

Issues: Group II Written Notice (failure to follow policy), Second Group II Written Notice (failure to follow policy), and Termination (due to accumulation); Hearing Date: 04/05/16; Decision Issued: 08/12/16; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10773; Outcome: No Relief – Agency Upheld.



# **COMMONWEALTH of VIRGINIA**

*Department of Human Resource Management*

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

## **DECISION OF HEARING OFFICER**

In re:

**Case Number: 10773**

Hearing Date: April 5, 2016  
Decision Issued: August 12, 2016

### **PROCEDURAL HISTORY**

On December 30, 2015, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow policy. On December 30, 2015, Grievant was issued a second Group II Written Notice of disciplinary action with removal for failure to follow policy.

On January 21, 2016, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On February 23, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 5, 2016, a hearing was held at the Agency's office.

### **APPEARANCES**

Grievant  
Grievant's Counsel  
Agency Party Designee  
Agency's 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. 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 an Academic Teacher at one of its facilities. She began working for the Agency on July 10, 2007. The Facility where Grievant's worked "is a behavioral treatment center recognized for its excellence by securely housing and treating civilly committed sex offenders. \*\*\* All contact between staff and residents is deemed therapeutic." The purpose of her position was:

To serve as an Academic Teacher to provide quality educational programs that meet individual needs of residents, who have been classified as sexually violent predators.<sup>1</sup>

No evidence of prior active disciplinary action was introduced during the hearing. Grievant received an overall rating of "Contributor" on her 2014 annual performance evaluation.

Grievant taught in a classroom with nine to ten students who were residents at the Facility. She also worked in the Facility's Library.

---

<sup>1</sup> Grievant Exhibit 1.

In 2012, the Supervisor instructed Grievant to stop speaking on the background information of residents in the classroom and to stop reading the background information in the resident evaluations. Grievant was told to read only information related to educational background.

On one occasion, the Supervisor entered Grievant's classroom and heard Grievant using a very loud voice to speak to a resident seated less than three feet from her. The Supervisor counseled Grievant to engage in more appropriate interactions with students.

Mr. M began working with Grievant at the Facility in 2008. He received complaints from Grievant's students who said that Grievant sometimes raised her voice while in class, treated students like children, and was mean to students.

Mr. M taught in a classroom next to Grievant's classroom. On several occasions, Mr. M heard Grievant speaking loudly and aggressively to students. Grievant supervised two Library Aides. Both Library Aides spoke with Mr. W and told him that Grievant was being disrespectful to them.

One resident reported that Grievant yelled at him for being late and berated him in front of other residents. The resident quit Grievant's class in response to Grievant's behavior. Another resident reported that Grievant began yelling at him because he had not finished his work. He felt Grievant was disrespectful to him. He indicated he had observed Grievant yelling at another resident.

In November 2015, Grievant was in the library. A resident was returning two books to the library and intended to check out two more books. Grievant told the resident he still had one book he had not returned. The resident said, "No, ma'am. All my books were returned." The resident looked at the sign in sheet to identify which book Grievant was questioning him about. He walked to the bookshelf and pulled out the book to show Grievant that the book had been returned. A Library Aide said something to the effect of "That is the book". Grievant told the Library Aide, "That is not your job!" Her tone was loud and aggressive. Mr. M in the adjoining classroom heard Grievant's comment to the Library Aide. Grievant said she did not need the Library Aide's help to do her job. The Library Aide responded that it was his job to help out in the library. Grievant continued to "berate" the Library Aide. She told the Library Aide his job was to put away DVDs and books when she told him to do so. The Library Aide felt demeaned by Grievant's behavior. The resident who was returning the books observed Grievant's behavior and felt she was being disrespectful to the Library Aide. Grievant made the resident feel uncomfortable.

The Library Aide later approached Mr. M and asked to have mediation between the Library Aide and Grievant and Grievant's Supervisor. Grievant responded "I want one too." Mr. M told them this was not the time and place to discuss the issue. Grievant later concluded she would not mediate with the Library Aide.

The Supervisor told Grievant that she did not believe Grievant had the qualifications necessary for Grievant's position and that the Supervisor would not have hired Grievant. Grievant told her class that her supervisors told her if they had been in place when she was hired, they would not have chosen her for the job.

In October 2015, Grievant asked a coworker to stand in the hallway with students in her class while she stepped away from her classroom. A resident remained in the classroom without being supervised. The Supervisor observed the student unattended and decided to meet with Grievant.

The Supervisor criticized Grievant.<sup>2</sup> Grievant spoke with two residents about walking out of the classroom without making sure everyone was out of the classroom. Grievant told a resident that she had been reprimanded by the Supervisor for leaving a student alone in the classroom. Grievant reprimanded the resident and told the resident if she gets in trouble so will he.

