

**VIRGINIA: IN THE DEPARTMENT OF HUMAN RESOURCE MANAGEMENT, OFFICE OF
EMPLOYMENT DISPUTE RESOLUTION**

IN RE: CASE NO.: 11916

DECISION OF HEARING OFFICER

I. INTRODUCTION

This matter involves the challenge filed by an employee terminated from employment by Radford University on December 5, 2022. The school took the drastic step because of a series of related incidents on October 13, 2022. As is true of most disciplinary actions taken by a state agency, the decision was made in the context of a history of issues arising from the employment of the terminated employee. For the reasons hereinafter discussed, I uphold the issuance of the Written Notice and his termination from employment.

II. PROCEDURAL BACKGROUND

The school issued the grievant a Written Notice on December 5, 2022 and terminated him from employment. The Written Notice cited him for all three levels of offences possible under Department of Human Resource Management (DHRM) Policy 1.60. Being a disciplinary action, the matter automatically qualified for a grievance hearing.

I was appointed as hearing officer on February 22, 2023. I conducted a prehearing conference call with the grievant and a representative of the school. By agreement, I scheduled the hearing for April 19. I apprised the grievant of his right to request a continuance from that date should he obtain representation by an attorney or advocate, or for other good cause.

I conducted the hearing at the school on April 19. The school was represented by legal counsel. A representative of the school was also present throughout the hearing, as was a security

officer. Prior to the hearing the school had submitted exhibits labeled A through M. Upon the commencement of the hearing the exhibits I accepted them into evidence without objection from the grievant.

The school presented five witnesses, all of whom testified in person. The grievant represented himself, making an opening statement and questioning the witnesses for the school. He also testified on his own behalf. He presented no other witnesses. He offered into evidence certain medical records. I accepted them into the record over the objection of the counsel for the school. Counsel was advised that if upon reviewing the records he believed the school was being unduly prejudiced by the late disclosure of the records, the hearing could be reconvened, and the record reopened. No such request has been made.

III. ISSUE

Whether the school acted properly in issuing to the grievant the formal Written Notice and terminating him from employment on December 5, 2022?

IV. FINDINGS OF FACT

The grievant served as a maintenance worker for the school at all relevant times. In October 2022 he had been employed at the school for approximately 4 years. He had performed capably in his tasks and received annual evaluations of “contributor.” He is of slight stature and suffers from mild persistent asthma and a learning disability. He had previously received from the school a Group I Written Notice on September 13, 2021. That notice was for failing to follow written policy and disruptive behavior; it remained active in October 2022.

In October of 2022, the department in which the grievant served had a staffing shortage. The grievant overheard a private discussion among higher level employees on October 12 regarding the plan to reassign certain employees to different work sites on the campus. The following day, October 13, the grievant's Supervisor and a housekeeping manager went looking for the grievant to tell him that he was being reassigned to a different building, commencing the following week. They located the grievant at the desk of a fellow employee, looking at something on a computer. They asked him to come with them to a more private room. Once they were in this separate room, they informed him of the pending reassignment, telling him that it was based on the business needs of the school. The manager explained that it was beneficial to the grievant as it would take him away from a supervisor and one other individual in the building where he was then assigned. He had a contentious relationship with those people.

The grievant reacted strongly to this news. He stated that the decision was a political one being made by the Associate Vice President for Facility Management. He stated that the Associate Vice President was in trouble and that it was a well-known fact. He threatened to report the administrator to "Richmond." By his words and gestures he indicated that he would not accept the decision to reassign him to a different building. He threatened legal action against unspecified individuals.

The meeting ended abruptly with the grievant indicating he would be going to the office of the Director of Housekeeping Services to discuss the reassignment. As the two women and the grievant went in the direction of that office, the grievant disappeared. He contacted the police department for the school while the women preceded further to locate the director. The grievant was next seen outside the office of the Associate Vice President with a school police officer. The officer asked the ladies whether they had been bullying the grievant and had called him "stupid."

The women denied that allegation. The grievant was escorted to meet with the human resources manager. After a discussion with him, she asked him to leave the school that day, even though his scheduled shift had not formally ended. Instead of immediately vacating the premises, the grievant proceeded to drive through a parking lot as though he was looking for something or someone. He did leave the campus shortly thereafter.

The grievant was then placed on administrative suspension and the due process steps commenced. The process culminated with the issuance of the Written Notice on December 5, 2022.

The disciplinary action cited him for two Group I level offences, abuse of state time and disruptive behavior. He was also cited for failing to follow instructions or policy as a Group II level offence. He received a Group Level III offence citation for interference with state operations.

