



# ***COMMONWEALTH of VIRGINIA***

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

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

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

In re:

**Case Number: 11540**

Hearing Date: August 19, 2020  
Decision Issued: September 8, 2020

#### **PROCEDURAL HISTORY**

On April 13, 2020, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow instructions and policy. He was removed from employment based on the accumulation of disciplinary action.

On May 11, 2020, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On June 1, 2020, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 19, 2020, a hearing was held by audio conference.

#### **APPEARANCES**

Grievant  
Agency Party Designee  
Agency'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 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 University of Virginia employed Grievant as an Animal Caregiver. He began working for the University in June 2018. Grievant was responsible for checking animal cages, ensuring sanitation, and making sure animals had adequate water and food. Grievant worked from Sunday through Thursday. His shift was from 7:30 a.m. to 4 p.m.

Grievant had prior active disciplinary action. Grievant received a Group II Written Notice on March 30, 2020.

The University had approximately 4,600 mice it uses as part of faculty research projects. A mouse could cost between \$40 and \$4,000. Faculty members would design a research project and have it approved by a University committee. Research projects had to be consistent with the University's standard protocol, which followed federal regulation. Every project had to be consistent with the University's protocols including animal safety and ethical treatment. Once a project was approved, mice were allocated to the project. The cost of the project was billed to the Faculty member's unit. Racks were filled with mice cages and each rack was marked with the Faculty member's name and project number.

If a mouse was not able to complete a project, the research time and cost for the project could be lost. The University decided that it would over-feed mice in order to ensure that they were not malnourished and would not die during the course of the

research project. The University considered the cost of excessive food to be much less than the cost of a research project failing.

Mice were stored in cages held by racks. One rack could hold up to 80 cages. Each cage had a hopper, which was used to hold food for the mice to eat. If a hopper was filled to the top, it held enough food for the mice to eat to avoid undermining the research project.

In January 2020, the Supervisor told Grievant he needed to provide more food to the mice and instructed him to fill the hopper. The Supervisor instructed Grievant many times to fill the hopper to the top with food so the mice would have plenty of food to eat. A filled hopper should have enough food for 14 days when cages were changed.

On February 6, 2020, the Supervisor told Grievant he was not providing the mice with enough food. She told Grievant not to worry about how much the food cost. Grievant questioned why they were adding so much food that would go to waste. She told Grievant not to focus on food waste since the Manager was not worried about food waste.

On February 21, 2020, the Supervisor spoke with Grievant again after learning Grievant was weighing the amount of food he gave to mice. Approximately 75 cages did not have adequate food in their hoppers.

On February 24, 2020, the Supervisor told Grievant not to worry about wasting food and to ensure the mice had adequate food.

On February 28, 2020, an Assistant Supervisor noticed Grievant was weighing food. He told Grievant not to worry about weighing food and to make sure he provided the cages with adequate food.

Mr. K told Grievant not to worry about the amount of food he was providing to the mice and to “top off” the hopper.

Grievant failed to add sufficient food to several mice gates on March 5, 2020. The Supervisor noticed several cages were not full on March 6, 2020.

On March 10, 2020, the Supervisor spoke with Grievant and told him not to worry about wasting food and to increase the amount of food he was giving to the mice. She told him he was causing additional work for other employees who would have to add additional food. She added that they had had “this discussion” too many times. Grievant said he would comply with the Supervisor’s request.

Grievant took several mice and placed them in approximately 37 cages. He allocated food to the mice. He put a tag on the rack saying, “[Grievant’s name] Food Study.” Grievant had written a note, “Do not add food” to instruct other employees not to provide the mice in his experiment with additional food.

On March 20, 2020, another employee directed the Supervisor's attention to Grievant's food study cages. When the Supervisor saw the cages, she was shocked. She had no idea that Grievant was conducting his own experiment. The Supervisor's unit was not able to bill for the cost of the project.

## 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."

Failure to follow a supervisor's instruction is a Group II offense.<sup>2</sup> The Supervisor repeatedly told Grievant he was not providing the mice with enough food and to fill the hoppers on the mice cages. Grievant continued to provide mice with an insufficient amount of food. He disregarded the Supervisor's instruction.

Grievant argued he was not told to fill the hopper to the top. He claims he was not told what amount of food to add and, thus, he did not fail to follow any supervisor's instruction. The Supervisor testified she told him to fill the hopper. Grievant knew or should have known that filling the hopper meant filling it to the top since it would be an unusual practice to fill the hopper to an amount below the top.

Failure to follow policy is a Group II offense.<sup>3</sup> The University had numerous policies setting forth the requirements to conduct experiments using mice. Only University faculty could be principal investigators who conducted experiments using animals. The University's policies required a scientific justification to control food and water to animals. The University's policies required a protocol for monitoring the mice. Grievant was not a faculty member. He was not authorized by policy to conduct research experiments using mice. He had no scientific justification to control food and water for the mice. He did not have an approved protocol for monitoring the mice. Grievant failed to comply with the University's policies when he conducted his own research project using mice. Grievant's experiment involved restricting the amount of food given to mice. This was contrary to the Supervisor's instruction to provide the mice with adequate food and not worry about food waste.

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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> See, Attachment A, DHRM Policy 1.60.

<sup>3</sup> See, Attachment A, DHRM Policy 1.60.

Grievant argued that the Supervisor gave him permission to perform the food study. The Supervisor testified she did not give Grievant permission to perform his study. Her denial was credible. The Hearing Officer does not believe the University took any actions to suggest Grievant could complete his own food study.

The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice. Upon the accumulation of two active Group II Written Notices, an agency may remove an employee. Grievant has accumulated two active Group II Written Notices. Accordingly, the University's decision to remove Grievant must be upheld.

*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>4</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 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

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<sup>4</sup> Va. Code § 2.2-3005.

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.