



# ***COMMONWEALTH of VIRGINIA***

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

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

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

In re:

**Case Number: 12063**

Hearing Date: February 15, 2024  
Decision Issued: May 8, 2024

#### **PROCEDURAL HISTORY**

On November 29, 2023, Grievant was issued a Group II Written Notice with removal for unsatisfactory performance, failure to follow policy, disruptive behavior, and lack of civility in the workplace.

On November 29, 2023, Grievant was issued a Group III Written Notice of disciplinary action with removal for unsatisfactory performance, failure to follow instructions or policy, safety rule violation, disruptive behavior, insubordination, and willful misconduct.

On December 19, 2023, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On January 16, 2024, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 15, 2024, a hearing was held by video conference.

#### **APPEARANCES**

Grievant  
Agency Party Designee  
Agency Counsel  
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 Virginia Department of Health employed Grievant as a Healthcare Technician Senior at one of its locations. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant worked in different office locations. Grievant began reporting to the Public Health Nurse Supervisor in March or April 2023. The Supervisor also supervised nursing staff. The Supervisor left her full time position on September 15, 2023.

The Agency's Women, Infants, and Children (WIC) program staff provided services remotely for approximately three years. The clinic "reopened its doors" on August 9, 2023 and began accepting WIC patients in-person. The Site Manager showed Grievant the offices assigned to WIC. WIC stickers were located on equipment in the rooms used by WIC staff.

Grievant was not a WIC staff employee. She went to the clinic approximately three times per month for a few hours.

Sexually Transmitted Infection (STI) clinics were typically held on Fridays from 8:30 a.m. to 10:30 a.m. Patients could receive services by appointment or by walking into the clinic.

#### August 4, 2023

On August 4, 2023, a patient was sitting in the hallway in the building. The DIS thought the patient had finished speaking with Grievant and was waiting to speak with him. The DIS did not realize the patient's blood had not yet been drawn. The DIS invited the patient into the room and closed the door to speak confidentially with the patient. Grievant knocked on the door. The DIS opened the door. Grievant accused the DIS of stealing her patient. Grievant's demeanor was "aggressive." Grievant was speaking loudly in front of the patient and the "whole clinic heard her." The DIS told Grievant he did not take the patient on purpose. Grievant did not listen to the DIS; she just walked away.

The DIS notified the Supervisor of the conflict because he did not want any "bad blood." The DIS and Grievant met with the Supervisor. The Supervisor wanted to find out the reason for the conflict and address the issue that day. During the meeting, Grievant kept asking the Supervisor, "Can I go now?" The DIS apologized saying he did not purposefully take a patient from Grievant. Eventually a solution was reached. After the meeting, the Supervisor, Grievant, and the DIS walked up the stairs to get lunch. The Supervisor walked through a door and Grievant followed. Grievant closed the door on the DIS and held the handle to stop him from passing through the door.

#### August 22, 2023

Grievant and the WIC employees used office labs and sometimes overlapped their usage. Grievant was sometimes unclear where she was supposed to work because she had previously worked in different office labs.

Grievant was working in the WIC Nutritionist's office lab. The Nutritionist asked Grievant to move to another office. Grievant left and began speaking loudly with other staff in the hallway. The Nutritionist did not hear all of the words of the conversation, but it made her feel uncomfortable. The Nutritionist was a "very non-confrontational" person. She had a lot of anxieties and did not like "stepping on anyone's toes." The interaction with Grievant made the Nutritionist feel uncomfortable but not afraid of Grievant.

Grievant went from one WIC lab to another WIC lab. Grievant had her purse out. The Site Manager asked Grievant to move her purse. Grievant yelled loudly in an angry tone, "where would you like for me to put it?"

Grievant spoke on her cell phone as she walked through the health department. She went to other staff and complained about WIC staff "thinking they own the place" and

taking up space. The Site Manager described Grievant as walking around the health department and complaining about WIC in a loud angry voice. Grievant caused chaos and made people feel uncomfortable. There were empty offices Grievant could have used. Grievant's comments could be heard by clients. One client heard Grievant's comments and asked if it was ok for her to remain seated in an area waiting to go into a lab. Everything "calmed down" once Grievant left the health department.

#### August 25, 2023

The Agency held an STI clinic on August 25, 2023. The clinic accepted walk-in clients and STI clients who were referred to the Agency.

Several employees were scheduled to work at the clinic on August 25, 2023. The Assigned RN and NP C were sick and did not report to work. NP J called and discussed with the Assigned RN about reducing the number of patients that could participate in the clinic. The Assigned RN agreed to reduce the number of patients to be seen that day from 15 to 10 patients because of the reduced staffing. NP J discussed the issue with Dr. H and they agreed to see fewer patients that day.

