



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11834

Hearing Date: October 13, 2022
Decision Issued: January 18, 2023

PROCEDURAL HISTORY

On April 20, 2022, Grievant was issued a Group III Written Notice of disciplinary action with removal for failure to follow instructions, abuse of State time, and Falsification of State records.

On May 10, 2022, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On May 23, 2022, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 13, 2022, a hearing was held by remote conference.

APPEARANCES

Grievant
Grievant's Counsel
University Party Designee
University's Counsel
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:

The University of Virginia employed Grievant as a Project Manager with the Facilities Management unit. He had been employed by the University for approximately 24 years. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant was responsible for construction phase management on projects throughout the University Grounds. He was to assist with determining the scope, schedule, and budget of projects. He was also responsible for project documentation and logs. Grievant described himself as operating like a "general contractor." Grievant often worked on several projects at a time.

The Facilities Management Unit was an "in-house, general contractor." The Unit was "self-supporting." Employees were responsible for recording the time they devoted to projects. The Unit billed its University customers based on the amount of time spent by employees working on projects.

The Unit had Motorized Utility Vehicles for employees to operate when they had to travel from the Unit's headquarters to a project or job site on University Grounds. A

Unit employee could reserve a vehicle to use on specific dates and times. The University kept records of when an employee signed out and used a utility vehicle. Grievant typically used vehicle 884. Vehicle 884 had two seats and could be driven on streets. The University had a tracking system to monitor the path vehicle 884 was driven across Grounds. The University could identify when and where the vehicle 884 was located on any date and at any time. If an employee checked out vehicle 884, the University expected that employee to be driving vehicle 884.

On May 17, 2021, the Associate Director¹ met with Grievant for a verbal counseling. On June 1, 2021, the Associate Director provided Grievant with a follow-up letter about their conversation. The Associate Director wrote:

An examination of the driving habits showed that rather than taking a direct route, you often took a longer tract to arrive at the destination. *** It is our expectation that going forward, you will do the following:

- Take the most direct route to your project sites.
- Focus your time and energy on completing your project in a timely manner.
- Keep your leadership informed of anything that interferes with your ability to perform your job duties.²

The University wanted to change its water fountains into bottle filler stations at S-Hall of the School.

On September 20, 2021, Grievant received a work order to replace water fountains in S-Hall with bottle fillers. Grievant sent the Associate Director of Facilities (ADF)³ an email asking him to meet with Grievant and the plumbing supervisor to go over locations and quantities. The ADF asked Grievant if any of the units had been ordered or come in yet. Grievant told the ADF that he was pretty sure nothing had been ordered.

On October 6, 2021, Grievant sent the ADF an email:

I have not forgotten about you and bottle fillers. I have to review a few issues with our building official. In order to get you the correct pricing, I need to work out some ADA and make sure what can and or have to do to get these installed. And just so you know when we do get the pricing straight and get approval, the units are at least 12 weeks out. I just wanted you to know where we are with this.⁴

¹ Grievant was within the Associate Director's supervisory authority.

² Agency Exhibit p. 6.

³ The Associate Director of Facilities was not part of the Facilities Management Unit.

⁴ University Exhibit p. 13.

On October 14, 2021, Grievant sent the ADF an email indicating he was meeting with a University building official to make sure it was alright to use the planned locations. Grievant indicated, "As far as quantities, I thought we only had 5 locations." Grievant said, "I will contact you after I meet with the [University building official] and let you know where we stand."⁵

Grievant sent the ADF an email asking, "Do we need to double-check this or are we good to order?"

On October 14, 2021, Grievant sent the ADF an email:

I have approval from UBO to install the bottle fillers in the wall indentions without having to frame out anything. Having said that have you had a chance to figure out how many unit you need? I just need [to] finalize the pricing and send that to you for your approval before we order anything. I would like to order today or tomorrow if possible. Please let me know something as soon as you can.⁶

The ADF replied to Grievant, in part, "We met to go over this already. The locations are on the plan we reviewed."

