



**COMMONWEALTH of VIRGINIA**  
**Department of Human Resource Management**

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 11922**

Hearing Date: March 31, 2023  
Decision Issued: April 11, 2023

**PROCEDURAL HISTORY**

On January 5, 2023, Grievant was issued a Group III Written Notice of disciplinary action with removal for violating the University's computer security policy.

On January 11, 2023, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On February 1, 2023, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 31, 2023, a hearing was held by remote conference.

**APPEARANCES**

Grievant  
University Party Designee  
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 University'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:

George Mason University employed Grievant as a Technology Specialist. No evidence of prior active disciplinary action was introduced during the hearing.

The primary purpose of Grievant's position was:

This position ensures the timely availability of electronic resources to faculty, staff, and students of the School of Business and associated programs. The secure access to resources is critical while reducing the impediments to access for authorized users. This is the primary person who ensures applicable access to electronic resources used by faculty, staff and students of the School of Business. May receive instruction from the IT Manager with regards to projects tangentially related to technology within the School.<sup>1</sup>

Grievant received training regarding the University's computer technology policies. He was trained that he was not permitted to share his login identification and password with anyone else.

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<sup>1</sup> University Exhibit p. 45.

Grievant's position required a high level of trust and integrity. Grievant had access to personally identifying information for every School of Business, GMU credit cards for purchases, the ability to remotely access any computer, and thus all assigned private drives that may contain sensitive information, and 24/7 access to card swipe mechanisms and master keys to physically access every office in the three School of Business sites.

The University allowed Grievant to use his personal cell phone to access the University's information system. He could log in using his cell phone and his identity would be authenticated using a secured token. That token would be saved to his cell phone so that he did not have to authenticate his identity every time he began using his phone to access the University's information system. This meant that any person with access to Grievant's cell phone could impersonate him and access all of the University's data including sensitive and protected data.

Grievant experienced a family emergency requiring him to leave the country immediately. Grievant spoke with Mr. F, an Employee Relations Consultant, because his supervisors were not working at the time. Grievant and his partner drove to the airport. Grievant forgot to take his cell phone with him. His partner retained control of his cell phone. Grievant went to a country with limited internet access.

On November 17, 2022, the Supervisor sent Grievant an email:

I am sorry to hear of your family emergency. [Mr. F] passed on that you plan to be out of the office from Monday 11/14 through Friday 12/2. In order to ensure that your use of leave is in compliance, I need to know more about your leave request. I understand that you have left or are going out of the country. Please elaborate on the type of family emergency—for example, was there a death in the family; was there an accident after which you need to be of assistance; are you providing transportation for someone who needs assistance? You had previously asked for and were approved for annual leave from Dec. 5-16. Considering your current need for unplanned leave, that Dec. 5-16 leave request is now being denied and can be revisited when you have returned to the office. Please get in contact with me by noon, Monday, Nov. 21, either by email or by Teams call.<sup>2</sup>

On November 20, 2022, Mr. F sent Grievant an email:

We have several questions that we need clarity on. Please let us know what time tomorrow we can call you. Without the clarity that we need, your leave cannot be approved. So it is imperative that we speak with you.

On November 20, 2022, Grievant's partner used Grievant's cell phone to send the Supervisor an email:

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<sup>2</sup> University Exhibit p. 10.

Just now getting to this email. I have very limited internet access out here. And immediate family member is extremely ill, and I am also here assisting my mother with transportation. I will submit my hours now that I have a chance. And yes, I asked [Mr. F] to no[t] remove the prior time off requested that you mentioned when me and [Mr. F] spoke, and I requested this time off and informed him of the family emergency and how to go about this request correctly.<sup>3</sup>

On November 21, 2022, Mr. F sent Grievant an email:

The headers for your email, which are viewable by anyone, suggest that your message was sent from a server in North America. ITS has tools that could give more information on this however; I would like to ask you to confirm a time to speak prior to me looking further into this. Please let us know a time that you will be available for us to call you today before 5pm.

On November 21, 2022, Grievant's partner used Grievant's cell phone to send Mr. F an email:

Yes, you are correct. I didn't bring my phone with me. I left my phone with my partner. I asked her to check my emails on my phone last night while on a WhatsApp call from my cousin's phone. She then informed me about [the Supervisor's] email with a Monday deadline. I am here for a family emergency, and my priority at this moment is family. And I can answer these questions that you need clarity on upon my arrival, Monday December 5th. Again I spoke to [Mr. F] and on Monday November 14th and explain to him for my urgency to take time off and how to go about it correctly. And his response was that I did the right thing and that he would inform [the Supervisor]. I had mention having prior issues with [the Supervisor] and timesheet approvals, and did my due diligence. I apologize for any confusion. This is a very unexpected trip and situation and if the time cannot be approved before I get back, I understand. This message is being sent by my partner on my behalf per my request. Please respect my time off and personal family emergency. Again, that is my priority, and I will no longer be asking my partner to check my phone. Thank you for understanding.

## 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 disciplinary action."<sup>4</sup> Group II offenses "include acts of misconduct of a more serious

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<sup>3</sup> University Exhibit p. 9.

<sup>4</sup> The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

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.”

The University’s Responsible Use of Computing Policy provides that employees should “not use any Mason Computing Resources for inappropriate purposes.” Employees are instructed, “[d]o not allow another user to access your accounts. \*\*\* The University considers any violation of this policy to be a serious offense. \*\*\* [T]he consequences of policy violation will be commensurate with the severity and frequency of the offense and may include termination of employment.”<sup>5</sup>

Grievant’s login credentials were stored on his cell phone. By permitting his partner to access his cell phone, Grievant effectively shared his credentials with the partner contrary to the training he received and contrary to University policy. Grievant instructed his partner to pretend to be him when sending an email on his behalf using the University’s information system. Grievant breached the University’s trust in him and exposed the University to the risk of unauthorized access into its computer systems. 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, the University’s decision to remove Grievant must be upheld.

Grievant admitted he made a mistake but argued there were extenuating circumstances. This case is unfortunate. Grievant’s intention was to ensure that his supervisor was aware of his need for leave and respond to her questions. His desire to timely respond to the Supervisor’s questions was appropriate. His means of response, however, was not appropriate. The University chose not to mitigate the disciplinary action and its decision was authorized by State policy.

*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>6</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

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<sup>5</sup> University Exhibit p. 24.

<sup>6</sup> Va. Code § 2.2-3005.

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 III Written Notice of disciplinary action with removal 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 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].

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

*/s/ Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer