

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

Office of Employment Dispute Resolution

DECISION OF HEARING OFFICER

**In re:
Case Number: 12039**

Hearing Date: December 21, 2023
Decision Issued: December 22, 2023

PROCEDURAL HISTORY

The Hearing Officer was appointed effective November 27, 2023. Upon being appointed, a pre-hearing telephone conference was conducted on November 28, 2023 and the Grievance Hearing was scheduled for December 21, 2023, with a copy of all exhibits and list of witnesses to be provided no later than December 14, 2023.

The Grievance Hearing was conducted on December 21, 2023 as scheduled.

The grievance hearing addressed the following Written Notice:

Group I Written Notice for failing to follow instructions or policy in violation of the Standards of Conduct, with no additional discipline.

APPEARANCES

Grievant

Agency Party Designee
Agency's Attorney

ISSUES

1. Did the Agency's evidence prove by a preponderance of the evidence that the Grievant's conduct was in violation of the alleged policy, procedure or directive?
2. Did the Grievant's conduct constitute a Group I violation under the Standards of Conduct?
3. Whether the Agency considered mitigating and aggravating factors as to the Written

Notice?

4. Was the Written Notice consistent with law and policy?

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 tabs 1-9.

The Grievant did not provide to the Hearing Officer or to the Agency prior to the hearing a notebook of indexed Exhibits. However, two Exhibits were admitted at hearing, the first designated as Grievant Exhibit A (an affidavit from a co-worker) and Grievant Exhibit B (a screenshot of a telephone text). These two Exhibits were placed in the sleeve of the Agency notebook.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness called to testify, the Hearing Officer makes the following findings of fact:

The Agency employed Grievant as an Assistant Manager for Zone Operations with the Housing Maintenance Department. The Grievant's employment was governed by the following:

- SEC P-038: Management of the University Keyed System (Key and Lock Policy) (Agency Exhibit 8)
- DHRM Policy 1.60 Standards of Conduct (Agency Exhibit 9)

The Agency's first witness was TM, Zone Manager, Housing Maintenance. TM testified that he has been Zone Manager for two years and with the Agency for five years. TM testified that TM's job included responsibility for all custodial and maintenance for the Agency, reporting to MP, Associate Director for Maintenance. TM testified that at the time of the incident, TM was supervisor for the Grievant whose job was to oversee day to day operations of the custodial staff. The witness testified that the Grievant had been with the housekeeping department since 2014 and had been promoted September 2022 with four direct reports and with indirect reporting employees, a total of forty-one custodians and custodian supervisors.

TM testified that the Group I Written Notice, failure to follow instructions of policy, was issued following an investigation involving a missing Gray Grand Master (GGM) key for which the Grievant was responsible (Agency Exhibit 2). TM testified that the GGM in question could open every door in 187 buildings, including dormitory rooms and single family residence housing, totaling approximately 7,000 beds. The witness testified that the GGM was issued to the Grievant and should have been used only by the Grievant. TM testified that the Grievant returned from a three week vacation on July 5, 2023, discovered that the GGM was missing from the cabinet in the Grievant's locked office but did not notify TM until July 10, 2023 that the GGM was missing.

TM testified that Agency housekeepers have swipe card access to front doors of buildings and common areas but that the swipe cards do not gain access into sleeping areas. In addition, use of the swipe cards are trackable whereas use of the GGM key is not trackable. TM testified that when TM was hired, TM was offered a GGM key but declined knowing the great responsibility that comes with possession of the GGM key.

TM testified that when the Grievant notified TM that the GGM key was missing from the Grievant's office, it was determined that access control records did not show any entries into Grievant's office during Grievant's vacation. TM testified that during the investigation the Grievant acknowledged that the Grievant lent the key to at least three employees who needed access to areas that a swipe card would not open. TM testified that Agency policy would require an employee to go to the lock shop or to the key vault in order to gain a key. TM also testified that TM was very concerned in that the Grievant did not keep any record of to whom or when Grievant entrusted the GGM key.

TM next reviewed the Grievant's responses to questions during a predetermination meeting (Agency Exhibit 4). When asked "Are you familiar with the ... Lock and Key Policy?" The Grievant answered "No."

TM testified that although TM believes that the Grievant is truthful, the Grievant should have been aware of the relevant Agency policy, aware of the procedure with the key vaults and to never lend out the GGM key to anyone. In referring to the Key and Lock Policy (Agency Exhibit 8) TM emphasized regarding the policy on Master Keys: "Responsibility for a Master Key may not be transferred by the Responsible Person to another individual or party."

