



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11770

Hearing Date: March 28, 2022
Decision Issued: April 18, 2022

PROCEDURAL HISTORY

On October 25, 2021, Grievant was issued a Group III Written Notice of disciplinary action with removal for unsatisfactory performance, insubordination, and gross negligence.

On November 22, 2021, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On December 6, 2021, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 28, 2022, a hearing was held by remote conference.

APPEARANCES

Grievant
Grievant's Counsel
University 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 University 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:

Norfolk State University employed Grievant as the Director of Football Operations. The purpose of her position was:

Assist with daily operations of football program, including logistics, travel, student resources, financial aid, onboarding, managing work study students, coaching staff, point of contact for NFL Scouts, recruits, staff, and campus partners for NSU football program.¹

Grievant began working for the University in September 2013. She reported to the Coach. Her "second level" supervisor was the Director. Grievant received an overall rating of Contributor on her October 23, 2020 evaluation.

The University's football team was scheduled to play a football game in Ohio in September 2021. Grievant was responsible for planning the trip and coordinating the logistics with University staff, airline staff, and Hotel staff. Grievant had organized five or six football trips prior to the September 2021 football trip.

¹ University Exhibit 6.

Grievant contacted a Hotel in Ohio and negotiated a contract for the Team. Hotel staff told Grievant that the Hotel could not accommodate a late check out because of other events. Grievant did not include a late check out option in the contract between the University and the Hotel.

On May 27, 2021, Grievant was notified that the football game on September 4, 2021 would begin at 7 p.m.

On June 1, 2021, Grievant drafted a Travel Requisition form for the trip. The Travel Requisition showed Lodging of 54 rooms for one night at \$152.55 per night, meals for 90 people for one day at \$59.90 per meal and meals for six managers for one day at \$20 per meal. The Coach signed the Travel Requisition form on June 29, 2021.

The Charter Equipment Manifest was a form showing the equipment to be transported on the trip to Ohio. The form had blank spaces to enter items or types of equipment, the weight of each item, the quantity of each item, and the total weight for all equipment.

Mr. W, the Football Equipment Manager, prepared a Charter Equipment Manifest for the Team's trip. The Charter Equipment Manifest showed sixteen items of equipment. Three of the items showed weight and quantity but not the total weight. The word "#VALUE!" appeared in the total weight column. One item showed a box weighing 60 pounds. The total weight was listed as "6060." The manifest showed 100 player travel bags weighing 15 pounds each. The form showed a "Total Equipment Weight" of "#VALUE!". Once Grievant received the Charter Equipment Manifest from Mr. W, she did not ask Mr. W to correct his mistakes and fill in missing information. She sent the Charter Equipment Manifest to the vendor who arranged the airline for the trip.

The Charter Passenger Manifest showed the Last Name, First Name, Gender, Date of Birth, and Weight (Non standard only) for each passenger. Some of the passengers were described by their nick names. The passenger manifest showed a count of 111 passengers.

The Banquet Check for Friday September 3, 2021 showed a dinner buffet for 96 people at \$34.95 per meal.² The Banquet Check for Saturday September 4, 2021 showed a breakfast buffet for 113 people at \$24.95 per meal and a lunch buffet for 113 at \$32.95 per meal.³

On Friday, September 3, 2021, the Football Team travelled from Virginia to Ohio to play a football game on Saturday, September 4, 2021. The Team consisted of players, coaches, managers, operations staff, and University employees and administrators

² The Friday Banquet Check was printed on September 3, 2021.

³ The Saturday Banquet Check was printed on September 5, 2021.

travelling from Virginia to Ohio. Grievant was responsible for handling travel logistics for the Team to ensure a safe and problem free trip.

The University chartered a plane to transport the Team to Ohio. The plane could not take off if it weighed more than the maximum amount allowed based on the type of plane. An overweight plane could crash. The plane's weight consisted of the weight of the plane when empty and the weight of the fuel, passengers, luggage, and player equipment.

