

Issue: Group III Written Notice with Termination (failure to report without notice);  
Hearing Date: 08/22/19; Decision Issued: 09/11/19; Agency: VSU; AHO: Carl  
Wilson Schmidt, Esq.; Case No. 11374; Outcome: Partial Relief; **Attorney's Fee  
Addendum issued 09/23/19 awarding \$8,187.50.**



# ***COMMONWEALTH of VIRGINIA***

## ***Department of Human Resource Management***

### **OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

#### **DECISION OF HEARING OFFICER**

In re:

**Case Number: 11374**

Hearing Date: August 22, 2019  
Decision Issued: September 11, 2019

#### **PROCEDURAL HISTORY**

On April 17, 2019, Grievant was issued a Group III Written Notice of disciplinary action with removal for “unauthorized leave for March 15, 2019 and for not coming to campus to respond to the ISP (Interim Suspension Protocol) on March 16, 2019.

On April 30, 2019, Grievant timely filed a grievance to challenge the University’s action. The matter advanced to hearing. On May 29, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 22, 2019, a hearing was held at the Agency’s office.

#### **APPEARANCES**

Grievant  
Grievant’s Counsel  
Agency 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 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:

Virginia State University employed Grievant as an Evening Program Manager. No evidence of prior active disciplinary action was introduced during the hearing.<sup>1</sup>

Grievant had various responsibilities including keeping event logs and attending and providing support to University events. Grievant was supposed to work on campus from 4 p.m. until midnight. He was also supposed to be "on call" on a rotating basis. This meant he might have to come to the campus when needed to address Interim Suspension Protocols.

On February 27, 2019, Grievant sent an email to the Supervisor requesting leave on the dates of March 7, 2019, March 8, 2019, and March 15, 2019. The Supervisor approved Grievant's requests for March 7, 2019 and March 8, 2019 since it was Spring Break. Grievant was scheduled to be "on call" on March 15, 2019, so the Supervisor disallowed Grievant's request for leave on March 15, 2019.

Grievant did not report to work on March 15, 2019.

---

<sup>1</sup> The University presented a copy of a Written Notice purportedly issued to Grievant. The Hearing Officer rejected the document because it was unsigned by a University manager and Grievant.

Grievant was on call on March 16, 2019. On March 16, 2019, a Student engaged in unacceptable behavior. A University Police Officer called Grievant and asked him to come to the campus to begin the ISP. Grievant falsely told the University Police Officer that Grievant was in Philadelphia. Because Grievant did not report to the University's campus on March 16, 2019, the Supervisor reported to the campus and began the ISP.

On March 29, 2019, Grievant shipped a package using the University's staff and equipment. He used a code to pay for the package with University funds without being authorized to use the code. The package was delivered on April 2, 2019 to an address in Maryland.

On April 5, 2019, the Supervisor held a due process meeting with Grievant. The Supervisor asked Grievant why he did not report to work on March 15, 2019 and why he did not respond to the ISP phone call. Grievant said he did not report to work on March 15, 2019 because he was ill. Grievant stated that he told the University Police Officer that he was out of town in Philadelphia on March 16, 2019 because he did not want the police officer to know his personal business. Grievant said he was ill with a calcium deficiency.

The Supervisor asked Grievant about a mail slip dated March 29, 2019. The Supervisor asked why the mail slip had Grievant's name on it and why Grievant had use the student conduct index for shipping an overnight package for \$33.49. Grievant said he told the Campus mailroom staff not to ship the package overnight but to mail it out on the next day. Grievant said he was shipping some documents for a lady and that it was urgent. The Supervisor informed Grievant to gather all of his documentation and provide a response to the due process notice and bring it to the follow-up meeting scheduled for Friday, April 12, 2019.

On Friday, April 12, 2019, the Supervisor met with Grievant for a follow-up due process meeting. Grievant presented the Supervisor with a letter responding to the due process notice dated April 5, 2019. Grievant admitted he did not report to work on March 15, 2019 due to illness. Grievant said he was not able to report to campus on Saturday, March 16, 2019 due to his medical condition. He said that his medical episode continued through Sunday March 17, 2019.

Grievant wrote that he mailed a package to a parent at her request. He said the parent accidentally left the package. He said that the parent<sup>2</sup> said she would reimburse the University. Grievant said it was his understanding that the reimbursement had been received and was being deposited.

---

<sup>2</sup> It is unclear whether the University verified the identity of the person receiving the package.

## 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>3</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 acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.”

“[F]ailure to report to work without proper notice” is a Group II offense. Grievant was scheduled to report to work on March 15, 2019. Although he was capable of notifying the Supervisor that he would not be reporting to work, Grievant did not notify the University that he would not be reporting to work as scheduled. The University has presented sufficient evidence to support the issuance of a Group II Written Notice. Upon the issuance of a Group II Written Notice, an agency may suspend an employee for up to 10 workdays. Accordingly, Grievant’s Group II Written Notice must be accompanied by a 10 workday suspension.

The University argued that Grievant should receive a Group III Written Notice of disciplinary action for unauthorized use of State property or records, theft, and falsifying records. Unauthorized use or misuse of State property is a Group II offense. Unauthorized use of State records is a Group III offense.<sup>4</sup> Theft is a Group III offense. Falsifying records is a Group III offense.

