



# ***COMMONWEALTH of VIRGINIA***

***Department of Human Resource Management***

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

## **DECISION OF HEARING OFFICER**

In re:

**Case Number: 11896**

Hearing Date: February 24, 2023

Decision Issued: April 14, 2023

### **PROCEDURAL HISTORY**

On August 1, 2022, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory performance.

Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On October 13, 2022, the Office of Employment Dispute Resolution issued Ruling 2023-5466. On October 24, 2022, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 24, 2023, a hearing was held by remote conference.

### **APPEARANCES**

Grievant  
Agency Party Designee  
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 Virginia Department of Transportation employed Grievant as a Resident Business Manager at one of its locations. She began working for the Agency on October 10, 2017. Grievant was responsible for the daily oversight of financial, procurement, inventory, and budget programs at a residency. Grievant resigned from the Agency on October 24, 2022.

On March 21, 2022, Grievant received a Notice of Improvement Needed/Substandard Performance. She was given until June 19, 2022 to correct her performance in five areas of concern. Grievant was given a performance plan. When Grievant was reevaluated in July 2022, the Agency concluded Grievant had successfully completed three of the five areas but two remained unsatisfactory. Those two were:

Monitor/track your employees' performance and behavioral needs and establish specific training goals for your staff.

Empower your team to take ownership of their tasks by requiring them to problem solve issues and only seek assistance when they are unable to

resolve the issue. You must also provide a performance status update during our bi-weekly meeting.

The Fiscal Tech reported to Grievant. She began working for the Agency on May 25, 2022. On July 14, 2022, the Fiscal Tech resigned from her position with the Agency effective that day. The Fiscal Tech met with the HR Consultant to discuss why she was leaving. The Fiscal Tech told the HR Consultant she wanted to discuss why she was leaving with “hopes of preventing the same thing from happening to the next employee we hire.” The Fiscal Tech said that she was leaving because of Grievant’s poor management. The Fiscal Tech said that Grievant gave her a lot of busy work but no real training. The Fiscal Tech said Grievant would give her 30 minutes of work and then the Fiscal Tech was left alone for three or four hours with nothing to do. The HR Consultant tried to get the Fiscal Tech to remain an employee and offered her training in another residency, but the Fiscal Tech refused. The Fiscal Tech did not want to work anywhere near Grievant which could happen if the Fiscal Tech remained in a fiscal position.

In January 2022, Ms. W asked Grievant to approve Ms. W’s request for summer vacation. Grievant did not approve the request. Ms. W had made reservations and needed to know if her leave was approved in order to avoid late cancellation penalties. In June 2022, Ms. W asked Grievant if Grievant would be approving Ms. W’s vacation request. Instead of approving Ms. W’s request for vacation, Grievant asked Ms. W additional questions. Ms. W became frustrated and contacted the Residency Administrator to get the leave approved.

A Superintendent wanted to extend the lease for a motor grader. The Superintendent asked Ms. W to provide assistance. Ms. W asked Grievant how to accomplish the task. Grievant spoke with the shop manager and expressed reluctance to extend the lease since new equipment had been ordered. The Residency Administrator told Grievant to extend the lease since he did not want to lose the motor grader and be without a motor grader if receipt of the new equipment was delayed. Grievant “went back and forth” with the shop manager. The Residency Administrator had to get his assistant to contact the shop manager to have the lease extended.<sup>1</sup>

Grievant alleged she was being treated unfairly and being retaliated against. The Agency’s Human Resources unit investigated the allegations and concluded they were unfounded.

## **CONCLUSIONS OF POLICY**

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “include acts of minor misconduct that require formal

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<sup>1</sup> The Agency presented additional factual scenarios. The Hearing Officer finds them not persuasive or not relevant and will not address them in this decision.

disciplinary action.”<sup>2</sup> Group II offenses “include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action.” Group III offenses “include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.”

“[U]nsatisfactory work performance” is a Group I offense.<sup>3</sup> In order to prove unsatisfactory work performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice. The Agency gave Grievant a Notice of Needs Improvement/Substandard Performance outlining its expectations with respect to her work performance. Grievant’s interaction with her co-workers was not satisfactory to the Agency. For example, the Fiscal Tech resigned from her position because she believed Grievant gave her busy work and did not provide adequate training. Ms. W became frustrated because Grievant did not approve her leave request on a timely basis which resulted in the Residency Administrator having to become involved. Grievant failed to extend a lease for a motor grader when asked to do so by a Superintendent which resulted in the Residency Administrator having to become involved to resolve the matter.

Grievant denied the allegations against her. For example, Grievant argued that the Fiscal Tech was out of the office half of the time. Although Grievant’s assertion is true, the Agency presented sufficient evidence that the Fiscal Tech was not fully trained and supervised and did not want to work with Grievant. Grievant argued that her actions were appropriate with respect to the lease extension. The evidence showed that Grievant was not focused on ensuring there was no gap in having a motor grader at the facility, she was focused on a 12-month lease. When the evidence is considered as a whole, there is sufficient evidence to support the issuance of a Group I Written Notice.

Grievant alleged the Agency retaliated against her for her refusal to participate in inventory fraud. She presented evidence that she participated in a physical inventory on June 1, 2022 and raised concerns about how the Agency was calculating inventory. The Hearing Officer does not believe that the Agency issued Grievant a Group I Written Notice in response to her concerns about the Agency’s inventory management. The Agency issued Grievant a Notice of Improvement Needed/Substandard Performance on March 21, 2022 and monitored her performance in response to the Notice. All of this happened prior to June 1, 2022 when Grievant contested the Agency’s inventory practices. The Agency’s issuance of a Group I Written Notice was a progression of its ongoing review of Grievant’s work performance.

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<sup>2</sup> The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

<sup>3</sup> See Attachment A, DHRM Policy 1.60.

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>4</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 I Written Notice of disciplinary action 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

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

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<sup>4</sup> Va. Code § 2.2-3005.

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.