



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

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 11830**

Hearing Date: September 29, 2022  
Decision Issued: September 30, 2022

**PROCEDURAL HISTORY**

On February 4, 2022, Grievant was issued a Group II Written Notice of disciplinary action for unsatisfactory performance.

On March 23, 2022, 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 May 16, 2022, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 29, 2022, 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 employs Grievant as a Business Administrator at one of its residencies. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant reported to Mr. S who reported to the Manager. Mr. G also reported to Mr. S.

Grievant had a telework agreement with the Agency. Grievant's home was 5.2 miles from the office. She could drive to the office from her home within ten minutes.

On January 20, 2022, Grievant and Mr. G had a conflict. Mr. G informed Mr. S of the conflict. Mr. S observed that Mr. G was extremely upset by his interaction with Grievant. Mr. G's hands were trembling as he spoke to Mr. S about Grievant. Mr. S became concerned regarding the conflict and wanted to speak with Grievant to obtain her side of the story. Mr. S told the Manager of the conflict.

On Friday, January 21, 2022, Grievant was working from her home pursuant to her telework agreement with the Agency. At approximately 9:50 a.m., the Manager and Mr. S had a conference telephone call with Grievant. The Manager told Grievant to report to

the office to discuss allegations of inappropriate workplace conduct. The Manager asked Grievant to come to the office at 2:30 p.m. Grievant refused to come to the office. Grievant said she had an unexpected medical appointment in the afternoon. Grievant asked if the meeting could take place next week. The Manager said “No.” Grievant had not advised the Manager or Mr. S of the medical appointment. After Grievant refused to come to the office at 2:30 p.m., the Manager asked Grievant to come to the office at noon. Grievant said, “no” because it was too short of notice. The Manager said she would get back to Grievant. Grievant hung up the telephone.

The Manager called the HR Consultant and discussed how to proceed with obtaining information from Grievant. They discussed how Grievant’s reasons for refusal were not adequate. The HR Consultant said to call Grievant again and offer a meeting time and if she refused to place Grievant on pre-disciplinary leave so the allegations against Grievant could be investigated.

At approximately 10:50 a.m., the Manager and Mr. S called Grievant at her home. The Manager told Grievant she needed to come into the office. The Manager offered to meet Grievant at noon or 1 p.m. Grievant refused to go to the office at noon or 1 p.m. Grievant said she had a contractor in her home and could not leave. Grievant said that she needed to leave her house at 2:30 p.m. to take her mother to a medical appointment. After Grievant made it clear to the Manager that Grievant did not intend to report to the office that day, the Manager placed Grievant on pre-disciplinary leave.

The Manager and Mr. S did not expect the meeting with Grievant to exceed one hour.

Under the Agency’s teleworking policies, teleworking is a privilege and employees who are teleworking are expected to report to the office when needed.

On January 27, 2022, Grievant filed a complaint with the Agency’s Office of Civil Rights alleging discrimination by the Manager, Mr. S, and the HR Consultant. Grievant also alleged she suffered retaliation. On February 2, 2022, the Assistant Division Administrator informed Grievant that several of her claims were time-barred and that her current claims did not provide sufficient evidence from which discrimination or retaliation could be inferred.

## **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>1</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

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<sup>1</sup> The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.”

Failure to follow a supervisor’s instruction is a Group II offense.<sup>2</sup> On January 21, 2022, the Manager instructed Grievant to report to the office for a meeting regarding her work performance. The Manager’s instruction was within the scope of her authority to give. Grievant was obligated to comply with that instruction. The fact that Grievant was teleworking that day did not excuse her from being obligated to comply with the Manager’s instruction. Grievant could have attended the meeting without prohibiting her from assisting her mother. Grievant failed to report to work as instructed thereby justifying the issuance of a Group II Written Notice. The Agency mitigated the disciplinary action to a Group I Written Notice. The Agency’s disciplinary action must be upheld.

Grievant argued that the Manager should have allowed her to come to the office the following week or conducted the meeting by virtual conference. Although the Manager could have conducted the meeting on another day or by video conference, the Manager had discretion to insist on an in-person meeting that day. Grievant had been accused of improper conduct with respect to her interaction with Mr. G. The Manager’s insistence on resolving the matter immediately and in-person was justified by the seriousness of the allegations against Grievant.

Grievant alleged the Agency discriminated against her because of her race and retaliated against her. She claimed “racism had been there for years.” No credible evidence was presented showing the Agency discriminated against Grievant because of her race. It is clear that the Agency took disciplinary action against Grievant because she refused to report to work and that decision had nothing to do with Grievant’s race or as a means to retaliate. Grievant did not testify but presented testimony from former employees who claimed discrimination. Grievant presented evidence from Mr. P who left Grievant’s work residency in 2018 and was not familiar with Grievant’s working conditions in 2022. She presented the testimony of Mr. A who left Grievant’s work residence in July 2020 and was not familiar with Grievant’s working conditions in 2022.

*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>3</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

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<sup>2</sup> See, DHRM Policy 1.60.

<sup>3</sup> Va. Code § 2.2-3005.

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 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>

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

[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