

**COMMONWEALTH OF VIRGINIA**  
Department of Human Resources Management  
Office of Employment Dispute Resolution

**DECISION OF HEARING OFFICER**

In re: **Case Number 12059**

Hearing Date: February 16, 2024  
Decision Date: March 16, 2024

**APPEARANCES**

Grievant  
Agency Representative  
Witnesses

**PROCEDURAL HISTORY**

Grievant is employed by the Agency as a DSA III Nursing Service Psychiatric Technician at a Virginia Agency location. The Agency written notice, issued August 30, 2023, stated an offense of violation of Agency Attendance Policy by unsatisfactory attendance with the discipline of a Group I Written Notice. Grievant timely grieved the disciplinary action by submitting the Grievance Form A on September 2, 2023. Grievant's Form A requested Grievant retain [their] employment back or replace the clause for termination.

The Office of Employment Dispute Resolution ("EDR") appointed the undersigned as the Hearing Officer ("HO") effective January 8, 2024. A Prehearing conference call was held on the mutually agreeable date of January 26, 2024 with participation by the Grievant, the Agency advocate, and the hearing officer ("HO"). The Hearing was held on January 16, 2024 at the Agency location, by agreement of the parties.

**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 characterize as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and of 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 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:

#### 1. Exhibits.

(a). All proposed exhibits, except Grievant Exhibit 7 ( audio recording identified by Grievant as a May 30, 2024 Agency meeting), submitted electronically prior to hearing by either party were admitted without objection of the other party as relevant and material to the case. The HO had directed the Agency to produce the recording.

(1).Grievant objected to so much of Agency Exhibit 3 as are verbal counseling documents that Grievant did not sign. Agency drafters stated Grievant refusal to sign and duplicate counseling so Grievant was only held accountable for the original verbal counseling she signed on 6/19/23 ( Agency Ex. 1 page 4). The HO gives no weight to the unsigned documents.

(b). At the hearing, Grievant submitted their Exhibit 7 as an electronic recording of the May 30, 2023 meeting previously submitted to the Agency and the hearing officer electronically, which was played at the hearing from a computer. Grievant proffered they were unable to convert the recording otherwise. The recording was only partially intelligible as played at the hearing. The Agency objected to admission of the exhibit due to unintelligibility. Grievant and other witnesses testified that a meeting did occur on May 30, 2024, where attendance was taken as per Grievant Exhibit 1. The Grievant did not sign as an attendee at the meeting and averred she did not attend. The agency averred it was unable to obtain a copy of the recording in Agency Exhibit 7. The HO admitted the recording as a Grievant exhibit, but gave it limited weight.

#### 2. Grievant has been employed by Agency since on or about 04/25/2019.

3. Grievant raises the defense that the applicable Attendance policy of Policy 053-019 ("Policy 2020") changed to her detriment and without in-service or email or unit meeting to her until 6/29/2023; and therefore she should not receive the Group discipline. A review of relevant portions of the two policies at issue shows that the standard for the unscheduled absence which constitutes an Agency attendance violation remains the same in both policies; that is that under either policy, arrival one minute after an employee's scheduled shift begins is a violation of Agency policy subject to discipline. In pertinent parts:

(1). The prior written Agency Attendance Policy 053-019 ("Policy 2020") at issue entered and admitted as an exhibit by both parties, is stated as effective September 11, 2020 and its stated policy outlines attendance expectations, as well as provides corrective and disciplinary actions to ensure adherence.

(2). The present written Agency Attendance Policy 053-023 ("Policy 2023") at issue, entered and admitted as an exhibit by both parties, is stated as effective May 14, 2023 and its stated policy is that it is imperative that all [Agency] staff adhere to scheduled work hours ...in accordance with DHRM Policy 1.60 regular attendance in accordance with the established work schedule is a condition of employment.

(3). The terminology of certain definitions changes from Policy 2020 to Policy 2023:

(a). Both policies define Absence as a period of time when an employee is not present at assigned work station during their scheduled shift.

(b). Policy 2020 defines Late arrival as when an employee swipes ( clocks) into Kronos between one (1) minute and six(6) minutes after their scheduled shift begins. However Policy 2023 uses the term Tardy for such 1-6 minute absence.