NP J told Grievant that the clinic would be receiving fewer patients that day. She did not agree with doing so. Grievant "attempted to take charge of the clinic." Grievant made decisions without consulting with NP J. Grievant called one registered nurse and asked her to come to work but that nurse refused because she was working in another location and had not worked in an STI clinic before. Grievant called RN R and asked her to come into work at the clinic. RN R told Grievant she had not worked in an STI clinic before. When RN R came to the clinic, Grievant gave RN R a chart and told her to go through the questions. RN R told NP J that Grievant had called RN R and asked her to come into work.

Grievant had no authority or responsibility to ask RN R to report to work. RN R was newly hired, had not been trained in STI, had not seen a clinic chart before, and could not competently work in the clinic.

NP J was "taken aback" by Grievant's action. NP J thought Grievant's behavior as "totally out of line." NP J told RN R, "anything you are not comfortable doing, don't do."

Once the clinic had received 10 patients, the front desk staff began calling Grievant instead of NP J about taking an 11<sup>th</sup> patient.

Grievant let an unscheduled patient come into the clinic late.

#### September 8, 2023

On August 30, 2023, the Supervisor sent an email to staff including Grievant informing them that the maximum number of patients to be seen in the clinic would be

eight but could be “pushed” to 10.<sup>1</sup> The Supervisor wrote, “we ultimately are looking not to go above the stated amount. \*\*\* Any questions or concerns about the limited STI clinic numbers can be addressed to [the Senior NP].”<sup>2</sup>

The Agency held an STI clinic on September 8, 2023. The Senior NP was in charge of the clinic and had instructed front desk staff to limit the number of patients they would see that day because of staff shortages. The Senior NP made everyone aware of the number of clients that could be seen. Grievant spoke with the front desk staff several times attempting to have them allow more patients to be seen than authorized by the Senior NP.

A conflict arose between Grievant and Ms. H, a public health nurse. They began yelling at each other and could be heard by patients. The Senior NP’s office was in the back of the clinic. She ran out of her office, passed four or five other offices to reach Grievant and Ms. H in the front of the clinic. The Senior NP told them to “knock it off.” The Senior NP had to calm down a client who was very concerned and did not want Grievant to touch her. The Senior NP had to reassure the client that Grievant was capable of performing her duties. It was only after the Senior NP had spoken with the client did the client allow Grievant to complete her duties. The situation was out of character for Ms. H but not out of character for Grievant.

### September 12, 2023

Grievant made “call backs” to patients. This meant she called patients and told them of their lab results. Call backs were subject to HIPAA regulations. Test results required interpretation. The responsibility for making call backs rested with nursing staff and not with Grievant. Grievant did not have a medical license. The Supervisor told Grievant several times not to do call backs. When the Senior NP told the Supervisor that Grievant was conducting calls backs, the Supervisor became startled and shocked because the Supervisor previously had instructed Grievant not to conduct call backs. The Supervisor began reviewing client charts on September 12, 2023 to make sure clients had not been missed.

As a result of Grievant’s behavior, the Supervisor sent an email on September 14, 2023 to Grievant and other staff informing them that “STI result callback clients should be referred to [Staff C] only, please do not refer them to any other staff member moving forward to help reduce confusion and duplication of calls.”<sup>3</sup>

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<sup>1</sup> The email was sent to the supervisors of the employee working at the front desk but not to the front desk employee herself. The Supervisor instructed the supervisors to notify the employee working at the front desk.

<sup>2</sup> Agency Exhibit p. 21.

<sup>3</sup> Agency Exhibit p. 24.

When patients called asking for their test results, Grievant provided the patients with the results. She did not give results to any patients with positive test results.

### September 22, 2023

On September 22, 2023, the Agency Head addressed staff including Grievant at Location 1. More than 25 staff were in attendance. Grievant believed the Agency Head had come to talk about Location 1. The Agency Head shared her agency-wide perspective and offered to answer questions from staff. Grievant raised her hand and said, "I hear you talk a lot about [Location 2] but this is [Location 1], you can't tell us how to fix the problem here." The Agency Head indicated she was just given examples of programs implemented in her last district. Grievant said, "I'm not trying to be disrespectful, but that's [Location 2] so you don't know anything about the programs needed in [this district]."

