

Issue: Group I Written Notice (unsatisfactory performance); Hearing Date: 10/15/18; Decision Issued: 11/05/18; Agency: VCU; AHO: Carl Wilson Schmidt, Esq.; Case No. 11255; Outcome: No Relief – Agency Upheld; **Administrative Review Ruling Request received 11/19/18; EDR Ruling No. 2019-4813 issued 12/14/18; Outcome: AHO’s decision affirmed; Request to Reconsider Ruling No. 2019-4813 received 12/17/18; Outcome: Request Denied.**



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11255

Hearing Date: October 15, 2018
Decision Issued: November 5, 2018

PROCEDURAL HISTORY

On April 25, 2018, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory performance.

On May 25, 2018, 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 he requested a hearing. On August 20, 2018, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On October 15, 2018, a hearing was held at the Agency's office.

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:

Virginian Commonwealth University employs Grievant as a Driver of a vehicle as part of the RamSafe program. He has been employed by the Agency for approximately ten years. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant typically worked from 11 p.m. until 8:15 a.m.

The RamSafe program is intended to provide safe transportation within campus boundaries for VCU faculty, staff, and students. The program relies on a software application accessible on cell phones to schedule trips on VCU buses. The application allows the rider to request a bus ride and to track the location of the bus as it arrives.

When a bus driver approaches the location of a rider, the bus driver uses the application to "honk". The honk sends a text notification to the rider through the application to indicate the driver is approaching. The text reads:

VCU RamSafe – Your ride is waiting outside!

The driver is supposed to make the last honk as the driver is "immediately approaching" the pickup point.

If the rider does not enter the bus within approximately three minutes after receiving the honk signal, the bus driver can go to the next rider. The bus driver would send the rider a signal:

VCU RamSafe – Your ride has been canceled. Please try again.

RamSafe has a Dispatcher who can make and receive telephone calls with riders and bus drivers.

On March 15, 2018, the Student called for a ride. He wanted to be picked up at Address 311. His address was in the middle of a block. The Dispatcher notified Grievant to pick up the Student at Address 311. Grievant drove his bus to pick up the Student but stopped the bus at the corner of the block and waited. The Student used the application and determined the bus was at the corner and not moving. The Student called the Dispatcher and indicated the bus was not at his address. The Dispatcher told the Student the bus was at the corner. The Student objected to being picked up at the corner. He told the Dispatcher that other drivers picked him up at Address 311 and not the corner. The Dispatcher apologized to the Student and told him Grievant would pick him up at Address 311.

The Dispatcher called Grievant and told Grievant the Student did not want to be picked up at the corner but instead wanted to be picked up at Address 311. Grievant believed the Student was complaining about being singled out to be picked up at the corner instead of Address 311.

The Dispatcher called the Student and told the Student to remain at Address 311 and he would be picked up there.

On March 15, 2018 at 6:23:22 a.m., the Student entered Grievant's bus and sat in a seat in the front row closest to Grievant. No other passengers were inside the bus. Grievant began talking to the Student once he sat down and continued talking to the Student as he drove. Grievant did most of the talking with the Student also talking. This conversation lasted until approximately 6:25:45 a.m. when the bus reached the Student's stop and the Student stepped out of the bus onto the street. The Student turned around and faced Grievant as Grievant continued to talk to the Student. At approximately 6:31:19 the conversation ended, Grievant shut the bus door and the Student walked away.

During their conversation, Grievant repeated his statements and opinions and minimized the Student's request. The first thing Grievant told the Student was "You can file a complaint if you want." The Student explained that other drivers did not pick him up at the corner. Grievant explained that the Student was not the only one he picked up at the corner. Grievant asked the Student if he wanted to be picked up at Address 311 even though it was clear that the Student wanted to be picked up at Address 311 and not at the corner. Grievant told the Student he would tell the other drivers to pick the Student up at Address 311 instead of the corner. The Student said that other drivers

stopped in front of his building and not at the corner. When Grievant told the Student he could file a complaint, Grievant's demeanor was such that the Student interpreted Grievant to be saying the Student could file a complaint but it would be meaningless. The Student perceived Grievant's demeanor as expressing anger and that Grievant's tone was rude.

After the Student walked away, he called the Dispatcher and said Grievant was angry and yelling at him and telling the Student he would speak with to other drivers.

As a result of his interaction with Grievant, the Student attempted to avoid taking the RamSafe bus if he believed Grievant was the driver. If he saw a particular bus number, he would cancel the ride because he believed Grievant was the driver. The Student learned later from the Dispatcher that the bus number did not mean Grievant was driving the bus since several drivers drove each bus. The Student later began riding in the bus with Grievant as the driver.

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."¹ 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."

Grievant was obligated to :

Demonstrate respect for the agency and towards agency coworkers, supervisors, managers, subordinates, residential clients, students, and customers.

"[U]nsatisfactory work performance" is a Group I offense.² In order to prove unsatisfactory work performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

On March 15, 2018, Grievant confronted the Student and persisted in advancing his opinions. His tone was confrontational, arrogant, and abrasive towards the Student. Grievant failed to provide proper respect towards one of the Agency's customers. The

¹ The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

² See Attachment A, DHRM Policy 1.60.

Agency has presented sufficient evidence to support the issuance of a Group I Written Notice for unsatisfactory performance.

Grievant argued that he was attempting to explain to the Student that he would pick up the student at Address 311 as requested and that Grievant did not single out the Student. Grievant argued that he was attempting to make sure the Student understood he would inform other drivers of the Student's request to ensure proper service to the Student.

The evidence showed that Grievant's conversation with the Student was more than a dissemination of useful information to the Student. Grievant could have made all of his points in a minute or two and then ended the discussion. Instead, Grievant engaged in a prolonged debate with the Student that caused the Student to feel mistreated and become fearful. For example, once the Student had stepped off the bus, Grievant could have closed the door and driven to his next appointment. Instead, he continued to debate unnecessarily with the Student for over five minutes.

Grievant argued that the Agency resolved this matter as a counseling without issuing a Group I and then later decided to issue a Group I. This argument is not persuasive because agencies can both counsel and discipline employees for the same behavior.

Grievant argued the Agency failed to meet certain procedural deadlines. The hearing processed cured any defects in the Agency's response to his grievance.

The Agency alleged Grievant should be disciplined for activating the honk signal too far away from the Library when picking up a Second Student on March 22, 2018. The Agency asserted that Grievant's last honk was when he was more than three minutes away from the Library and, thus, when he arrived at the Library, he did not wait the required three minutes before leaving. The Second Student later complained.

The Agency presented evidence showing when and where the first three honks occurred. Those honks were not within an immediate approach. Grievant presented evidence showing there was a fourth honk when Grievant's bus was closer to the Library. The Agency's witness was not aware of a fourth honk. The Agency could not determine the precise location of the fourth honk. Without knowing the location of the fourth honk, the Hearing Officer cannot determine the distance from the bus at the fourth honk and the Library. Thus, there is not sufficient evidence to show Grievant failed to honk on immediate approach. There remains, however, sufficient evidence to support the issuance of a Group I Written Notice regarding Grievant's interaction with the Student as discussed above.

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

Management³ 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 I Written Notice of disciplinary action 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 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.

³ Va. Code § 2.2-3005.

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].

Carl Wilson Schmidt, Esq.
Hearing Officer

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