(c). Policy 2020 defines Tardy as an unscheduled arrival to work between 7 and 59 minutes after the start of your scheduled shift. However Policy 2023 does not define Late arrival specifically, but defines an Occurrence as an unscheduled absence from work that does not meet the criteria defining a scheduled absence; or being more than six (6) minutes late in reporting for work; or calling -in to request time off without having requested the leave before the last workday preceding the day of attendance. Policy 2023 mentions late arrivals under its Pattern definition of "consistently arriving after the start of your shift (e.g. 3 late arrivals or tardies in a week, 10 late arrivals or tardies in a month).

6. Grievant did not attend the May 30, 2023 Agency meeting where the Policy 2023 was discussed, and was not working that day ( Grievant and Witness testimony, Grievant Exhibit 5).

7. Staff who miss an in service meeting may listen to the recording, obtain information from a supervisor or on an line site, and also in this case, review the printed copies of the Policy 2023 placed on the unit prior to the in-service. ( Agency witnesses' testimony, Grievant Ex. 5).

8. Grievant did have absences without approval on the dates stated in the Written Notice and as stated on Kronus, did not provide exculpatory documentation, and did not provide any information that s/he had contacted the Facility to report absence/late arrival or an explanation. These absences includes some of less than 7 minutes and some of more than 7 minutes.(Grievant statements, Agency Ex. 5).

9. Regarding Grievant's unscheduled absences, the Agency followed a course of progressive and situationally appropriate discipline that objectively and consistently addressed employee behavior, conduct and behavior, but Grievant continued to exhibit absences after counseling and after receiving information on the Policy 2023 on or about June 30, 2023. The Resolution Step investigators all upheld the decision to issue a Group I Written Notice based on the excessive and continuing violations, and progressive discipline.( Grievant statements, Agency witnesses, Agency Ex.1, 5).

10. Grievant did have unscheduled absences without approval on the dates in question, including such absences after June 30, 2023 when she received instruction on the 2023 policy; and as stated on Kronus reports (Grievant statements, Agency witnesses, Agency Ex. 5).

11. Grievant did not provide documentation under either Policy to potentially negate an unscheduled absence.

12. Grievant raised mitigators that she did not know of Policy 2023 until attending an in-service on June 29, 2023, did not understand why she was receiving continuing counseling sessions on attendance issues of May and June 2023 with verbal sessions on 6/14/23 (signed 6/19/23), 6/22/23 (unsigned), and written counseling issued on 6/30/23(unsigned), and that Policy 2023 was wrongfully applied to her attendance. Grievant also stated personal stressors, and that her attendance had improved. The Hearing Officer does not find mitigation or colorable defenses apply to this case. (Agency witnesses testimony, Agency Ex.5).

13. The Grievant's untimely arrivals violated both the former Agency policies of which the Grievant had actual knowledge, and violated the present policy after the time s/he had actual knowledge of the 2023 policy, and also occurred after unsuccessful Agency progressive efforts to correct Grievant's performance problems. The Grievant knew or should have known that their untimely arrivals violated Facility Attendance Policies both past and present and subjected him/her to disciplinary procedures.

14. The Agency serves a vulnerable population placed in Facility care, who require staff sufficiency at all times (Witnesses testimony, Facility and DHRM policy) .

15. All witnesses presented with appropriate demeanor and credibility.

### CONCLUSIONS OF POLICY

#### 1. Virginia Department of Human Resource Management ("dhrm") Policy 160

A. Employee Offenses :Unacceptable behavior is divided into three types of offenses , according to their severity, as per the *Virginia Department of Human Resource Management ("dhrm") Attachment A: Policy 1.60. Group I Level offenses* " generally have a minor impact on agency business operations but still require intervention. Examples may include: tardiness, poor attendance...First Offense: Typically, verbal or written counseling is appropriate although an agency has the discretion to issue a Group I..."

Group II Level offenses " include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action".

Group III Level offenses "...generally include acts of misconduct, violations of policy or performance that is of a most severe nature and significantly impacts agency operations...or serious violations of policy, procedures or laws ...First Offense: Discharge. In lieu of discharge the agency may suspend without pay for up to 30 workdays; and/or Demote or transfer with disciplinary salary action of at least 5%..."

#### B. Applicable Standards of Conduct:

(1) "...Not all inclusive...illustrate the minimum expectations for acceptable workplace conduct and performance include failure to comply with agency policies and procedures... Report to work as scheduled and seek approval from the supervisor in advance for any changes to the established work schedule, including the use of leave and late or early arrivals and departures...comply with all state and agency policies and procedures, the Conflict of Interest Act, and Commonwealth laws and regulations. Report circumstances or concerns that may affect satisfactory work performance to management..."

