

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 12285

Hearing Officer Appointment: May 12, 2025

Hearing Date: June 17, 2025

Decision Issued: June 17, 2025

PROCEDURAL HISTORY, ISSUES
AND PURPOSE OF HEARING

The Grievant was until recently employed at a facility (the “Facility”) of the Department of Behavioral Health and Developmental Services (the “Department”, “DBHDS” or the “Agency”).

The Grievant requested an administrative due process hearing to challenge termination of her employment effective April 17, 2025, pursuant to a Group III Written Notice issued by Management of the Department of Behavioral Health and Developmental Services as described in the Grievance Form A dated April 27, 2025.

The Group III Written Notice was for violation of Written Notice Offence Codes 11 – Unsatisfactory performance; 13 — Failure to follow instruction or policy; and 37 — Disruptive behavior. AE 1 at 1, 3.

The Grievant is seeking the relief requested in her Grievance Form A, including reinstatement or the option to be reassigned to a different facility. The Grievant was informed that she should contact [REDACTED] to discuss her requested relief.

The parties duly participated in a first pre-hearing conference call scheduled by the hearing officer on May 27, 2025. 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 parties agreed that email is acceptable as a sole means of written communication.

Following the first pre-hearing conference, the hearing officer issued a Scheduling Order entered on May 28, 2025 (the “Scheduling Order”) which is incorporated herein by this reference.

At the hearing, the Agency was represented by its advocate while the Grievant chose not to be represented by an advocate. 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 1-15 (pages 1-130).¹ 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 (left during the hearing)
Representative for Agency
Witnesses

FINDINGS OF FACT

1. The Grievant was a Direct Support Associate (“DSA”), previously employed by the Agency for approximately 3 years before the termination of her employment by the Agency. AE 4 at 11; AE 12 at 120. A DSA functions much like a CSA, monitoring patients and performing close observation (“CO”), performing special checks on patients every hour or 15 minutes (depending on the order), and assisting RNs checking vital signs, bathing patients, etc. Tape. As a DSA, Grievant was required by her IEP to maintain “a therapeutic and safe milieu.” AE 9 at 88.
2. On December 5, 2023, the Grievant was issued a “NOTICE OF IMPROVEMENT NEEDED/SUBSTANDARD PERFORMANCE” due to the Grievant’s facial piercings being not in compliance with the Facility’s dress code. The notice warned that continued poor performance would result in an overall

¹ References to the agency’s exhibits will be designated AE followed by the exhibit number.

“Below Contributor” rating on her annual performance evaluation conducted in that performance cycle. AE 11 at 106.

3. On July 24, 2024, the Grievant attended a Supervisory Session where she was spoken to about her unprofessional behavior during breakfast. The Grievant had called out “come get ya’lls food” over the radio when announcing breakfast. AE 11 at 109.
4. On August 26, 2024, the Grievant was the subject of a Human Resources (“HR”) Administrative review regarding insubordination (though unsubstantiated). AE 5 at 38.
5. On September 23, 2024, the Grievant was the subject of a HR Administrative review regarding insubordination/profanity/refusal to perform responsibilities (status unknown). *Id.*
6. On February 7, 2025, the Grievant attended a Supervisory Session where she was spoken to about her attendance issues, having accumulated 8 points within the past 6 months. AE 11 at 110.
7. On March 6, 2025, the Grievant was working at the Facility and was assigned to work in H unit. AE 4 at 18.
8. Sometime between 0000 and 0100, DSA Staff #3, who was in the G6 Bedroom with Patient #1, called for help, stating that she was afraid. *Id.*
9. At approximately 0055, the Grievant and DSA Staff #2 walked down the hallway and into the G6 Bedroom to assist Staff #3. They remained in the room for approximately four minutes. AE 4 at 15, 18.
10. At approximately 0059, the Grievant walked into G Unit Nurse’s Station and Staff #3 walked to H Unit Nurse’s Station. AE 4 at 15.
11. A recorded video of a Snapchat “story” was obtained by the Facility Director. The recording appeared to show the story playing on one phone, while another phone records. At the top left of the screen, the account name is visible: “Staff #3.” A time stamp was also displayed at the top left, under the name. The stamp indicated that the story was posted 15 hours before it was recorded for this video. *Id.*
12. One of the stories captured in the video showed Staff #2 and the Grievant sitting in a doorway. Behind Staff #2, another doorway was shown across the hallway. Above this doorway, there was a sign that labelled the door as “G18,” identical to the one that would be found above G Unit Room G18. The Grievant was seen in the video making an obscene gesture towards the camera. The video’s caption

near the bottom of the screen stated, “Well at least they come check on me but they ain’t no help cracking jokes.” AE 4 at 16.

