



# ***COMMONWEALTH of VIRGINIA***

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

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

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

In re:

**Case Number: 11526**

Hearing Date: August 13, 2020

Decision Issued: August 14, 2020

#### **PROCEDURAL HISTORY**

On March 6, 2020, Grievant was issued a Group II Written Notice of disciplinary action with a two workday suspension for failure to report to work without notice.

On March 12, 2020, 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 she requested a hearing. On May 18, 2020, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 13, 2020, a hearing was held by audio conference due to the COVID-19 pandemic.

#### **APPEARANCES**

Grievant  
Agency Representative  
Witness

#### **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 Department of Social Services employs Grievant as a Program Administrative Specialist II. She has been employed by the Agency since 2018. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant had been tardy on several occasions. On June 27, 2019, the Supervisor sent Grievant an email, "[p]lease notify me as you have in the past when you will be late."<sup>1</sup>

Grievant's work hours were from 9 a.m. to 5 p.m. On January 27, 2020, Grievant did not report to work at 9 a.m. At 9:29 a.m., the Supervisor sent Grievant a text message asking her status. Grievant did not reply to the text message.<sup>2</sup> At approximately 10:10 a.m., Grievant reported to work. The Supervisor asked Grievant why she was late. Grievant did not offer an explanation. In her response to the Agency's Notice of Intent, Grievant asserted she was late due to "numerous traffic accidents" on her route to work.

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<sup>1</sup> The Agency did not issue disciplinary action for failure to follow a supervisor's instructions.

<sup>2</sup> Grievant argued she was driving and it would have been unlawful for her to respond to the Supervisor's text message.

## 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.”

Tardiness is a Group I offense.<sup>4</sup> On January 27, 2020, Grievant was scheduled to report to work at 9 a.m. She reported to work at 10:10 a.m. and, thus, was tardy to work. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice. A Group I Written Notice does not support the suspension of an employee. Thus, the Agency’s suspension is not upheld.

The Agency argued that Grievant should receive a Group II Written Notice for “failure to report to work without notice.” The Agency is interpreting this provision as “failure to report to work as scheduled without notice.” The policy does not say “as scheduled” – it says “failure to report to work.” “Failure to report to work” and “failure to report to work as scheduled” are materially different standards. In this case, Grievant reported to work on January 27, 2020. She worked approximately seven hours of her shift. She did not fail to report to work without notice because she reported to work. Grievant’s behavior is best described as being tardy.

*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>5</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<sup>6</sup>, and (3) the

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<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> See, Attachment A, DHRM Policy 1.60.

<sup>5</sup> *Va. Code § 2.2-3005.*

<sup>6</sup> Grievant argued that other employees were permitted to adjust their schedules to account for being tardy instead of being disciplined. Grievant did not present sufficient evidence to support this assertion.

disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to further 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 a two workday suspension is **reduced** to a Group I Written Notice. The Agency's two workday suspension is **rescinded**. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of suspension. The Agency 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>

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<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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer