

**COMMONWEALTH OF VIRGINIA**  
**Department of Employment Dispute Resolution**

**DIVISION OF HEARINGS**

In the matter of: Case No. 12197

Hearing Officer Appointment: November 4, 2024

Hearing Date: December 4, 2024

Decision Issued: December 8, 2024

PROCEDURAL HISTORY, ISSUES  
AND PURPOSE OF HEARING

The Grievant requested an administrative due process hearing to challenge termination of her employment at a facility (the “Facility”) of the Department of Behavioral Health and Developmental Services (the “Department”, “DBHDS” or the “Agency”), effective October 2, 2024, pursuant to a Group III Written Notice issued by Management of the Agency, as described in the Grievance Form A dated October 10, 2024. The Grievant is seeking the relief requested in her Grievance Form A, including reinstatement, removal of the Group III Written Notice, and restoration of any and all lost wages and benefits.

The parties duly participated in a first pre-hearing conference call scheduled by the hearing officer on November 7, 2024. The Agency’s advocate and the hearing officer participated in the call. The Grievant did not participate and efforts to reach her proved unsuccessful. The Grievant subsequently confirmed via email that the hearing date was acceptable. The parties agreed to communication by email alone.

Following the first pre-hearing conference, the hearing officer issued a Scheduling Order entered on November 9, 2024 (the “Scheduling Order”), as well as an Amended Scheduling Order entered on December 2, 2024 (the “Amended Scheduling Order”), which are both incorporated herein by this reference.

In her Form A, the Grievant asserted that she “was not the one who left the door unsecured” and that she had “[f]ollowed same protocol as every employee for the entire 3 years [she] was employed at [the Facility]”. AE 23. In her opening statement, the Grievant asserted that she was wrongfully terminated. Tape 1A.<sup>1</sup>

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<sup>1</sup> References to the recorded tape of the December 4, 2024 hearing will be designated Tape 1A.

At the hearing, the Agency was represented by its advocate while the Grievant represented herself. Both parties were given the opportunity to make opening and closing statements, to call witnesses and to cross-examine witnesses called by the other party. The hearing officer also received various documentary exhibits of the parties into evidence at the hearing, namely Agency exhibits bates-stamped 1–138 in the Agency’s binder.<sup>2</sup> The Grievant did not submit any documentary exhibits. The Facility’s camera tapes of the incident were also admitted into evidence and were left in the custody of the Facility for security and confidentiality reasons.

No open issues concerning non-attendance of witnesses or non-production of documents remained by the conclusion of the hearing.

In this proceeding, the Agency bears the burden of proof and must show by a preponderance of the evidence that the discipline was warranted and appropriate under the circumstances.

### APPEARANCES

Grievant  
Representative for Agency  
Witnesses

### FINDINGS OF FACT

1. The Grievant was a Psychiatric Tech III (“PT3”), previously employed by the Agency for approximately 3 years before the termination of her employment by the Agency.
2. On August 23, 2024, the Grievant was working as a PT3 at the “Facility” in which she was formerly employed. AE 6.
3. On August 23, 2024, the Grievant was working on a shift at the Observation Post from 1:30 p.m. – 2:30 p.m. (the “Shift”). AE 6.
4. At approximately 2:01 p.m., Patient M was seen through video evidence walking in the Left Hallway before approaching the exterior door. AE 13. The Grievant saw Patient M walking from the hallways to the Day Room. AE 16.
5. At approximately 2:08 pm, Patient M can be seen through video evidence exiting building #94. AE 13. No staff was seen in the Hallway or in the Day Room who had a visual on the door Patient M exited. AE 18.

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<sup>2</sup> References to the agency’s exhibits will be designated AE followed by the exhibit number.