In this case, the University issued a Group III Written Notice with an attachment dated April 17, 2019 setting forth the University’s allegations. Those allegations focused on Grievant’s failure to report to work without notice.<sup>5</sup>

Subsequent to the first due process meeting, Grievant engaged in misbehavior but that misbehavior was not described as an offense in the attachment to the Written Notice. For example, Grievant falsified a doctor’s note and presented it to the Agency to excuse his absence on March 15, 2019 and March 16, 2019. In addition, Grievant went to a local convenience store and obtained a money order. He completed the money order and presented it to the University. Grievant falsely claimed the money order was submitted by the parent in Maryland but in fact Grievant obtained the money order and his handwriting appeared on the money order.<sup>6</sup>

---

<sup>3</sup> The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

<sup>4</sup> Grievant did not use State records without authorization.

<sup>5</sup> The Attachment mentions Grievant shipping a package using the student conduct index but does not describe Grievant’s usage as improper or a misapplication of policy. Nevertheless, Grievant’s use of the University’s mailing system to ship a package for personal reasons would merely constitute a misuse of State property which is a Group II offense.

<sup>6</sup> It does not appear that the University intended to discipline Grievant for lying to the University Police Officer.

The University listed offense codes for theft and falsifying records. Offense codes are used for statistical reporting and do not in themselves serve to place an employee on notice of an agency's basis for taking disciplinary action. The University asserted it orally informed Grievant of the additional allegations at the time Grievant was presented with the Written Notice. The University's oral description of the additional allegations was not sufficient to cure the absence of those allegations in the attachment to the Written Notice.

The University's disciplinary action is limited by a reasonable interpretation of its wording in the Written Notice. The University could have issued numerous written notices but instead issued only one. The University's Written Notice does not describe with sufficient detail the University's claim that Grievant engaged in theft and falsification of records. The Written Notice is not sufficient to trigger disciplinary action against Grievant for the Group III offenses of theft or falsification of records. Grievant's removal must be reversed.

*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>7</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 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 further the disciplinary action.

The Virginia General Assembly enacted *Va. Code § 2.2-3005.1(A)* providing, "In grievances challenging discharge, if the hearing officer finds that the employee has substantially prevailed on the merits of the grievance, the employee shall be entitled to recover reasonable attorneys' fees, unless special circumstances would make an award unjust." Grievant has substantially prevailed on the merits of the grievance because he is to be reinstated. There are no special circumstances making an award of attorney's fees unjust. Accordingly, Grievant's attorney is advised to submit an attorneys' fee petition to the Hearing Officer within 15 days of this Decision. The petition should be in accordance with the EDR Director's *Rules for Conducting Grievance Hearings*.

## DECISION

---

<sup>7</sup> *Va. Code § 2.2-3005.*

For the reasons stated herein, the University's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is **reduced** to a Group II Written Notice with a ten workday suspension. The University is ordered to **reinstate** Grievant to Grievant's same position at the same facility prior to removal, or if the position is filled, to an equivalent position at the same facility. The University is directed to provide the Grievant with **back pay** less the ten workday suspension and any interim earnings that the employee received during the period of removal. The University is directed to provide **back benefits** including health insurance and credit for leave and seniority that the employee did not otherwise accrue.

### **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>

---

<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*

---

Carl Wilson Schmidt, Esq.  
Hearing Officer





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

**ADDENDUM TO DECISION OF HEARING OFFICER**

In re:

**Case No: 11374-A**

Addendum Issued: September 23, 2019

**DISCUSSION**

The grievance statute provides that for those issues qualified for a hearing, the Hearing Officer may order relief including reasonable attorneys' fees in grievances challenging discharge if the Hearing Officer finds that the employee "substantially prevailed" on the merits of the grievance, unless special circumstances would make an award unjust.<sup>8</sup> For an employee to "substantially prevail" in a discharge grievance, the Hearing Officer's decision must contain an order that the agency reinstate the employee to his or her former (or an objectively similar) position.<sup>9</sup>

To determine whether attorney's fees are reasonable, the Hearing Officer considers the time and effort expended by the attorney, the nature of the services rendered, the complexity of the services, the value of the services to the client, the results obtained, whether the fees incurred were consistent with those generally charged for similar services, and whether the services were necessary and appropriate.

Grievant's Attorney submitted a petition showing he devoted 62.50 hours to representing Grievant. At an allowable rate of \$131 per hour, Grievant is to be reimbursed \$8,187.50.

**AWARD**

Grievant is awarded attorneys' fees in the amount of \$8,187.50.

---

<sup>8</sup> Va. Code § 2.2-3005.1(A).

<sup>9</sup> § 7.2(e) Department of Human Resource Management, *Grievance Procedure Manual*, effective August July 1, 2017. § VI(E) EEDR *Rules for Conducting Grievance Hearings*, effective July 1, 2017.

## APPEAL RIGHTS

If neither party petitions the EDR Director for a ruling on the propriety of the fees addendum within 10 calendar days of its issuance, the hearing decision and its fees addendum may be appealed to the Circuit Court as a final hearing decision. Once the EDR Director issues a ruling on the propriety of the fees addendum, and if ordered by DHRM, the hearing officer has issued a revised fees addendum, the original hearing decision becomes “final” as described in §VII(B) of the *Rules* and may be appealed to the Circuit Court in accordance with §VII(C) of the *Rules* and §7.3(a) of the *Grievance Procedure Manual*. The fees addendum shall be considered part of the final decision. Final hearing decisions are not enforceable until the conclusion of any judicial appeals.

*/s/ Carl Wilson Schmidt*

---

Carl Wilson Schmidt, Esq.  
Hearing Officer