13. The last story captured in the video showed the Grievant utilizing a cellphone. The caption of the video stated, “3 hours later she wanna join I when she the first person I called.” AE 4 at 17.
14. On March 6, 2025, Staff #2 was interviewed. She confirmed that she went down to the G6 Bedroom to help Staff #3, who was scared due to seeing a roach. She stated that she only stayed there for “a few minutes.” AE 4 at 24.
15. On March 7, 2025, the Grievant was interviewed. She stated that she was “not aware of” an alleged Snapchat video of an individual. AE 4 at 17.
16. The Grievant then claimed that she went into the G6 Bedroom during her lunch break, staying in the room for “approximately twenty minutes.” AE 4 at 18.
17. When asked if she, at any point during her shift, witnessed staff using cell phones in the treatment area, she claimed that she had not. *Id.*
18. When asked if she has had training in Departmental Instruction 201(RTS)03 (“DI 201”) or Health Insurance Portability and Accountability Act (“HIPPA”) during her tenure at the Facility, she confirmed that she had had training in both. *Id.*
19. When asked if she was aware that staff members are prohibited from using personal portable electronic devices in the treatment area, she responded by saying that she was aware of the policy. *Id.*
20. When asked if she had an electronic device on her while helping Staff #3, the Grievant replied in the affirmative. When further asked if she had taken out her device and utilized it while in the G6 Bedroom, she replied also in the affirmative. *Id.*
21. The Grievant finally confirmed during the interview that the device was a cell phone when asked. She claimed that she was on the phone with her mother while in the G6 Bedroom. When asked who else was in the room with her at the time, she replied, “I don’t know, I don’t remember.” *Id.*
22. On that same day, the Grievant was reported to the Employee Health & Infection Control and Preventionist (“the Preventionist”) for having extremely long artificial fingernails, which posed potential infection control issues. The Preventionist indicated that she had previously spoken a while back with the Grievant and requested that she remove the nails. However, the Grievant responded negatively to such instructions and continued to disregard them as of that day. AE 11 at 115, 116.

23. On March 12, 2025, a follow-up interview was conducted with the Grievant. When asked if she knew who initiated the Snapchat story and who posted it, the Grievant claimed that she did not know as she was unaware of its existence. The Grievant was then asked who was recording the digital media, to which she denied knowledge of. AE 4 at 18.
24. When asked who was in the room at the time of the alleged event, she stated, “It was me, Staff #1, Staff #9, Staff #2, ... Staff #10 was in the Nurses Station ... Staff #6 was the one who killed [the roach].” *Id.*
25. On the same day, Staff #3 was interviewed. When asked if she captured any digital media of another staff member using a cell phone, she replied in the affirmative though she could not remember the identity of that staff. AE 4 at 20.
26. On the same day, Staff #4 was interviewed. When asked who responded to Staff #3’s call for help, she stated that herself, the Grievant, and Staff #2 went into the G6 Bedroom. AE 4 at 23.
27. When Staff #4 was asked if any staff members used personal portable electronic devices in the treatment area on the night of the alleged event, she stated that the Grievant used her phone to answer a call from her mother. *Id.*
28. On March 13, 2025, Staff #2 had a follow-up interview. When she was asked how long she was in the G6 Bedroom, she now responded with “twenty to twenty-five minutes.” AE 4 at 24.
29. The Snapchat video showed the numerous staff interviewed, including the Grievant, looking in the direction of the camera. The Grievant was thus “more likely than not ... uncooperative with the investigation by being dishonest to the investigator.” AE 4 at 30.
30. The Grievant showed no remorse for her actions and inactions.
31. The investigation conducted by the Department was thorough and impartial. The conclusions reached by the investigator were reasonable.
32. 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 DHRM Policy 1.60, *Standards of Conduct*. AE 6 at 43.

