

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 12291

Hearing Officer Appointment: June 2, 2025

Hearing Date: August 11, 2025

Decision Issued: August 14, 2025

PROCEDURAL HISTORY, ISSUES
AND PURPOSE OF HEARING

The Grievant was until recently a Direct Support Associate III (“DSA”) at a facility (the “Facility”) of the Department of Behavioral Health and Developmental Services (“DBHDS” or the “Department” or the “Agency”).

The Grievant requested an administrative due process hearing to challenge the issuance on May 12, 2025, of a Group III Written Notice with termination effective the same date, by management of the DBHDS, as described in the Grievance Form A. The issues for hearing are those delineated by the Grievant in her Form A.

The hearing officer and the parties scheduled and held a first prehearing conference call via Zoom at 11:30 am on June 12, 2025. The Grievant, the Agency’s advocate and the hearing officer participated in the call.

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 June 15, 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 documents consisting of pages 1-42.¹ The Grievant did not submit any documentary exhibits.

No open issues concerning the attendance of witnesses or production of documents remained at 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 Direct Support Associate (“DSA”), previously employed by the Agency before the termination of her employment by the Agency. AE 3.
2. 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.
3. As a DSA, Grievant was required to maintain a therapeutic and safe milieu.
4. On August 16, 2024, Grievant was issued a Group I Written Notice for failure to follow instructions or policy. This written notice remains active.
5. Video footage from the gymnasium captured the incident concerning the present grievance on April 10, 2025. AE 42.
6. Patient A was sitting at a table with other peers. AE 42.
7. As described by the CEO, unprovoked, the Grievant made a beeline to Patient A from some distance away.

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

8. In an intimidating and aggressive fashion, the Grievant proceeded to crowd and push against the back of the seated Patient A, while maintaining her hands behind her back.
9. Patient A managed to extricate himself from the chair and move some distance away from the Grievant. The Grievant also withdrew momentarily.
10. Patient A then began to play some one-on-one basketball with Patient B.
11. Again, from some distance away, unprovoked, the Grievant made a beeline towards Patient A. Patient A remained calm and hid himself behind Patient B until he was able to withdraw to a safe distance from the Grievant.
12. The Grievant has received human rights training concerning her job duties and the appropriate methodologies for implementing her direct care services to the adult psychiatric patients. As detailed by the Facility's Director of Clinical Psychology and Forensic Services, the Agency provided the Grievant with significant orientation and annual human rights training in safe and therapeutic interactions with patients, and Departmental Instruction 201(RTS)03 ("DI 201") during her tenure at the Facility.
13. The Facility conducted a thorough investigation and the assigned experienced Investigator, after assessing the credibility of the witnesses, reasonably found the allegation of abuse substantiated. AE 15.
14. The Facility issued a Group III Written Notice with termination on May 12, 2025, for Written Notice Offense Code 81 – Patient/Inmate/Client abuse.
15. The Grievant showed no remorse for her actions and inactions.
16. The investigation conducted by the Department was thorough and impartial. The conclusions reached by the investigator were reasonable.
17. 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.

In this instance, the Agency appropriately determined that the Grievant's violations of policy by causing psychological harm to Patient A constituted abuse and a Group III Offense.

Departmental Instruction 201-3 defines abuse as follows:

. . . 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 a person receiving care or treatment for mental illness...

AE 25.

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.”

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.

Although Grievant attempted to justify her actions by citing her efforts to find contraband regarding Patient A, on cross-examination, Grievant admitted that no contraband was seen by her, that she did not call for a search, or assistance, or generally follow through with any investigation.

Grievant's conduct undermined the high standards of respect and professionalism expected at the Facility. Her actions, both directly and indirectly, undermined the mission and values of the agency and compromised the safety and wellbeing of Patient A.

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 service to the Department. AE 3.

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;
3. her hard work for the Facility;
4. the long hours worked by the Grievant; and
5. the shortage of staff at the Facility

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. Additionally, Grievant has an active Group I. 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).

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]

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

ENTER: 8/14/25

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).