On October 14, 2021, Grievant sent the ADF an email, "I will go by the plan I have. That shows we will install 5 units total. The price to furnish and install 5 units will be \$34,000. I will wait on approval before we order any units." The ADF replied, "I approve of this. Please use [order number]. Please let me know when you have an estimated time of arrival."⁷

On November 3, 2021, the ADF sent Grievant an email stating, "I assume the order has been placed. Do we have an ETA as to when we may be able to start?"⁸

On November 5, 2021, Grievant sent the ADF an email stating, "Yes, the order has been placed. I will double check with the plumbers on ETA. We were told originally 10 to 12 weeks from the time we ordered. *** I should have the permit early next week so could possibly start if we can get some of the units in early."⁹

⁵ University Exhibit p. 14.

⁶ University Exhibit p. 18.

⁷ University Exhibit p. 17.

⁸ University Exhibit p. 16.

⁹ University Exhibit p. 22.

The order was actually placed on November 8, 2021 according to the Supervisor. Grievant testified that he met with the plumbing supervisor in mid-October 2021 and verbally placed the orders with the supplier prior to the paperwork being submitted.

On November 29, 2021, the ADF sent Grievant an email asking, "Please let me know when we can start. I would like to let others know as well because they kept on asking."¹⁰

On December 6, 2021, the ADF sent Grievant an email indicating he thought they would have started work by now and wanted an update. On December 7, 2021, Grievant sent the ADF an email:

Let me check with the plumbers and see the ETA on the units. It was 12 weeks lead time when we ordered them back in late October. That puts us close to the new year to get the units. To be honest with you it will probably be after the Christmas break before we can install anything. I will talk to the plumbers and get back with you.¹¹

On January 10, 2022, the Associate Director sent Grievant an email asking the status of the permits and if the water stations had arrived. She added, "this is an important project to them and they requested us to start looking at this in July of 2021." On January 11, 2022, Grievant sent the Associate Director an email, "I'm sure [the ADF] sent you something on this. There are no drawings. I will get with [name] today and put something together to get the permit straight if one is needed."¹²

On January 11, 2022, Grievant submitted a Building Permit to the University Building Official for consideration.

On January 11, 2022, Grievant sent the ADF an email, "If all goes as planned we should have the permit for this work this week. The units are here at Facilities."¹³

A Building Permit was issued on January 14, 2022 to "[r]eplace 5 water fountains with new Bottle filler/water fountains."¹⁴

On January 21, 2022, the ADF sent Grievant an email, "Please don't forget about the second floor of the class room building where I think you mentioned we needed 2

¹⁰ University Exhibit p. 15.

¹¹ University Exhibit p. 14.

¹² University Exhibit p. 28.

¹³ University Exhibit p. 35.

¹⁴ University Exhibit p. 33.

units. I will never hear the end of this and they will expect these as well.”¹⁵ Grievant was “taken aback” because he only expected there would be five units to install but the ADF was asking for two more.

On January 24, 2022, the ADF asked Grievant to order another unit for the second floor and charge the same purchase order. He added, “I see that the one unit is completed and it looks great! Will the plumbers keep moving on the others?”¹⁶

On January 26, 2022, the ADF sent Grievant an email asking if the plumbers were back on-site to install the other units. He asked to be notified when the unit for the second floor was ordered.

On January 26, 2022, Grievant sent the ADF an email indicating that he had asked the plumbing supervisor to order an additional unit for the second floor. Grievant added that the plumbing supervisor was having staff shortages. He said that some of the work in the Faculty Building had been completed. He told the ADF he would speak with the plumbers and let the ADF know what they said.

On February 21, 2022, Grievant billed the project for 2.5 hours of time. He reserved vehicle 884. He did not travel to the job site at S-Hall.

On February 24, 2022, Grievant billed the project for 3 hours of time. He reserved vehicle 884. He was at S-Hall for 12 minutes.

On February 25, 2022, Grievant billed the project 2 hours of time. He reserved vehicle 884. He did not travel to the job site.

