



# ***COMMONWEALTH of VIRGINIA***

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

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

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

In re:

**Case Number: 11488**

Hearing Date: September 8, 2020  
Decision Issued: September 30, 2020

#### **PROCEDURAL HISTORY**

On December 10, 2019, Grievant was issued a Group II Written Notice of disciplinary action with removal for disruptive behavior, insubordination, and violation of the civility in the workplace policy.

On December 17, 2019, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On January 21, 2020, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The Agency failed to appear at the scheduled hearing and a decision was entered in favor of the Grievant. The Office of Employment Dispute Resolution remanded the matter to the Hearing Officer. On September 8, 2020, a hearing was held by audio conference.

#### **APPEARANCES**

Grievant  
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:

The Virginia Community College System employed Grievant as a Trades Technician III. He had been employed by the Agency since June 2014. Grievant had prior active disciplinary action consisting of a Group II Written Notice with a seven day work suspension issued September 17, 2017.

The Agency had a computer system where if one person remained logged into the system another person could not log in until that person logged off. Grievant would log into the system but would fail to log off causing others to complain. Grievant disputed that he was not properly logging off the computer system. When other employees told him he failed to log out, he called them illiterate and stupid.

On March 12, 2019, Grievant logged into a Computer System but failed to log out. After being informed that he had not logged out, Grievant said loudly, "show me if you think you know better than me." Mr. C told another employee he would not deal with Grievant's attitude and began walking out of the area. Grievant called Mr. C a "cry baby" as well as other names. This angered Mr. C who responded by cursing at Grievant.<sup>1</sup>

On April 1, 2019, Mr. W and a Contractor went to the boiler room and met Grievant. Grievant said he had reset the chiller and the boiler was "all good." Grievant left to begin performing his work orders for the day. Mr. W inspected the equipment and realized Grievant had not fully inspected the equipment. Later in the day, Mr. W told

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<sup>1</sup> Mr. C received corrective action for cursing at Grievant.

Grievant he did not need Grievant to do the boiler room readings in the morning any more. Mr. W told Grievant to come to work and start working on his work orders. Later on, Grievant tracked down Mr. W and showed anger towards Mr. W for not needing Grievant to do boiler room readings in the morning. Grievant began yelling at and yelling over Mr. W as Mr. W tried to speak. Mr. W walked away. Grievant approached Mr. W two more times and yelled at Mr. W telling Mr. W he was wrong. Grievant told Mr. W he was not a man and could not do his job.

On September 16, 2019, Mr. W called Grievant, Mr. C, and Mr. M to meet at the loading dock. Mr. W asked Mr. M if he had checked the VFD. Mr. M said “no.” Mr. W then asked Grievant if he checked the VFD. Grievant said it was not his job. Mr. W told Grievant if it was not his job, then he could go ahead a leave. Mr. W tried to continue his conversation with Mr. M but Grievant would not let him. Grievant kept repeating it was not his job. Then Grievant said he never said it was not his job. Mr. M said, “Yes you did” to Grievant. Mr. W repeatedly requested that Grievant go back to work. Grievant ignored those requests and followed Mr. W and Mr. M and continued to argue loudly.

### **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>2</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.”

DHRM Policy 2.35 governs Civility in the Workplace. This policy provides:

- The Commonwealth strictly forbids harassment (including sexual harassment), bullying behaviors, and threatening or violent behaviors of employees, applicants for employment, customers, clients, contract workers, volunteers, and other third parties in the workplace.
- Behaviors that undermine team cohesion, staff morale, individual self-worth, productivity, and safety are not acceptable. \*\*\*

Any employee who engages in conduct prohibited under this policy or who encourages or ignores such conduct by others shall be subject to corrective action, up to and including termination, under Policy 1.60, Standards of Conduct.

The DHRM Policy Guide provides:  
Prohibited conduct includes:

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<sup>2</sup> The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

Invading personal space; \*\*\*  
Demonstrating behavior that is rude, inappropriate, discourteous, unprofessional, unethical, or dishonest;  
Behaving in a manner that displays a lack of regard for others and significantly distresses, disturbs, and/or offends others;  
Making disparaging remarks, spreading rumors, or making innuendos about others in the workplace;  
Raising one's voice inappropriately or shouting at another person;

Grievant violated DHRM Policy 2.35. He argued loudly with others. He invaded the personal space of other employees. He interrupted and talked over other employees. He called other employees offensive names such as "cry baby." The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

Grievant had prior active disciplinary action consisting of an active Group II Written Notice. Grievant has accumulated a second Group II Written Notice. Upon the accumulation of two active Group II Written Notices, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

Grievant denied the Agency's allegations but did not present any testimony to contradict the Agency's evidence. The Agency has presented sufficient evidence to support its decision to issue disciplinary action.

*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>3</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 the disciplinary action.

## DECISION

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<sup>3</sup> Va. Code § 2.2-3005.

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.