6. At approximately 2:19 p.m., the Grievant documented that Patient M was accounted for in the Treatment Mall and his behavior was appropriate. AE 18. By this time, video evidence showed that Patient M had run between buildings #94 and #95 towards the Medical Records building (west) until he was out of sight. AE 13.
7. Patient M was on 15 Minute Special Observation status. AE 16, 58.
8. During the hearing, the Grievant admitted that she understood the policies well and her duty to do the rounds every 15 minutes.
9. During the Grievant's nursing orientation, it was communicated to her that there may be times when other staff members may do something outside of policy, but this did not mean that the Grievant should follow the staff members' actions, as there was ultimately an expectation that the Grievant will be held personally accountable for any potential mishaps.
10. Despite all of this, the Grievant deliberately chose not to do the required rounds during the Shift, which allowed Patient M to escape undetected. Tape 1A.
11. The Grievant's Employee Work Profile ("EWP") requires of the Grievant, as one of her core responsibilities, that she "[m]onitors patients' whereabouts at appropriate time, according to observation status and accurately document on observation sheets." AE 42.
12. The Grievant's failure to observe Patient M (who was under 15 Minute Special Observation status) allowed him to escape building #94 and potentially endangered the safety and security of Facility staff and patients as well as Patient M himself.
13. Grievant admitted that she violated policy by not performing her mandated rounds while documenting that she had made the rounds.
14. The investigation conducted by the Department was thorough and impartial. The conclusions reached by the investigator were reasonable.
15. The testimony of the Agency witnesses was credible and consistent. The demeanor of such witnesses was open, frank and forthright.

#### APPLICABLE LAW, ANALYSIS AND DECISION

The General Assembly enacted the *Virginia Personnel Act, Va. Code § 2.2-2900 et seq.*, establishing the procedures and policies applicable to employment within the Commonwealth.

This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

*Va. Code* § 2.2-3000(A) sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . . To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the Agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. *Grievance Procedure Manual*, § 5.8.

To establish procedures on Standards of Conduct and Performances for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the *Code of Virginia*, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60. AE 7. The Standards of Conduct (the "SOC") provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The SOC serves to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4<sup>th</sup> Cir. 1988).

Pursuant to DHRM Policy 1.60, Standards of Conduct, management is given the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer is not a "super-personnel officer" and must be careful not to succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management. *Id.*

Pursuant to Departmental Instruction 201 and consistent with the SOC, the Grievant's neglect could clearly constitute a Group III offense, as asserted by the Department.

**Group III Offense:**

Offenses in the category include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination. This level is appropriate for offenses that, for example, endanger others in the workplace, constitute illegal or unethical conduct; neglect of duty; disruption of the workplace; or other serious violations of policies, procedures, or laws.

...

- One Group III Offense normally should result in termination unless there are mitigating circumstances.

AE 6 at 119-120.

**“201-1 Background**

There is no tolerance for abuse or neglect. Whenever an allegation of abuse or neglect is made, the department takes immediate steps to protect the safety and welfare of individuals who are the victims of the alleged abuse or neglect, conducts a thorough investigation pursuant to central office procedures and all applicable laws and regulations, and takes any action necessary to prevent future occurrences of abuse and neglect.

**201-2 Purpose**

The purpose of this departmental instruction (DI) is to establish policies, procedures, and responsibilities for reporting, responding to, and investigating allegations of abuse and neglect of individuals receiving services in department facilities.”

AE 6 at 100.

Departmental Instruction 201-3 defines neglect to include "... any act or failure to act by an employee or other person responsible for the care of an individual in a facility operated by the department that was performed or was failed to be performed knowingly, recklessly, or intentionally, and that caused or might have caused physical or psychological harm, injury, or death to an individual receiving care or treatment for mental illness, developmental disability, or substance abuse."

AE 6 at 100.

As previously stated, the Agency's burden is to show upon a preponderance of evidence that the discipline was warranted and appropriate under the circumstances. The hearing officer agrees with the Agency's advocate that the Grievant's disciplinary infractions jeopardized the safety and security of Facility staff and patients as well as Patient M himself.

The Grievant was aware that Patient M was under 15 Minute Special Observation status. Nevertheless, Grievant admitted that she neglected to make the necessary rounds adequately to observe Patient M because she alleged that very few staff members did so. The Grievant did not call witnesses to establish this allegation because she stated that she did not want to get them in trouble. Accordingly, the Grievant's behavior constituted misconduct and the Agency's discipline is consistent with law and consistent with policy, being properly characterized as a Group III offense.