On March 1, 2022, Grievant billed the project 1 hour of time. He reserved vehicle 884. He did not travel to the job site.

On March 7, 2022, the ADF sent Grievant and others an email, “I need an update on what’s going on here. *** I see most of the places have been roughed in except the second location on the second floor of the classroom building but we are still waiting on units. It has been since the 22nd of the last month since I reached out with no response. Can someone please help push this along?”¹⁷

On March 9, 2022, Grievant billed the project 2 hours of time. He did not check out vehicle 884 and did not travel to the job site in any other utility vehicle.

On March 14, 2022, Grievant billed the project 3 hours of time. He drove vehicle 884 to the project site, but did not stop. Grievant drove a four mile loop.

¹⁵ University Exhibit p. 48.

¹⁶ University Exhibit p. 47.

¹⁷ University Exhibit p. 44.

On March 15, 2022, Grievant billed the project zero time, but he checked out vehicle 884, drove to the job site and spent 16 minutes there.

On March 17, 2022, Grievant billed the project 1 hour of time. He reserved vehicle 884. He did not travel to the job site.

On March 18, 2022, Grievant billed the project 2 hours of time. He reserved vehicle 884. He did not travel to the job site. Grievant drove a six mile loop, but did not stop at the project.

On March 23, 2022, the ADF sent Grievant an email stating, "I walked around today and it looks like all the fountains are done except for the one at the end of the hallway on the second floor of the classroom building."¹⁸

On March 23, 2022, the ADF told the Associate Director that he did not believe his unit should have to pay the management fee for the bottle filler project. He said, "We have had very little support on this one." He added, "I have never had to check behind project services for such a small project. I have spent a lot of time emailing back and forth for information."¹⁹

On March 24, 2022, the Associate Director sent Grievant an email:

Management is going to take over completion of this project at [S-Hall]. Please meet with [another employee] this morning to discuss the situation and provide him with the status of any remaining bottle fill stations to be installed. Please do not charge this project work order any further.²⁰

On April 4, 2022, the Construction Superintendent notified the ADF that, "the water/filler station was installed on Friday."²¹

During a predetermination meeting, Grievant stated he felt the ADF was disrespectful to him.

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

¹⁸ University Exhibit page 52.

¹⁹ University Exhibit page 51.

²⁰ University Exhibit page 53.

²¹ University Exhibit page 61.

disciplinary action.”²² 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.”

The University alleged Grievant did not complete the project in a timely manner. The Supervisor asserted that the project should have been completed before Christmas 2021. The Supervisor testified that since the project began on September 21, 2021, Grievant should have offered pricing to the ADF and developed a schedule before October 6, 2021. By October 14, 2021, Grievant had not confirmed pricing for the job. The Supervisor asserted that the units should have been ordered within a week of approval which would have been October 14, 2021. Grievant ordered the units in November 2021. The Supervisor stated that Grievant failed to timely respond to the ADF. For example, the ADF sent Grievant an email on November 29, 2021 seeking information because Grievant had not responded to him for two weeks.

Grievant argued that it was difficult to get employees to come to work to perform their job duties. This was due to staffing shortages and sickness from COVID19. In some cases when employees were working, they were diverted to other duties. For example, when the University experienced significant snowfall on January 3, 2022, it diverted trades employees to snow removal duties. In addition, the scope of the project changed when the ADF indicated he wanted two additional units to be installed.

The Hearing Officer cannot conclude that Grievant failed to timely and adequately perform the project. The University did not identify or discuss any standards to measure how long a project should take or how engaged the project manager should be with a client. The ADF’s frustration with Grievant’s performance was not in itself sufficient to show Grievant’s work performance was unsatisfactory. There were several factors beyond Grievant’s control that delayed the project. These included delays in receiving units from the supplier, difficulty scheduling staff due to weather events and sickness, and the ADF’s unexpected expansion of the scope of the project by asking for additional units on January 21, 2022. Grievant’s failure to obtain a building permit sooner did not materially delay the project. It was not necessary for Grievant to get the building permit until the units had been received by the University.²³ In addition, on October 6, 2021, Grievant informed the ADF that once “we do get the pricing straight and get approval, the units are at least 12 weeks out.” Approval occurred on approximately October 14, 2021. At least one unit had been installed by January 21, 2022 which was “at least 12 weeks out.”

