



# ***COMMONWEALTH of VIRGINIA***

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

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

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

In re:

**Case Number: 12148**

Hearing Date: July 26, 2024  
Decision Issued: August 1, 2024

#### **PROCEDURAL HISTORY**

On May 17, 2024, Grievant was issued a Group III Written Notice of disciplinary action with removal for client neglect. The Agency considered Grievant's request to mitigate the disciplinary action but declined to do so. Grievant was removed from employment effective June 3, 2024.

On June 25, 2024, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On July 8, 2024, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 26, 2024, 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 Direct Service Associate II at one of its locations. He began working for the Agency on April 23, 2023. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant began orientation training on April 23, 2023. On April 26, 2023, Grievant wrote his signature to acknowledge, "Expectations for Nursing Orientation and Nursing Pre-service, 'Wear a wristwatch with a second hand; No "I" watches.'"<sup>1</sup>

On May 11, 2023, Grievant signed an acknowledgement that, "[w]hen I am assigned to Constant Observation, Direct Observation, 1:1 Observation, or 2:1 Observation, I am aware of the following:

I must keep my eyes on the patient at all times. \*\*\*

I must not use my cell phone or IWatch ... or engage in any like activity while performing special observations.<sup>2</sup>

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<sup>1</sup> Agency Exhibit p. 29.

<sup>2</sup> Agency Exhibit p. 28.

The Patient was admitted to the Facility on March 14, 2024. He had a diagnosis of antisocial personality disorder and Post Traumatic Stress Disorder.

Grievant was in a 1:1 Observation with the Patient on April 29, 2024. The Patient was suicidal and wearing a suicide smock to prevent injury. Grievant was standing within a few feet of the Patient. Grievant was wearing an Apple "I" watch on his left wrist. An Apple I Watch is a "smart watch" that allows for reading and sending text messages.

The Agency presented a video recording of Grievant's interaction with the Patient during an approximately ten minute period on April 29, 2024. At 2:04, Grievant looked at his I Watch on his left wrist. He used his right hand to manipulate the watch so he could read the screen. He looked at his watch for approximately three seconds. At 2:13, Grievant looked at his watch and used his right hand to manipulate the screen. He looked at the screen and manipulated the watch for approximately 12 seconds. At 5:15, Grievant looked at the watch and used his right hand to manipulate the watch. He looked at the watch for approximately five seconds.

Grievant held a clipboard with a Special Observations sheet to document the Patient's location and behavior every fifteen minutes. His writings on the sheet were not consistent with the times he looked at his I Watch.

## **CONCLUSIONS OF POLICY**

The Agency has a duty to the public to provide its clients with a safe and secure environment. It has zero tolerance for acts of abuse or neglect and these acts are disciplined severely. Departmental Instruction ("DI") 201 defines Neglect as:

This means the failure by a program, or facility operated by the department, responsible for providing services to do so, including nourishment, treatment, care, goods, or services necessary to the health, safety, or welfare of an individual receiving care or treatment for mental illness, development disability, or substance abuse.<sup>3</sup>

Hospital Instruction Number 4042 governs Use of Electronic Equipment by Staff, Visitors, and Clients. Section VI(E) provides, "Cell phone/wireless device, including smart watches, use for personal reasons while on the job may be limited by department policy and allowable according to the supervisor's discretion."<sup>4</sup> The policy establishes Procedures including:

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<sup>3</sup> The definition of neglect in DI 201 is poorly written because it appears to apply only to a program or facility. Va. Code § 37.2-100 and 12 VAC 35-105-20 define neglect to include failure by a person.

<sup>4</sup> Agency Exhibit p. 36.

Cell phones, Smart Watches, or Bluetooth devices may not be used in the presence of patients including in the front of the team center. \*\*\*

Cell phone, Smart Watch, or Bluetooth use (including texting) is never acceptable while watching a patient on special observation or while working as a monitor in the mall areas. \*\*\*

Cell phone, Smart Watch, or Bluetooth use interferes with the ability to perform one's job duties. Any observation of cell phone, Smart Watch, or Bluetooth use (including texting) should be reported to the RNC and will be addressed according to the Standards of Conduct. Disciplinary action up to and including termination may be taken.<sup>5</sup>

Group III offenses include "significant neglect of duty."<sup>6</sup> Neglect of duty includes:

Intentional or negligent actions in attending to or failing to perform job duties. Neglect of duty may also incorporate negligence when an employee fails to abide by their duty of care to customers, patients, residents, students or other stakeholders as expected of a reasonable employee in the position. It is not material whether the neglect is willful, through malice, ignorance or oversight, when such neglect is grave and the frequency of it is such as to endanger or threaten the public's safety and well-being. Involves facts or factual occurrences resulting in negligence specific to conduct or omission of duty in violation of a standard of care which is clear in its requirements and known to the employee.<sup>7</sup>

Grievant received adequate notice that he was prohibited from wearing his I Watch when in a 1:1 Observation with the Patient and that doing so could result in disciplinary action up to and including removal from employment.

On April 29, 2024, Grievant was in a 1:1 Observation with the Patient. He was obligated to observe constantly the Patient. Grievant was wearing a smart watch for at least ten minutes. During that time, he looked at his smart watch at least three times and manipulated the screen to read information on the smart watch. While looking at his smart watch, Grievant was not observing the Patient. The Agency has presented sufficient evidence to show that Grievant failed to provide services and care to the Patient thereby neglecting the Patient and constituting a significant neglect of duty. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, the Agency's decision<sup>8</sup> to remove Grievant must be upheld.

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<sup>5</sup> Agency Exhibit p. 27.

<sup>6</sup> DHRM Policy 1.60.

<sup>7</sup> See, Attachment A, DHRM Policy 1.60.

<sup>8</sup> The Agency decided not to mitigate the disciplinary action against Grievant because he continued to wear his smart watch after being advised of the Agency's decision to issue disciplinary action for wearing a smart watch. Grievant had been instructed not to wear the smart watch but continued to do so.

Grievant asserted he had not been using his watch for “personal usage.” He claimed he looked at his watch to determine the time. The Agency replied that the times Grievant looked at his smart watch were not the times he wrote information on the sheet held by the clip board he was carrying. The Agency concluded Grievant was not simply looking at his smart watch to determine the time. Grievant did not testify or otherwise present any evidence to support his assertion. Without evidence, Grievant cannot counter the Agency’s evidence and argument.

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>9</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 III Written Notice of disciplinary action with removal 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

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<sup>9</sup> Va. Code § 2.2-3005.

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.