

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

Office of Employment Dispute Resolution

DECISION OF HEARING OFFICER

**In re:
Case Number: 11850**

Hearing Date: September 8, 2022
Decision Issued: September 14, 2022

PROCEDURAL HISTORY

The Grievant was issued a Written Notice on April 27, 2022 citing a Group I:14 offense, namely, that the Grievant as a bus driver drove recklessly and his actions while driving were visible to co-workers, passengers and community members and were in violation of Parking & Transportation's Priority of Safety and Mission Statement.

Grievant timely filed Grievance Form A to challenge the Agency's action.

Upon being appointed as Hearing Officer effective June 29, 2022, the Hearing Officer confirmed with the Grievant and the Agency Advocate a date for the grievance hearing, namely, Thursday, September 8, 2022 beginning at 9:30 a.m.

By letter notice dated July 18, 2022 from the Hearing Officer, the parties were advised of the hearing date, time and location and reminded that a copy of all exhibits, in the form of hard copy, a party intends to introduce at the hearing and a list of witnesses to be called to be provided to the Hearing Officer and to the other party by mail or hand delivery, no later than Thursday, September 1, 2022 by 5:00 p.m.

The Agency timely provided the Hearing Officer with a single notebook containing the Agency's exhibits one through seven and its list of witnesses. The Grievant did not provide anything to the Hearing Officer by September 1, 2022.

By email dated September 5, 2022 directed to the Hearing Officer, the Grievant advised

that "There is absolutely no way I can make it to this meeting on Thursday. I have to attend to some very important family matters..." A copy of the email is enclosed with the hearing exhibits.

Upon receiving the Grievant's email, the Hearing Officer had a telephone conversation with the Grievant at the conclusion of which the Hearing Officer advised Grievant that the hearing would be conducted as scheduled and that the hearing would proceed even if the Grievant is absent at the hearing.

The Grievant did not appear at the hearing.

APPEARANCES

Agency Advocate
Agency's Representative

ISSUES

1. Did the Grievant operate an Agency bus and conduct himself as alleged?
2. If so, was Grievant's conduct in violation of Agency Standard Operating Procedure and the Standards of Conduct?

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 Grievant 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) section 5.8. a preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM section 9.

EXHIBITS

The Agency Exhibits admitted into evidence are contained in one notebook with the following contents

1. Grievance Form A w/ Group I Written Notice
2. Documents relating to misconduct of March 17

3. Interviews with three witnesses
4. Notes from predetermination meeting 4/20/22
5. Informal counseling
6. Pages from University Trans Service Standard Operating Procedures
7. 1.60 Standards of Conduct

FINDINGS OF FACT

The Agency's first witness has been a bus driver with the Agency for 6 years. The witness met the Grievant upon starting work for the Agency in 2019 and entered into an intimate relationship with the Grievant in September 2020. The witness testified that the relationship was quickly ended by the witness "probably in October 2020."

The witness testified that after breaking off the relationship, the witness continued to see the Grievant daily in the course of work but did not speak to the Grievant. The witness testified that the Grievant's demeanor deteriorated until March 2022 when the Grievant would "flip me off." The witness testified that on March 17, 2022 at 11:45 the Grievant was driving a bus in one direction and the witness was driving a bus in the Grievant's oncoming lane when the Grievant swerved the bus into the witness's lane while the Grievant made eye contact with the witness and made the motion of cutting his throat. The witness referred to a photograph of the scene at Agency Exhibit 2. The witness testified that at the time of the incident the witness had passengers, as did the Grievant. The witness then reviewed the email the witness sent to a supervisor (Exhibit 2, Page 10).

Finally, the witness added that perhaps two weeks prior to the incident where the Grievant swerved the bus, the witness had told the Grievant "No one wants your ass."

The Agency's second witness was the dispatch supervisor who knows both the Grievant and the witness bus driver. The dispatch supervisor testified that the intimate relationship between the Grievant and the witness lasted a couple of weeks and according to what the witness bus driver told the dispatcher supervisor was ended because the Grievant was too possessive or jealous. The dispatcher supervisor testified that things were awkward between the Grievant and the other bus driver after they split up and that the dispatcher supervisor counseled the two of them to stay apart, to do their jobs and go home.

The dispatch supervisor further testified that in March 2022, the Grievant would come in three hours earlier than his shift started and would walk around and watch the other bus driver.

The dispatch supervisor then reviewed the notes at Exhibit 2, Page 11 which the dispatch supervisor noted contemporaneous with the events, confirming that on March 17, 2022 it was reported that the Grievant swerved toward the other bus driver; that on March 21, 2022 that the

Grievant gave the other bus driver the finger several times each time he passed her on route; on March 22, 2022 the Grievant gave the other bus driver the finger several times; and on March 29, 2022 the Grievant gave the other bus driver the finger and later ran his finger across his neck when he passed her and that a passenger saw the whole thing.

The dispatch supervisor then reviewed the notes from the dispatch supervisor's interview with the Grievant regarding the complaints and noting that there had not been reports of any obstructions in the road where the Grievant was reported to have swerved.

The final witness for the Agency was the Operations Supervisor who was the Grievant's direct supervisor and issued the Group I Written Notice for unsafe operation of a state vehicle (Written Notice Offense Code 14).

The Operations Supervisor reviewed the photograph at Exhibit 2, Page 6 showing the location of the bus swerving incident and the work schedules (Page 12 and 13) of the Grievant and the other bus driver.

The Operations Supervisor then reviewed Agency Exhibit 4, Page 34 where the Grievant explained the swerving incident as follows: "St. Pats. Day weather branches on Alderman. Had to serve to avoid the on road hazard. Oncoming bus would not have been near me." The Operations Supervisor testified that an investigation revealed no reports of obstruction (even by the Grievant) and no broken branches were found on trees in the area of the incident.

The Operations Supervisor then reviewed the written letter of counseling issued to the Grievant on April 27, 2022 and the Grievant's prior work record and complaints against the Grievant.

Finally, the Operations Supervisor testified that the Grievant's behavior justified a Group II Written Notice which includes acts of misconduct, violations of policy or performances of a more serious nature that significantly impact the Agency services and operations (Agency Exhibit 7, Page 73). However, in deciding on a Group I Written Notice, rather than a Group II, while management considered that the Grievant has previously been verbally coached on three separate occasions on safety protocols, management took into consideration that the weather on March 17, 2022 at the time in question was confirmed as lightly raining, foggy and at 90% humidity.

CONCLUSIONS

The Hearing Officer concludes that the Grievant did in fact intentionally swerve the bus and make the gestures as alleged. Such actions by the Grievant constitute at least a Group I offense as charged in violation of the Agency's Standard Operating Procedures and the Standards of Conduct.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice is upheld.

APPEAL RIGHTS

You may request an administrative review by EEDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EEDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Equal Employment and Dispute Resolution
Department of Human Resources 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.

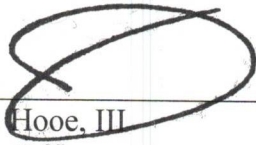
A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to 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 EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

ENTERED:

9/14/2022
Date



John R. Hooe, III
Hearing Officer

[1] Agencies must request and receive prior approval from EEDR before filing a notice of appeal.