



# ***COMMONWEALTH of VIRGINIA***

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

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

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

In re:

**Case Number: 11476**

Hearing Date: June 29, 2020

Decision Issued: July 20, 2020

#### **PROCEDURAL HISTORY**

On November 22, 2019, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow policy. Grievant was removed from employment based on the accumulation of disciplinary action.

On December 10, 2019, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On January 7, 2020, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. This matter was originally scheduled for March 19, 2020 but continued due to the COVID19 pandemic. On June 29, 2020, a hearing was held by audio conference.

#### **APPEARANCES**

Grievant  
University Party Designee  
University 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:

Virginia Commonwealth University employed Grievant as a Roofing Assistant. He had been employed by the University for approximately five years. Grievant had prior active disciplinary action. Grievant received a Group II Written Notice on March 9, 2018 for failure to follow policy.

The University provided Grievant with a University-owned cell phone. He was authorized to use a University pickup truck to perform his job duties.

On November 1, 2019, Grievant drove the University pickup truck from the VCU campus to a nearby convenience store to obtain lunch. He parked the vehicle in front of the store and went inside the store. He left his personal and University cell phones in the truck. He failed to lock the doors of the truck. One of several people standing outside of the store opened the truck door and took both cell phones. Grievant exited the store and returned to the pickup truck. He noticed the cell phones were missing. He borrowed a cell phone from another person and called his personal cell phone number. He heard his personal cell phone ringing and the sound came from the location of one of the people outside the store. He obtained his personal cell phone. Grievant did not call his University cell phone number because he did not remember the number. Grievant asked where his University phone was located. He was told that the University

phone was in a cell phone kiosk at a nearby grocery store. He went to the grocery store and the University cell phone was not located there.

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

VCU Vehicle Accident Prevention and Safety Policy provides:

VCU vehicles will only be used for purposes related to VCU business or university-sponsored events. \*\*\*

Before leaving a VCU vehicle unattended, shut off the engine, remove the keys, set the emergency brake, and lock the vehicle.

Failure to follow policy is a Group II offense. On November 1, 2019, Grievant drove a University-owned pickup truck from the Campus to a store off campus. His use of the vehicle was not related to VCU business. Grievant failed to lock the vehicle as required by VCU policy. The University has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow policy. Grievant has accumulated two Group II Written Notices. Upon the accumulation of two Group II Written Notices, an agency may remove an employee. Accordingly, the University’s decision to remove Grievant from employment is upheld.

Grievant argued that he did not realize one of the truck doors was unlocked. Grievant’s assertion explains his behavior but does not excuse it. An objective of the University’s policy was to remind and ensure that employees left the University’s vehicles secured. Grievant’s failure to realize that the pickup truck was not locked does not excuse his failure to lock the doors of the pickup truck.

Grievant contends the disciplinary action should be mitigated. *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>2</sup> Under the *Rules for Conducting Grievance Hearings*, “[a] hearing officer must give deference to

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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.

<sup>2</sup> *Va. Code § 2.2-3005.*

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.

Grievant asserted that other employees would leave campus to get lunch at the store. Grievant presented pictures of other employees going off campus to purchase lunch. He did not establish that University managers were aware of and condoned that employees were leaving campus with University vehicles. He has not established that the University inconsistently disciplined employees. In light of the standard set forth in the Rules, 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 II Written Notice of disciplinary action with removal 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>

[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

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