



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

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 11532**

Hearing Date: July 22, 2020  
Decision Issued: September 25, 2020

**PROCEDURAL HISTORY**

On March 30, 2020, Grievant was issued a Group III Written Notice of disciplinary action with removal for failing to maintain civility in the workplace and violation of a safety rule.

On April 15, 2020, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On May 4, 2020, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 22, 2020, a hearing was held by audio conference.

**APPEARANCES**

Grievant  
Grievant's Counsel  
Agency Party Designee  
Agency's 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 Department of Transportation employed Grievant as a Transportation Operator II at one of its facilities. He had been employed by the Agency for approximately four years. No evidence of prior active disciplinary action was introduced during the hearing.

On October 24, 2019, Grievant received an annual performance evaluation with an overall rating of "Contributor." His supervisor wrote, "[Grievant] has displayed a negative attitude towards leadership on occasion that hinders his ability to reach full potential in his VDOT career."<sup>1</sup>

In October 2019, a conflict arose between Grievant and the Manager. Grievant asked the Manager not to "joke" with him any longer. The Manager took that request "to heart." Grievant testified that they were "no longer joking around."

Grievant had a medical history of nasal septal deviation and nasal congestion. This condition caused him to cough periodically. His coughs were sometimes loud and persistent.

---

<sup>1</sup> Agency Exhibit p. 7.

In March 2020, the Agency was operating with heightened concern regarding the COVID-19 pandemic. Staff were concerned about contracting the virus and the Agency was concerned about limiting the spread of the virus. Safety meetings were not normally held at the fuel pumps. The Manager began holding meetings at the fuel pumps because of COVID-19. The pumps were outdoors and employees could remain adequately distanced from each other.

On March 19, 2020, Grievant was in a morning safety meeting with other staff members. Grievant “displayed a tremendous cough.”<sup>2</sup> Grievant did not cover his mouth as he coughed. The Manager told Grievant he could go home if he was not feeling well due to COVID-19. Grievant replied, he might go to the Manager’s house and see, “what kind of fun he could have.” The Manager responded that if Grievant showed up at his property, Grievant may have other things to contend with. Grievant had not been to the Manager’s home before.

The Manager considered Grievant’s comment to be rude and out of place. The Manager construed Grievant’s comment to be a threat to go to his house and attack his family and him in some way. The Manager was offended by Grievant’s remark.

In the afternoon, the Manager called a safety meeting to take place outdoors near the fuel pumps on the “fuel island.” Grievant lit a cigar when he was at the Shop. He heard the call for the meeting so he walked to the fuel island without realizing he held a lit cigar. The fuel island had a “No Smoking Within 50 Feet” sign posted. Grievant did not put out his cigar because he did not realize he was holding a lit cigar near the fuel island.

The Manager alleged Grievant’s name and directed his attention to the no smoking sign. Grievant brushed his cigar against the ground to put out the cigar. He put the unlit cigar back in his mouth as was his habit. Grievant later apologized for his action.

## **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.”

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

---

<sup>2</sup> Agency Exhibit 49.

<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.

- The Commonwealth strictly forbids ... threatening or violent behaviors of employees ... in the workplace.
- Behaviors that undermine team cohesion, staff morale, individual self-worth, productivity, and safety are not acceptable

The DHRM Policy Guide identifies prohibited behavior to include:

Demonstrating behavior that is rude, inappropriate, discourteous, unprofessional, unethical, or dishonest; \*\*\*

Making unwelcome or suggestive comments or jokes;

DHRM Policy 2.35 provides:

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.

“[T]hreatening others” is a Group III offense.<sup>4</sup> On March 19, 2020, Grievant told the Manager he might go to the Manager’s house and see, “what kind of fun he could have.” Grievant’s statement was a threat to the Manager. The Manager perceived Grievant’s statement as a threat. It is not necessary for the Agency to show that Grievant had a present intent to carry out his threat or that he had the means to do so. Grievant’s words, standing alone, are sufficient to establish his threat against the Manager. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant’s removal must be upheld.

Grievant argued that he intended his comment about going to the Manager’s house as a “joke.” The evidence showed that by March 2020, Grievant and the Manager did not have a relationship where they frequently “joked.” Indeed, in October 2019, Grievant had asked the Manager to no longer joke with him. In addition, the Supervisor also heard Grievant’s remark and perceived it as a threat to the Manager.

The Agency alleged that Grievant continued to smoke his cigar after being instructed to stop. The evidence showed that the Supervisor was standing approximately 50 feet away from Grievant. This distance was too far from Grievant to accurately assess whether Grievant’s cigar remained lit. Although the Agency has not established its allegations regarding Grievant smoking a cigar, there remains sufficient evidence to support the issuance of a Group III Written Notice.

*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

---

<sup>4</sup> See, Attachment A, DHRM Policy 1.60.

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, 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 III 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

---

<sup>5</sup> Va. Code § 2.2-3005.

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*

---

Carl Wilson Schmidt, Esq.  
Hearing Officer

---

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