²² The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

²³ If the Hearing Officer were to assume for the sake of argument that Grievant’s work performance on the project was unsatisfactory, his behavior would not rise above a Group I offense and not be sufficient to establish the Group III Written Notice given to Grievant.

The University argued that Grievant did not follow the most direct path to his job sites as he had been counseled to do. The University considered this to be an abuse of State time. The University has not proven this allegation. Grievant testified that he selected his driving path in order to avoid student crowds and in order to check on employees working across the Grounds. Grievant was expected to monitor projects throughout the University's Grounds and he did so.²⁴

The University alleged Grievant falsified records. Group III offenses include, "serious violations of policy, procedures or laws."

Falsification is defined as:

Intentionally or with willful disregard make false or misleading statements, orally or in writing, in connection with any matter of official interest. Matters of official interest include, but are not limited to, the following: Official reports and any other official information upon which the Agency, the Commonwealth of Virginia or the public may act or rely; transactions with the public, government agencies or other government employees; application forms and other forms that serve as a basis for any personnel action; vouchers; procurement activities; time and attendance records, including leave records; work reports of any nature or accounts of any kind; affidavits; record of or data concerning any matter relating to or connected with an employee's duties; personnel records; and reports of any moneys or securities received, held or paid to, for or on behalf of the Commonwealth of Virginia.²⁵

Falsification of records is a serious violation of policy constituting a Group III offense. The University has established that Grievant falsified billing records for several reasons. First, maintaining accurate billing records was a matter of official interest because the Unit relied on the records to support seeking payment from Unit customers. Second, by February 21, 2022, most of Grievant's work duties for the project were to be conducted at the job site. In other words, it was unlikely that Grievant would bill for several hours of work and none of that work would involve travelling to the job site. Third, Grievant billed the project for 16.5 hours on 9 days, but was at the job site for only approximately 28 minutes. Fourth, Grievant demonstrated a pattern of behavior. He falsely charged time to the project on 9 days within a brief period of time beginning on February 21, 2022 and ending on March 18, 2022. Fifth, Grievant knew or should have known that he was claiming time worked on the project even though he had not performed duties for the project. The University has justified its decision to issue Grievant a Group III Written Notice for falsifying records. Upon the issuance of a Group III Written Notice, an agency

²⁴ If the Hearing Officer were to assume for the sake of argument that Grievant had abused State time contrary to the written counseling he received, Grievant's behavior only would have justified issuance of a Group II Written Notice and not the Group III Written Notice issued to Grievant.

²⁵ See, Attachment A, DHRM Policy 1.60.

may remove an employee. Accordingly, the University's decision to remove Grievant must be upheld.

Grievant argued that he performed many work duties when he was not at the job site. For example, when he was attempting to estimate costs using a computer, he would not be at the job site. Other than his testimony, Grievant did not present any records, computer activity logs, or other documents confirming he performed work duties away from the job site on the days the University claimed he falsified records. Most employees cannot remember what they did on specific days several months earlier. It is possible Grievant performed work duties on the dates in question, but there is insufficient evidence from Grievant to refute the University's evidence showing he billed the project for work he did not perform.

Grievant argued that he rode as a passenger in the vehicles driven by other employees or contractors. Although this is a possible explanation, it is an unlikely explanation. When Grievant reserved vehicle 884, he was expected to drive that vehicle. If Grievant expected to ride with another employee, there was no reason for him to reserve vehicle 884. Grievant did not present evidence that he routinely rode with other employees despite having reserved a utility vehicle.

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"²⁶ 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 III Written Notice of disciplinary action with removal is **upheld**.

APPEAL RIGHTS

²⁶ *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.