V. ANALYSIS

The Commonwealth of Virginia provides protections to employees in Chapter 30 of Title 2.2 of the Code of Virginia. Among these protections is the right to grieve formal disciplinary actions. The Department of Employment Dispute Resolution has developed a Grievance Procedure Manual (GPM) and Rules for Conducting Grievance Hearings (the Rules). The manual sets the applicable standards for this type of proceeding. Section 5.8 of the GPM provides that in disciplinary grievance matters that the agency has the burden of going forward with the evidence. It has the burden of proving, by a preponderance of the evidence, that its actions were warranted and appropriate. The Rules state that in a disciplinary grievance, such as this matter, a hearing officer shall review the facts de novo and determine:

- I. Whether the employee engaged in the behavior described in the Written Notice.
- II. Whether the behavior constituted misconduct.
- III. Whether the discipline was consistent with policy; and
- IV. Whether there were mitigating circumstances justifying the reduction or removal of disciplinary action, and, if so, whether aggravating circumstances existed that would overcome the mitigating circumstances.

Section 5.8 of the GPM requires a hearing officer uphold the discipline unless it exceeds the “bounds of reasonableness.” Under Section VI(A) of the Rules the decision of the agency is to be given the “appropriate level of deference.” A hearing officer is not to serve as a “super-personnel manager.” In other words, I can overrule the agency’s decision only if it was an unreasonable one. In this case, as is true in many grievance matters, reasonable people can disagree with the choices of the agency but find them to be reasonable.

The school, as stated above, cited four different code numbers to justify three levels of offenses. The testimony from certain of the school’s witnesses was confusing and somewhat contradictory as to what actions or omissions by the grievant were being relied upon to justify the disciplinary action. To the extent that the intent of the school can be gleaned from the Written Notice, and consistent with principles of due process, I will base my decision on the language used by the school in the narrative portion of the Written Notice. I will discuss the levels of offenses in order, from least serious to most serious.

The Written Notice gives as Group I offenses two theories or actions. The first of these is that the grievant was guilty of abusing state time. At the hearing, the Director of Housekeeping Services testified that eavesdropping by the grievant constituted an abuse of the state time. It is

not disputed that the grievant overheard certain conversations to which he was not a party, in particular, the meeting on October 12 discussing the pending reassignments. The agency presented no evidence indicating whether the grievant's hearing the conversation was inadvertent, as opposed to intentional. The evidence also lacked any clarity on whether the grievant spent five seconds or five minutes listening to the discussion. An abuse of state time is one which unreasonably distracts an employee from his legitimate job duties. I cannot find from the evidence presented that the grievant is guilty of abusing state time merely by overhearing certain private discussions.

Also given as a Group I offence was the disruptive behavior by the grievant at his meeting with the Supervisor and Manager on October 13. I can accept this classification. Group I offenses are defined as those that "generally have a minor impact on agency business operations but still require intervention." Virginia Department of Human Resource management policy 1.60. Among the examples listed for Group I offenses is disruptive behavior. The actions and statements of the grievant during the meeting with the women, combined with his requesting the intervention of a police officer, was clearly disruptive. The grievant disputed whether he was any more disruptive than the Supervisor and Manager. Based on my observation of the witnesses as well as the testimony, I find the testimony of the Supervisor and the Manager (in particular) to be more credible than that of the grievant.

The formal Written Notice has as a Group II offence the failure to follow instruction and/or policy. The evidence supports the issuance of two separate Group II violations by the grievant. First, his blatant refusal to accept the reassignment to a different building on campus was clearly a preemptive or anticipatory violation of the legitimate order from his superiors to work in a different building. The extent and way he objected to this decision is alleged to have

been a violation of DHRM Policy 2.35, Civility in the Workplace. That policy is designed to cover a wide range of rude or offensive behaviors. The Guide to the Policy lists as prohibited conduct “behaving in a manner that displays a lack of regard for others and significantly distresses, disturbs, and/or offends others.” That clause captures the words and conduct of the grievant. Although the grievant may have had a good faith belief that he was entitled to report the Associate Vice President for certain things not otherwise described in the record, that belief does not excuse his repeated threats against the administrator, whether those threats were legal or professional, or the complaints founded or unfounded.

Policy 2.35 does not specify a certain level of offense, instead providing for a range of punishments as provided for by DHRM Policy 1.60. The rude and threatening behavior of the grievant directed toward three other school employees supports the issuance or classification as a Group II offence in this case.

The school argued that the failure of the grievant to immediately leave the campus on October 13 after meeting with the Human Resource Manager was also a violation of an order. The testimony at the hearing from that person was that she “asked” him to leave and gave him permission to end his shift early. That choice of words is not consistent with the intent or language of Policy 1.60. A request is not an order. The school is bound by the testimony of its witness to the extent it is not contradicted. The actions of the grievant in not leaving the premises in a prompt manner cannot be the basis for this formal discipline.

The second Group II offence noted in the Written Notice is for the refusal to accept the reassignment to a different building. The grievant does not dispute his initial refusal. He testified that he would have moved to the other building “if it had been handled differently.” He did not

explain how it could have been handled to his satisfaction. In any event, the choice was not his. He was being given specific instructions and he indicated his unwillingness to comply.