Grievant was responsible for providing the airline with an accurate list of equipment that identified the weight of the equipment. Grievant submitted the Charter Equipment Manifest to the vendor coordinating the airline transportation. The Charter Equipment Manifest was not accurate because three items of equipment did not show weight, a 60 pound item was showed weighing 6060 pounds, and the total equipment weight for all items was not calculated. The airline could not accurately determine the maximum gross takeoff weight. In order to ensure the plane was not overweight, the airline decided to burn fuel before taking off. This resulted in a delayed departure. Because the airline had to burn fuel, it later had to purchase more fuel than anticipated to refuel the plane. The airline sent the University a bill for an additional \$5,536 cost to refuel the plane because it did not have an accurate Charter Equipment Manifest.

The Coach authorized more than the initial 96 passengers to go on the trip. Grievant should have known that the number had increased at least two weeks prior to the trip. The additional number of passengers was "confirmed" at least a week before the trip.

There were 113 passengers on the plane instead of the 111 listed on the Charter Passenger Manifest. Grievant provided the passenger lists to the Flight Attendants. A roll call had to be conducted until all of the 113 passengers were identified. Five or six counts were made until the list discrepancy was resolved.

The flight was scheduled to depart at 2 p.m. on September 3, 2021 but because of problems with the Charter Equipment Manifest and Charter Passenger Manifest, the departure was delayed until 4 p.m.

When the Team arrived at the Airport in Ohio, two buses transported them to the Hotel.

When the Team arrived at the Hotel, Hotel staff had prepared a banquet for 96 people based on information provided by Grievant. Hotel staff had to add additional seating and prepare additional meals to ensure all of the Team who wanted to eat were able to eat. The President and Director had to wait until additional seating was in place in order to eat.

The football game was scheduled for 7 p.m. on Saturday September 4, 2021. The Team was to remain at the Hotel after check out until the Team departed for the Stadium. Regular check out for a group was at 1 p.m.

During dinner Friday night, the Director realized that the Team did not have a late check out for Saturday. She believed a late check out was important to provide the team with “proper rest” before playing the football game. The Director spoke with Hotel management who said there was an additional fee for a late check out.

After the meal on Friday night, the Director held a staff meeting. During the meeting, the Director perceived Grievant as “not paying attention” and expressing the attitude of “why am I here.” The Director told Grievant to obtain a late check out for the Team and to get things in order. Grievant did not tell the Director a late checkout (after 1 p.m.) was not possible. Grievant did not follow the Director’s instruction. Grievant negotiated a late check out for administrative staff but not for players. On Saturday, the players had to go to the Hotel ballroom and wait until 3:30 p.m. for their pre-game meal instead of remaining in their rooms.

The Hotel had rooms with two beds. Prior to departure, Grievant had scheduled four student managers to a room. She was following a practice she learned from a prior coach. This meant two student managers would have to sleep in a bed. This was too crowded. When students raised their concerns to the Business Manager, Grievant was instructed to obtain additional rooms so that no more than two students would be in a room. Grievant completed the instruction.

All of the 113 people had rooms at the Hotel to sleep. The University was billed for 69 rooms instead of 54 as listed in the Travel Requisition.

When the time came for the Team to travel to the Stadium, only one bus was available.⁴ Grievant was not at fault for the bus driver failing to report to the Hotel on time. Grievant did not hold the bus that was on time until the second bus arrived. As a result, half of the players went to the Stadium while the other half remained at the Hotel.

CONCLUSIONS OF POLICY

The Agency took disciplinary action against Grievant for having an inaccurate equipment manifest, inaccurate travel manifest, unapproved travelers, ground transportation, insufficient meal planning, insufficient planning for lodging, insubordination for failure to negotiate late checkout option, and insufficient bus logistics.