DHRM's *Rules for Conducting Grievance Hearings* provide in part:

1. DHRM's *Standards of Conduct* allows agencies to reduce the disciplinary action if there are "mitigating circumstances" such as "conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or . . . an employee's long service, or otherwise satisfactory work performance." By law, the hearing officer must "[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency." Examples of "mitigating circumstances" to be considered by the hearing officer include, but are not limited to:

- whether an employee had notice of the rule, how the agency interprets the rule, and/or the possible consequences of not complying with the rule;
- whether the discipline is consistent with the agency's treatment of other similarly situated employees; or
- whether the penalty otherwise exceeds the limits of reasonableness under all the relevant circumstances."

*Rules* § VI(B) (alteration in original).

If the Department does not consider mitigating factors, the hearing officer should not show any deference to the Department in his mitigation analysis. In this proceeding, the

Department did consider mitigating factors in disciplining the Grievant, including her three years of service to the Department and positive feedback from her supervisors. AE 5.

Accordingly, because the Department assessed mitigating factors, the Rules only allow this hearing officer to mitigate the discipline further if this hearing officer upon consideration of the evidence finds that the Department's discipline exceeded the limits of reasonableness.

The Grievant also specifically drew attention to her positive reputation among the Facility's staff and patients. Tape 1A. Accordingly, the hearing officer considered many factors including those specifically referenced above and all of those listed below in his analysis:

1. the Grievant's service to the Agency of 3 years;
2. the Grievant's positive reputation among the Facility's staff and patients;
3. the Grievant received an overall rating of "Contributor" in her 2023 Evaluation Cycle (AE 49); and
4. the fact that the Grievant was not the person who left the door unsecured.

EDR has previously ruled that it will be an extraordinary case in which an employee's length of service and/or past work experience could adequately support a finding by a hearing officer that a disciplinary action exceeded the limits of reasonableness. EDR Ruling No. 2008-1903; EDR Ruling No. 2007-1518; and EDR Ruling 2010-2368. The weight of an employee's length of service and past work performance will depend largely on the facts of each case, and will be influenced greatly by the extent, nature, and quality of the employee's service, and how it relates and compares to the seriousness of the conduct charged. The more serious the charges, the less significant length of service and otherwise satisfactory work performance become. *Id.*

Here the offense of neglect was very serious. Clearly, the mitigation decision by the Department was within the permissible zone of reasonableness.

The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4<sup>th</sup> Cir. 1988).

Pursuant to DHRM Policy 1.60, Standards of Conduct, and the SOC, management is given the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer is not a "super-personnel officer" and must be careful not to succumb to the temptation to substitute his judgment for that of an agency's management

concerning personnel matters absent some statutory, policy or other infraction by management. *Id.*

In this proceeding, the Department's actions were clearly consistent with law and policy and, accordingly, the exercise of such professional judgment and expertise warrants appropriate deference from the hearing officer. *Id.*

The hearing officer decides for each of the offenses specified in the written notice (i) the Grievant engaged in the behavior described in the written notice; (ii) the behavior constituted misconduct; (iii) the Department's discipline was consistent with law and policy and that there are no mitigating circumstances justifying a further reduction or removal of the disciplinary action.

### DECISION

The Department has sustained its burden of proof in this proceeding and the action of the Department in issuing the Group III Written Notice and in terminating the Grievant's employment and concerning all issues grieved in this proceeding is affirmed as warranted and appropriate under the circumstances. Accordingly, the Department's action concerning the Grievant is hereby upheld, having been shown by the Department, by a preponderance of the evidence, to be warranted by the facts and consistent with law and policy.

### **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 and 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 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>

ENTER: 12/8/24

*John Robinson*

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John V. Robinson, Hearing Officer

cc: Each of the persons on the Attached Distribution List (by e-mail transmission)

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