The grievant was also cited for the Group III offense of interfering with state operations. The school, in the formal document and in the testimony of two employees, stated that the alleged eavesdropping by the grievant interfered with state operations. As is true of the argument that his eavesdropping was an abuse of state time, the supporting evidence does not meet the required standard of proof of beyond a preponderance of the evidence. How the work of other employees was directly impacted at the time by any eavesdropping was not shown by the evidence. In a general sense, the eavesdropping started a chain of events that led to the other actions of the grievant. Those actions resulted in the investigation and the grievance process. Those collateral consequences are not what the policy is designed to encompass.

The grievant argued that he is being discriminated against because of his physical conditions and his learning disability. With appropriate assistance, the grievant may have been able to fully develop this argument and present evidence to support it. The evidence did not show that his misconduct was a manifestation of his alleged disabilities. The school had previously accommodated the asthma condition by allowing “mask breaks” during the relatively recent period when mask wearing was mandatory. Based on the evidence as presented to me, I cannot find that the termination from employment was based on discriminatory or improper motives. His allegations of a hostile work environment created by bullying by other employees also were not supported by sufficient facts for me to make a finding in that regard. The grievant failed to present any evidence to mitigate any of the offences with which he was cited.

The grievant, as stated above, had an active Group I notice at the time of the offense in October 2022. If the school had proven a Group III offense, termination of the employee would

have been appropriate under Policy 1.60 without consideration of the other offenses. That did not happen here. I have found that the grievant committed, and was properly cited for, two Group II level offenses. Under Policy 1.60 discharge may occur for an accumulation of offenses including two Group II level offenses. It is only on that basis that I can find that the termination of the grievant was appropriate.

VI. DECISION

With the reasons stated above, I uphold the issuance of the December 5, 2022, Written Notice and the termination of the grievant from employment.

APPEAL RIGHTS

The parties may file an **administrative review** request within 15 calendar days from the date this decision is issued, if any of the following apply:

1. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resources Management to review the decision. You must state the specific policy and explain why you believe the decision is not consistent with that policy.

Please address the request to:

**Director, Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219**

or send by facsimile to (804) 371-7401, or by email.

2. If you believe the decision does not comply with the grievance procedure, or you have new evidence that could not have been discovered before the hearing you may request that EDR review the decision. You must state these specific portions of the grievance procedure with which you believe the decision does not comply. Please address your requests to:

Office of Employment Dispute Resolution
Department of Human Resource Management
101 N 14th street, 12th floor
Richmond, VA 23219

or send by email to EDR@dhrm.virginia.gov, or by facsimile to (804) 786-1606.

You may request more than one type of review. Your request must be in writing and must be received by the reviewer within **fifteen calendar days** of the date of the issuance of this decision. You must provide a copy of all your appeals to the other party, EDR, and the hearing officer. The decision becomes final when the 15-calendar day period has expired, or when requests for administrative review have been decided.

You may request a **judicial review** if you believe the decision is contrary to law. You must file a notice of appeal with the clerk of circuit court in the jurisdiction in which the grievance arose within 30 days of the date when the decision becomes final.

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or you may call EDR'S toll-free Advice Line at 888-232-3842 to learn more about appeal rights help from an EDR Consultant].

ORDERED this first day of May ,2022

Thomas P. Walk
Thomas P. Walk, Hearing Officer

**VIRGIINIA: IN THE DEPARTMENT OF HUMAN RESOURCE MANAGEMENT, OFFICE
OF EMPLOYMENT DISPUTE RESOLUTION**

IN RE: MATTER NO.11916

DECISION UPON RECONSIDERATION

On June 27, 2023, the Director of the Office of Employment Dispute Resolution issued Administrative Review Ruling 2023-5558 in this matter. The Ruling addressed multiple issues raised by the Grievant during his appeal of my original final decision. As directed by the Ruling I have reconsidered certain portions of my decision. I incorporate the factual findings of that decision herein. I issue the following in clarification of the decision. It is modified only to the extent expressly stated herein.

The Written Notice listed as a Group !! violation failing to follow an order or policy, shown as Code 13. The narrative portion of the Written Notice set forth two separate failures by the Grievant. One was his refusal to accept a job reassignment. The second was the way he noted his displeasure when notified of the decision. His outbursts and inflammatory comments were violations of the established policy regarding Civility in the Workplace. If he had refused the order appropriately, the second Group !! violation would not have occurred, and the outcome of this case would look very different.

Although the school listed the Code 13 only once on the Written Notice, the narrative description of events in the document provided the Grievant with fair notice of the behavior for which he was being disciplined. A “best practice” would be to list the Code number for each alleged violation along with a further description of the act or acts on which an agency is relying. In the absence of a detailed narrative, failing to list the Code section more than once could result in a fundamentally unfair proceeding. That is not what happened here.

For the reasons stated above and in the prior decision, I uphold the termination of the Grievant from employment based on the two Group II offenses involved here while under an active earlier discipline. My decisions regarding the Group I and III offenses are unmodified.

ENTERED this July 6, 2023.

Thomas P. Walk, Hearing Officer