Unsatisfactory work performance is a Group I offense. Failure to follow a supervisor’s instruction is a Group II offense. OEDR has ruled that an agency may accumulate separate related offenses to elevate the disciplinary action to a Group III offense.⁵

⁴ In April, 2021, Grievant contacted a bus company and reserved two buses for the trip.

⁵ The Hearing Officer does not agree with ODER’s interpretation of the Standards of Conduct.

Grievant was responsible for delaying the plane departure on Friday September 3, 2021. When Grievant received and reviewed the Charter Equipment Manifest, she should have recognized that the manifest contained errors and was missing significant information. Grievant should have contacted Mr. W to obtain a corrected manifest. Because the airline did not have a correct Charter Equipment Manifest, it had to burn fuel to ensure the plane did not travel overweight. The University had to pay \$5,536 to refuel the plane. In addition, Grievant was responsible for ensuring that airline staff received the correct number of passengers. The Charter Passenger Manifest did not contain the names of all of the passengers. When Grievant learned that more than 96 people would be travelling, Grievant should have updated the Charter Passenger Manifest to include all of the travelers. Grievant provided the Flight Attendants with an inaccurate list.

Grievant argued that she was not responsible for Mr. W's errors shown in the Charter Equipment Manifest. Although Grievant did not create the errors, the errors were obvious and Grievant should have noticed the errors and addressed them with Mr. W.

Grievant argued she was not responsible for the confusion regarding the number of passengers on the plane because the Coach determined who travelled on the plane. The evidence showed that the number of passengers was confirmed several days before the trip and, thus, Grievant should have updated the Charter Passenger Manifest to ensure the Flight Attendants had accurate information.

Grievant did not inform Hotel staff that 113 people would be ready for dinner on Friday September 3, 2021. On or before September 3, 2021, Grievant should have realized that the Team consisted of at least 111 people instead of the 96 listed in the contract with the Hotel. She should have called the Hotel and told Hotel staff to prepare additional meals on Friday night.

Grievant argued that not all of the 113 travelers ate meals at the Hotel Friday night. Assuming this is true, it has no bearing on the outcome of this case. Grievant was responsible for planning and that planning would have included telling the Hotel staff to prepare for meals on Friday night for up to 113 guests.

On Friday night, the Director instructed Grievant to negotiate late check out for the Team on Saturday. Grievant did not follow this instruction. Grievant denied refusing to comply with the Director's instruction to obtain a late checkout for the Team. Grievant claimed the Coach told her that the late checkout was not necessary. The Coach testified he did not recall having a conversation with Grievant in which he said the late check out was not necessary. Grievant did not tell the Director that the Coach had told her that the Director's instruction was not necessary. Even if the Coach had told Grievant a late check out was not necessary for players, Grievant should have informed the Director of the Coach's instruction.

None of Grievant's actions separately rise to the level of a Group III offense. When considered as a whole, however, Grievant's behavior rises to the level of a Group III

offense. The University 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, Grievant's removal must be upheld.

Grievant argued the Agency failed to counsel her prior to taking disciplinary action. Although the Standards of Conduct encourages agencies to engage in progressive disciplinary action, it does not require that practice. The University was free to take disciplinary action without first counseling Grievant.

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"⁶ 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.

Grievant argued the University did not discipline Mr. W for drafting an incorrect Charter Equipment Manifest. Although the University could have taken disciplinary action against Mr. W, the University's failure to do so does not undermine the University's discipline against Grievant. Grievant and Mr. W held different positions. Grievant was responsible for reviewing the manifest prepared by Mr. W to ensure it was accurate. Mr. W's errors were obvious and Grievant should have asked Mr. W to correct his errors. The Hearing Officer does not believe the University singled-out Grievant for disciplinary action. In light of the standard set forth in the Rules, 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

⁶ Va. Code § 2.2-3005.

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 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]

[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

Carl Wilson Schmidt, Esq.
Hearing Officer

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