## **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>4</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."

### List of Offenses is Not All-Inclusive

DHRM Policy 1.60 lists numerous examples of offenses. These examples "are not all-inclusive," but are intended as examples of conduct for which specific disciplinary actions may be warranted. "Accordingly, any offense not specifically enumerated, that in the judgment of agency heads or their designees undermines the effectiveness of agencies' activities, may be considered unacceptable and treated in a manner consistent with the provisions of this section."<sup>5</sup>

### DHRM Policy 2.35 Civility in the Workplace

DHRM Policy 2.35 governs Civility in the Workplace. This "policy is to ensure that agencies provide a welcoming, safe, and civil workplace for their employees, customers, clients, contract workers, volunteers, and other third parties and to increase awareness of all employees' responsibility to conduct themselves in a manner that cultivates mutual respect, inclusion, and a healthy work environment." This policy prohibits, "[b]ehaviors

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<sup>4</sup> The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

<sup>5</sup> See, DHRM Policy 1.60.

that undermine team cohesion, staff morale, individual self-worth, productivity, and safety are not acceptable.” “Any employee who engages in conduct prohibited under this policy or who encourages or ignores such conduct by others shall be subject to corrective action, up to and including termination, under Policy 1.60, Standards of Conduct.”

DHRM Policy 2.35 Policy Guidance lists prohibited behavior to include:

- Demonstrating behavior that is rude, inappropriate, discourteous, unprofessional, unethical, or dishonest;
- Behaving in a manner that displays a lack of regard for others and significantly distresses, disturbs, and/or offends others; and
- Raising one’s voice inappropriately or shouting at another person.

### Group II Written Notice

The Agency issued Grievant a Group II Written Notice based on the events of August 4, 2023, August 22, 2023, and September 22, 2023.

On August 4, 2023, Grievant spoke aggressively towards the DIS in front of patients. She was resistant to resolving the dispute with the DIS. She closed the door on the DIS and held the handle as they walked up the stairs to lunch. Grievant was rude, inappropriate, and disrespectful towards the DIS.

On August 22, 2023, Grievant was using office space intended to be used by WIC employees. Grievant did not like being asked to work in a different office. Grievant complained loudly to other staff in the hallway and could be overheard by patients. Grievant yelled loudly when asked by the Site Manager to move her purse. Grievant spoke loudly on her cell phone while walking through the department complaining about WIC staff. Grievant made people feel uncomfortable including a client waiting to go into a lab. Grievant was rude, inappropriate, unprofessional, and she raised her voice inappropriately.

On September 22, 2023, Grievant challenged the statements of the Agency Head during a staff meeting. None of Grievant’s words rose to the level justifying disciplinary action. Grievant’s tone and demeanor were not sufficiently abrasive to justify disciplinary action. Many of the observers were surprised at Grievant’s comments because she was challenging the Agency Head. Merely challenging or disagreeing with an Agency Head is not in itself a basis for disciplinary action.

Based on the evidence presented on August 4, 2023 and August 22, 2023, there exists sufficient evidence to support the issuance of a Group II Written Notice for failing to maintain civility in the workplace.

### Group III Written Notice

The Agency issued the Group III Written Notice based on the events of August 25, 2023, September 8, 2023, and September 12, 2023.

On August 25, 2023, Grievant attempted to take charge of the clinic. She did not have supervisory authority and was not licensed as a registered nurse. She was able to persuade an inexperienced nurse to come to work in a clinic performing services for which the nurse was not trained. In the Agency's judgment, Grievant's behavior rose to the level of a Group III offense. The evidence presented supports the Agency's judgment.

On September 8, 2023, Grievant and another employee began yelling at each other and could be overheard by clients. One client became concerned about Grievant's ability to render services to the client. Grievant's behavior was contrary to DHRM Policy 2.35 because yelling at another employee did not reflect maintaining civility in the workplace.

On September 12, 2023, Grievant made "calls backs" to patients. She had been instructed not to make calls backs and was not properly trained to do so. Grievant failed to follow a supervisor's instructions and undermined the Agency's ability to properly treat patients.

Based on the evidence presented regarding the incidents on August 25, 2023, September 8, 2023, and September 12, 2023, the Agency has presented sufficient evidence to support the issuance of a Group III Written Notice.

### Removal

The Agency has presented sufficient evidence to support its decision to remove Grievant based on the accumulation of a Group II Written Notice and a Group III Written Notice. Moreover, the issuance of a Group III Written Notice is sufficient, in itself, to support removal.

### Grievant's Defenses

Grievant argued that the Agency's disciplinary action was defamatory, false, and retaliatory. Grievant has not presented sufficient evidence to support these defenses.

Grievant argued that the Agency failed to properly counsel her before taking disciplinary action. The Agency could have counseled Grievant and then allowed her to correct her behavior. The Agency, however, was not obligated to counsel Grievant prior to taking disciplinary action. The Agency's failure to first counsel Grievant is not a basis to reverse the Agency's disciplinary action.

### 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>6</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 is **upheld**. The Agency’s issuance to the Grievant of a Group III Written Notice of disciplinary action is **upheld**. The Agency’s decision to remove Grievant from employment 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

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<sup>6</sup> Va. Code § 2.2-3005.

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.