## **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>3</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>4</sup>

### Group II Written Notice -- Policy 503

Facility Policy 503 governs Staff and Resident Interactions and Boundaries. The purpose of this policy is:

To provide guidance to staff on appropriate and inappropriate interactions with residents (committed and discharged) of [the Facility.]

Policy 503 defines Inappropriate Interactions to include:

---

<sup>2</sup> Grievant wrote a statement asserting that "I'm usually very upset at the way [the Supervisor] speaks to me." See, Agency Exhibit C.

<sup>3</sup> The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

<sup>4</sup> See, Attachment A, DHRM Policy 1.60.

Staff discussion/disclosure of personal information in the vicinity of residents.

Grievant disclosed to her class that the Supervisor told Grievant the Supervisor would not have hired Grievant if the Supervisor had been the Supervisor at the time of Grievant's hire. This was personal information about Grievant. Grievant told her students that she had been criticized by the Supervisor for leaving a resident in the classroom unattended. This was personal information about Grievant. Grievant was prohibited by Policy 503 from disclosing personal information to her students thereby justifying the issuance of a Group II Written Notice.

Grievant denied revealing personal information to residents. It is difficult for the Hearing Officer to believe that a resident could describe an unusual and unique event (a supervisor telling an employee that the supervisor would not have hired that employee) and that story arose from the resident's fantasy. The resident who disclosed Grievant's behavior worked as an Aide for Grievant for more than a year. His comments do not appear to have been elicited by suggestive questioning. His comments are consistent with Grievant's assertion that she did not like how the Supervisor spoke to her and that the Supervisor sometimes was able to make Grievant so angry she could not perform her regular class discussions. It is most likely that the Aide's statements to the investigator reflected his recollection of Grievant's behavior.

Grievant denied telling the residents that she had been "spoken to" about leaving a resident in the room without someone supervising the resident. The resident making this claim was a tutor who knew about the occurrence of two staff meetings and the contents of the meeting. He was complaining that he had been yelled at for leaving the resident in the class unattended. He explained that he had been reprimanded by Grievant because she had been reprimanded by her supervisor. The tutor's narrative appears genuine and not elicited by design.

#### Group II Written Notice – Policy 503 and 504

Policy 503 defines Appropriate Interactions to include:

Treating and speaking to each resident with courtesy and respect; \*\*\*  
When talking to residents, addressing them at an appropriate distance  
(not yelling down the hallway or across the room);\*\*\*

Policy 503 defines Inappropriate Interactions to include:

Profane, demeaning, ethnic, or other derogatory language or references.  
\*\*\*

Using words, tone, body language, or any other action done deliberately  
or repeatedly to provoke, entice, or upset a resident. \*\*\*

Facility Policy 504 provides Guidance on Ethical Codes of Conduct and Practices. The purpose of this policy is:

To provide guidelines for appropriate ethical behavior for all employees acting on behalf of the facility, and to encourage a commitment to professionalism and ethical standards.

Policy 504 addresses “Unprofessional Behavior”:

Unprofessional Behavior is not tolerated at [the Facility]. Unprofessional behavior is defined as malicious, threatening, disruptive, or aggressive verbal communication or actions, which go beyond the bounds of professional conduct and are directed toward facility personnel or residents, including their families and associates.

Examples include but are not limited to:

- Demeaning, disrespectful, discourteous, or abusive language or behavior towards other. \*\*\*

The Agency has presented sufficient evidence to show that Grievant had a pattern of inappropriately raising her voice when speaking to residents, making residents feel demeaned by Grievant’s comments, and residents complaining about Grievant’s treatment of them including quitting Grievant’s class. In particular, Grievant yelled at the Library Aide who pointed out that Grievant was mistaken in her claim that a resident had not returned a book. The Agency has presented sufficient to support its conclusion that Grievant acted contrary to Policy 503 and 504 thereby justifying the issuance of a Group II Written Notice.

Grievant argued that she had a loud voice and, thus, might appear to be raising her voice even though she was speaking normally. There is sufficient evidence in the record to show that even if Grievant had a loud voice she was counseled by the Supervisor to avoid speaking loudly and she demonstrated a pattern of speaking loudly and in a degrading manner to several residents.

### Accumulation

Upon the accumulation of two Group II Written Notices, an employee may be removed from employment. Grievant has accumulated two Group II Written Notices thereby justifying the Agency’s decision to remove her from employment.

### 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 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 two Group II Written Notices of disciplinary action for failure to follow policies with removal is **upheld**.

### **APPEAL RIGHTS**

You may file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

1. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

Office of Employment Dispute Resolution  
Department of Human Resource Management

---

<sup>5</sup> Va. Code § 2.2-3005.



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 may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must provide a copy of all of your appeals to the other party, EDR, 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.

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>6</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>6</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.