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 (4th 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.*

The Grievant did not follow the applicable state and agency policies.

Specifically, DHRM Policy 2.35, *Civility in the Workplace*, prohibits “[s]wearing, or using obscene language or gestures toward another person.” AE 7 at 82.

Furthermore, the Facility’s Instruction 524(HRM)03-15, *Personal Portable Electronic Devices* (“Instruction 524”) provides that:

“I. PROCEDURES

A. Personal Portable Electronic Devices: (PPED) include ... phones ... the use of these devices in the work place can pose serious safety, confidentiality, privacy and performance issues and loss of productivity. PPEDs are permitted in the facility but are **NOT permitted in the treatment areas of the facility.** Staff should leave any PPEDs either in their office or in their locker. These devices may be used during breaks or lunch periods as long as they are used in the appropriate areas (i.e. staff break areas, offices) and **not in the presence of individuals receiving services** or visitors at [the Facility].

...

C. Incoming Personal Emergency Calls: In-coming personal emergency calls should be directed to the main number of [the Facility] or to any appropriate office or unit telephone. An employee’s expectation of a **personal emergency call is not an acceptable reason to allow a personal cell/smart phone in treatment areas** or for cell/smart phones remain on while on duty, during training or a meeting.”

AE 8 at 83, 84 (emphasis added).

Additionally, pursuant to DHRM Policy 1.75, *Use of Electronic Communications and Social Media*, p 3 & 7, users must “comply with their Agency’s supplemental policies specific to their use of the Agency’s electronic communications, applications, and business-related social media ... Agencies must address violations of this policy in accordance with Policy 1.60, *Standards of Conduct* ... with sanctions up to or including termination depending on the severity of the offense.”

As such, pursuant to DHRM Policy 1.60, the Grievant's actions 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 54 (emphasis added).

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 Snapchat video clearly showed the Grievant making an obscene gesture toward the camera. Additionally, the Grievant was visibly using her cellphone in the Snapchat video. During the investigative interview, she admitted to being on a call with her mother while in the G6 Bedroom. Furthermore, Staff #3 had admitted to capturing digital media of another staff member using a cell phone, though she could not remember the identity of that staff. Staff #4 ultimately confirmed the identity of that person to be the Grievant.

Although the Grievant attempted to justify her actions by citing concern for her mother's wellbeing, Instruction 524 explicitly states that “a personal emergency call is not an acceptable reason to allow a personal cell/smart phone in treatment areas.” AE 8 at 84.

The Grievant's conduct undermined the high standards of respect and professionalism expected at the Facility. Her actions, both directly and indirectly, compromised the safety and wellbeing of staff and, more critically, of Patient #1.

The Grievant's current misconduct is further aggravated by a history of similar disruptive behavior, including two prior dress code violations and a breach of professional speech standards, as well as a prior failure to adhere to attendance policies. In short, the Grievant's tenure at the Facility has been marked by a consistent pattern of unsatisfactory performance.

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:

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)(2) (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 1 at 1.

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 has asserted that the discipline was unwarranted. While the Grievant might not have specified for the hearing officer's mitigation analysis all of the mitigating factors below, the hearing officer considered a number of factors including those specifically referenced in AE 1, the Written Notice, the Form A, the hearing, those referenced herein, and all of those listed below in this analysis:

1. the demands of the Grievant's work environment
2. the Grievant's service to the Agency of 3 years;
3. her very hard work for the Facility;
4. the long hours worked by the Grievant
5. the shortage of staff at the Facility
6. her mother's numerous health challenges; and

7. the fact that the allegations of abuse regarding Patient #1 made against the Grievant were found to be unsubstantiated.

AE 3 at 6; AE 4 at 27.

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 (4th 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 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to 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.^[1]

ENTER: 6/17/25

John Robinson

John V. Robinson, Hearing Officer

cc: Each of the persons on the Attached Distribution List (by U.S. Mail and e-mail transmission where possible and as appropriate, pursuant to *Grievance Procedure Manual*, § 5.9).

^[1] Agencies must request and receive prior approval from EDR before filing a notice of appeal.