(2). Disciplinary Actions. "When counseling has failed to correct misconduct or performance problems, or when an employee commits a more serious offense, management should address the matter by issuing a Written Notice..."

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**2. Agency/Facility Attendance Policy:** As stated above herein, the Facility where Grievant is employed has a written Attendance Policy. The prior written Agency Facility Attendance Policy 053-019 ("Policy 2020") is stated as effective September 11, 2020. The present written Agency Attendance Policy 053-023 ("Policy 2023") at issue, is stated as effective May 14, 2023.

**A. Responsibility/Purpose/Policy:** Both policies, using the same wording, state responsibility for all Facility employees "...for [the] Facility purpose [of] commitment to having qualified, well-trained and capable staff, reporting as scheduled, to provide services to those entrusted into our [Facility] care... The role of [ the Facility] is to provide appropriate care to individuals placed in our care. Therefore, it is imperative that all [Facility] staff adhere to scheduled work hours. This policy outlines attendance expectations, as well as provides corrective and disciplinary actions to ensure adherence".

(i). The Policy 2023 adds "In accordance with DHRM Policy 1.60, regular attendance in accordance with the established work schedule is a condition of employment".

**B. Absence:** Both policies, using the same wording, define absence as "a period of time when an employee is not present at assigned work station during their scheduled shift".

**C. Documentation:** Both policies, using the same wording, define Documentation as " Written justification as requested by a supervisor and/or manager for an absence not previously approved. Written forms of documentation are to be provided by an employee to potentially negate an occurrence..."

**D. No Call/No Show:** Both policies, using the same wording, define No Call/No Show as " when an employee fails to report to work as scheduled and/or does not contact the appropriate Facility] representative based on departmental procedures".

**E. Attendance Violations:** Using different terminology, both policies identify the time when an employee is identified as failing to report as scheduled ( hereinafter "untimely").

(i). One to Six minutes untimely: Policy 2020 uses the term 'Late Arrival ' for " when an employee swipes (clocks) into Kronos between one (1) minute and six (6) minutes after their scheduled shift begins", while Policy 2023 uses the term 'Tardy' for " when an employee swipes (clocks) into Kronos between one (1) minute and six (6) minutes after their scheduled shift begins" .

(ii). Over 6 minutes untimely: Policy 2020 uses the term 'Tardy' for " an unscheduled arrival to work between 7 and 59 minutes after the strt of your scheduled shift". Policy 2023 uses the term ' Occurrence' for " an unscheduled absence or being more than six(6) minutes late in reporting for work , or calling in to request time off without having requested the leave before the end of the last workday preceding the day of absence..."

(iii). Pattern: Policy 2020 defines Pattern as " A repeating frequency of events...". Policy 2023 definition is " A repeating frequency of events that are predictable..."

(iv). Discipline: Both Policies address discipline. Both policies provide for progressive discipline from the least form of verbal counseling, then if more occurrences a formal written counseling, and if more occurrences, a Group I Written Notice; with further instances subject to a Group II written Notice.

3. The Hearing Officer finds that, by a preponderance of the evidence, under the facts in this case and in violation of the applicable regulatory standards, that the Grievant engaged in the behavior described in the written notice, that the behaviors at issue constituted misconduct, and that the Agency's discipline was consistent with law and policy. The agency had taken prior progressive action with verbal and written counseling, the opportunity to improve Grievant's job performance, and further training; which action was not effective in this case. Further, the violations significantly impact agency operations, where this Agency/Facility function is to provide appropriate services to those entrusted to their care.

4. 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. 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...". In this case, after careful consideration of the record, witnesses, and party positions, and the applicable standards, the hearing officer finds no mitigating circumstances exist to reduce or remove the disciplinary action. Thus, the Agency had proper cause to issue a Group I Written Notice to the Grievant under the applicable criteria.

### DECISION

For the reasons stated above, the Agency's issuance to the Grievant of a Group I disciplinary action of Written Notice 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> Street, 12<sup>th</sup> Floor  
Richmond, VA 23219

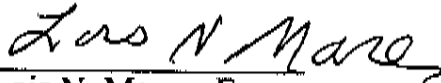
or send by email to [EDR@dhrm.virginia.gov](mailto:EDR@dhrm.virginia.gov) or by fax to (804)786-1606

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 day calendar day period has expired or when requests for administrative review have been decided.

A challenge that the hearing officer decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing officer decision is not in compliance. A challenge that the hearing officer 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. 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].

  
Lois N. Manes, Esq.  
Hearing Officer