

COMMONWEALTH OF VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

Case Number 11934

Hearing Date: 14 June 2023

Decision Issued: 20 June 2023

PROCEDURAL HISTORY

The agency issued a Group III Written Notice of disciplinary action to the Grievant on 5 January 2023. Along with the Group III Written Notice, the agency terminated the Grievant's employment with the Department of Motor Vehicles [hereinafter DMV].

On 30 January 2023 the Grievant filed a timely grievance to challenge the Agency's action. The Grievant disagreed with the decision of the Third Resolution Step upholding the termination of employment and requested a hearing. The Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer on 7 March 2023. A Pre-hearing Conference was held 30 March 2023 at 10:00 a.m. The counsel for the Grievant and counsel for DMV were present. The Hearing was scheduled for 31 May 2023 at 10:30 a.m. via video conference. On 30 May 2023, counsel for DMV moved for a continuance of the hearing due to the death in the family of one of the primary witnesses. Counsel for the Grievant concurred with this motion. The hearing was rescheduled for 14 June 2023 at 10:30 a.m.,

The Hearing was held on 14 June 2023 at 10:30 a.m.
Case No. 11934

APPEARANCES

Grievant
Counsel for Agency
Counsel for Grievant
Witnesses

ISSUES

1. Whether the Grievant engaged in the behavior as described in the Written Notice?
2. Whether this behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law and policy?
4. Whether there were any mitigating circumstances justifying a reduction or removal or 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 the 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. Grievant 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 FACTS

After a review of the evidence and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

Case No. 11934

At the time of the alleged violation, the Grievant was employed as the Assistant Manager of the Norton Customer Service Center [hereinafter CSC] of DMV. Due to the absence of the Manager of the CSC, the Grievant was the senior employee and was therefore primarily in charge of the CSC.

Agency did not present any evidence that the Grievant had any prior active disciplinary action at the hearing.

On 8 December 2022, the Grievant was not at the CSC. She notified [REDACTED] M [REDACTED], the work leader at CSC, that the Grievant's daughter would be coming to CSC to pick up Christmas packages left at CSC for the Grievant. The Christmas packages were in the Grievant's office in the secure area of the CSC. Ms. M [REDACTED] knew the daughter as the daughter had been at CSC prior to this date.

All visitors who go into the secure area of the CSC are required to sign a visitors log.

Ms. M [REDACTED] stated that the daughter came into CSC by the back door, rather than the front door. The front door did not lead into a secure area of the CSC. Access by the back door led into the secure area of the CSC.

Ms. M [REDACTED] said she was surprised that the daughter came into CSC by the back door. Access by the back door required use of a security code to open that door. Only employees of CSC should have security codes to enter the building by the back door.

The Grievant's daughter admitted that she came into the CSC on 8 December 2022 by the back door. She used the Grievant's code to enter the building and she did not sign the visitor's log after she came into the building.

Once the daughter left with the packages, Ms. M [REDACTED] contacted [REDACTED] C [REDACTED], the District Manager for DMV CSCs in the Bristol area.

When Ms. C [REDACTED] learned that the Grievant's daughter came into the CSC by a secure entrance, she was concerned. Ms. C [REDACTED] contacted her supervisor

Case No. 11934

about this breach of security.

Ms. C [REDACTED] was concerned about a non-employee both entering the building by a secure entrance and using a secure passcode that should be known only by the employee. Ms. C [REDACTED] said this was serious violation of security.

Security for DMV is extremely important due to the personal information on citizens of the Commonwealth, i.e. Social Security numbers, driver license numbers, date of birth, addresses. Employees was taught to take it security seriously.

The Grievant said she did not specifically give her pass code to her daughter. She did, however, admit that her oldest daughter as well as a younger daughter may have learned the code. The Grievant used the same code she used for the CSC security for other personal secure things, such as a cell phone. From the testimony submitted at hearing, the Grievant did not take security of the access code seriously.

Failure to follow policy is normally a Group II offense. The agency determined that, since this serious offense was committed by a supervisor, the offense level should be elevated to a Group III, with termination.

The Grievant exercised her right under the grievance procedure to have a hearing.

CONCLUSIONS OF POLICY

A Group II offense “include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary Action.” A Group III offense include “acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.”

Failure to follow policy is normally a Group II offense. The agency argued that state policy allows an agency to elevate the level of a written notice when the offense is committed by a supervisor. The agency elevated the Group II to a
Case No. 11934

Group III offense with termination.

The question becomes whether the agency's determination to elevate the offense to a Group III is appropriate.

There is no doubt that the Grievant violated state policy to keep security codes secure. The Grievant argued that she did not actively give her daughter the code to enter CSC. The daughter stated that her mother did not give her the code. However, the daughter clearly knew the code and used it to access CSC without authorization.

The Grievant did not seem to understand the importance of security for the CSC and DMV. The Grievant used the same passcode for different things other than access to the Norton CSC. She apparently made no effort to keep the passcode secure. Her daughter used it to access CSC. Apparently, a younger daughter also knew the passcode, if not for CSC directly, for personal things, such as a cell phone.

The Grievant did not seem to understand the importance of securing the CSC from visitors, allowing her daughter to come into her office without signing the visitors log.

It is apparent the Grievant did not take the matter of security at the CSC seriously. Nor does it appear she took any take responsibility for this serious violation of security policy.

The agency argued that, prior to termination, mitigation was reviewed. Ms. C [REDACTED] stated that she reviewed the incident with her supervisor; they discussed this case with Employee Relations Director [REDACTED] A [REDACTED] and the Acting Commissioner of DMV. After this review, Ms. C [REDACTED] issued the Group III notice with termination.

Case No. 11934

DECISION

For the reasons stated hereinafter, the Agency's issuance of a Group III Written Notice with termination is hereby upheld.

The agency reviewed the actions of the Grievant and determined that the offense was a serious violation of the security policy. Further, the agency found that the Grievant did not take this violation seriously nor did she take responsibility for her actions. As a supervisor, the agency held the Grievant to a higher standard of responsibility for her actions. Therefore, elevating the written notice to a Group III is appropriate.

APPEAL RIGHTS

The Grievant may request an administrative review by EDR within **15 calendar** days from the date this decision was issued. The request must be in writing and must be **received** by EDR with 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 Street, 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 to 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.

Case No. 11934

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]

ENTERED this 20th day of June 2023.

/s/ Thomas E. Wray
Thomas E. Wray, Esq.
Hearing Officer

Case No. 11934

¹Agencies must request and receive prior approval from EDR before filing a Notice of Appeal.