she was scheduled to work on October 5, 2020. Ms. R did not report to work thereby causing the shift to be understaffed. Grievant failed to ask an employee why the employee was assisting a resident with activities of daily life instead of performing fifteen minute checks.

Grievant argued that she was working on some days when Ms. R was not working and did not have an opportunity to speak with Ms. R about the schedule change. Grievant, however, could have communicated to Ms. R by other means to inform Ms. R that her schedule had been changed and that she was expected to report to work on October 5, 2020.

Grievant argued the Agency should have issued her a written counseling prior to taking disciplinary action by issuing a Group I Written Notice. The Agency argued that it had already given Grievant informal counseling by giving her a Plan of Correction on June

---

<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.

12, 2020. Although the Agency could have counseled Grievant instead of taking disciplinary action, the Agency was not obligated to do so. There is no basis in State policy to require the Agency to counsel Grievant before taking disciplinary action.

The Agency's written notice was drafted poorly and the Agency's processing of the grievance through the third step was handled poorly. The text of the Written Notice addresses unsatisfactory work performance and not poor attendance. The offense code in the Written Notice is listed as "01" for "attendance/excessive tardiness." One of the Step Respondents testified the Written Notice was upheld based on poor attendance. The Agency's evidence at the hearing, however, was sufficient to establish unsatisfactory work performance. The Agency's confused justification for its disciplinary action does not in itself form a basis for reversing the disciplinary action.

*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 I 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

---

<sup>3</sup> Va. Code § 2.2-3005.

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*

Carl Wilson Schmidt, Esq.  
Hearing Officer

---

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