TM noted that all keys have GPS, so that when a key is checked out it can be tracked to determine locations to which the key was taken (but could not determine if the key was used at any particular location). TM reviewed Agency Exhibit 6 regarding the key vault (Page 32 and 33) and testified that in order to enter the key vault an employee would swipe the employee's ID card which would then allow the employee to take from the key vault only such keys as the employee's ID card was coded to allow.

TM concluded testimony by emphasizing the severity of the incident and negative impact on the Agency. TM testified that the cost to change all locks which the lost GGM key could open would be over one million dollars. In addition, the compromise of trust between Agency departments and the public and the Agency could be severely compromised. Accordingly, TM testified that the Agency initially considered issuing a Group III Written Notice with demotion. However, the Agency mitigated based on the Grievant's good work record and good reputation, first reducing to a Group II Written Notice and ultimately mitigating to a Group I Written Notice.

On follow up questions from the Grievant, TM admitted that the Grievant was advised of the key vault after the incident but not before the incident. However, TM repeated that the Grievant should have been aware of the policy as part of the Grievant's employee obligations.

The Agency rested its case at the conclusion of TM's testimony.

The Grievant testified that the Grievant's former supervisor was the person who issued the GGM key to the Grievant. The Grievant testified that although the former supervisor emphasized the importance of the key, the Grievant was not made aware of the key policy nor the procedure of getting a key from the key vault.

The Grievant testified that the GGM key was always in Grievant's possession on a lanyard or in the file cabinet in Grievant's office, although the file cabinet was not locked. Upon being asked by the Agency Advocate if the Grievant ever took the key home, the Grievant stated "I can't recall".

The Grievant called as the Grievant's only witness MM, employed as a Supervisor. MM testified that he kept his keys in his desk drawer when not in use and that he did not have a lock box or use a key vault. MM also testified that he had never seen an Agency key policy, never accessed the key vault and never had training regarding the key vault. MM also testified that he was one of the supervisors who would borrow the Grievant's GGM key.

At the conclusion of the Grievant's evidence, both the Agency and the Grievant were given the opportunity to make closing statements.

CONCLUSIONS

Unacceptable behaviors are divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action." 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." (Standard of Conduct)

Virginia Code Section 2.2-3005.1 authorizes Hearing Officer's to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "accordance with rules established by the Department of Human Resource Management...". Under the rules for Conducting Grievance Hearings "[a] hearing officer must give deference to the agency's consideration in the 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.

The Commonwealth of Virginia provides certain protections to employees Chapter 30 of Title 2.2 of the Code of Virginia. Among these protections is the right to grieve formal disciplinary action. The Department of Equal Employment and Dispute Resolution has developed Grievance Procedure Manual (GPM). This manual sets forth the applicable standards for this type of proceeding. Section 5.8 of the GPM provides that in disciplinary grievances the Agency has the burden of going forth with the evidence. It also has the burden of proving, by preponderance of evidence, that its actions were warranted and appropriate. The GPM is supplemented by a separate set of standards promulgated by the Department of Employment Dispute Resolution, *Rules For Conducting Grievance Hearings*. These Rules state that on a disciplinary grievance a Hearing Officer shall review the facts *de novo* and determine:

- A. Whether the employee engaged in the behavior described in the written notice;
- B. Whether the behavior constituted misconduct;
- C. Whether the discipline was consistent with law and policy; and
- D. Whether there were mitigating circumstances justifying the reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances.

After reviewing all of the Exhibits, the testimony of all of the witnesses and the arguments made by the Agency Attorney and the Grievant, the Hearing Officer concludes as follows:

1. The Agency proved by a preponderance of the evidence that the Grievant failed to follow instructions or policy, specifically failing to exercise due diligence in preventing loss or theft of keys issued to the Grievant, that such behavior constituted a violation of the Standards of Conduct of the most serious nature and could be charged as a Group III offense;
2. The Agency considered the mitigating factors of the Grievant having an otherwise

good work record and acknowledging using poor judgment resulting in a Group I Written Notice being issued without further discipline.

3. The Hearing Officer further concludes that the Written Notice was consistent with law and policy.

DECISION

For the reasons stated herein, the Agency's 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.

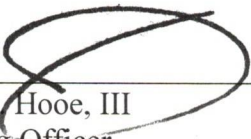
You must also provide a copy of your appeal to the other party and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

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: 12/22/23
Date



John R. Hooe, III
Hearing Officer

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