



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

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 11401**

Hearing Date: October 17, 2019  
Decision Issued: November 6, 2019

**PROCEDURAL HISTORY**

On June 5, 2019, Grievant was issued a Group III Written Notice of disciplinary action with removal for poor attendance/excessive tardiness.

On June 28, 2019, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On July 15, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 17, 2019, a hearing was held at the Agency's office.

**APPEARANCES**

Grievant  
University Party Designee  
University Counsel  
Witnesses

**ISSUES**

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?
3. Whether the University'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 University 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 Tech employed Grievant as a Housekeeper. He had been employed for approximately 15 years. Grievant’s work performance when he reported to work was satisfactory to the University. Grievant’s attendance was not satisfactory to the University.

Grievant’s work shift began at 5 a.m. and ended at 1:30 p.m.

Grievant had prior active disciplinary action. On April 13, 2018, Grievant received a Group I Written Notice for Attendance/Excessive Tardiness. On August 21, 2018, Grievant received a Group II Written Notice for failure to follow policy and/or instruction. On February 28, 2019, Grievant received a Group II Written Notice with a five workday suspension for Attendance/Excessive Tardiness.

As of April 11, 2019, Grievant had exhausted all of his leave balances. Grievant was aware of his obligation to report to work as scheduled.

On April 11, 2019, Grievant was at work and asked to leave early to attend a medical appointment. As a result he was placed on docked status<sup>1</sup> for .5 hours. Grievant submitted a note from a medical provider stating, “This is to certify that [Grievant] was seen in my clinic on 4/11/2019.”

On May 1, 2019, Grievant called at 4:08 a.m. and left a message saying he, “won’t be in today should be back tomorrow. At 12:52 p.m., Grievant called and said

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<sup>1</sup> The University referred to this as leave without pay status.

that his doctor had laid him off until May 3, 2019 and said he would bring a doctor's note on Friday morning when he returned to work. Grievant was on docked status for eight hours on May 1, 2019, eight hours on May 2, 2019, and eight hours on May 3, 2019.

Grievant presented a note dated May 1, 2019 from a medical provider indicating that Grievant "was seen in my clinic on 5/1/19" and "He may return to work 5-3-2019."

## **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."

Poor attendance is a Group I offense.<sup>3</sup> Grievant showed a pattern of poor attendance by leaving work early on April 11, 2019 and failing to report to work on May 1, 2019, May 2, 2019, and May 3, 2019 as expected by the University. The University has presented sufficient evidence to support the issuance of a Group I Written Notice. Because Grievant's behavior is a repeated violation of the same offense of poor attendance, the University may elevate the disciplinary action to a Group II Written Notice. There is no basis to elevate a Group I offense to a Group III offense based on having a repeated violation of the same offense.

Upon the accumulation of two or more Group II Written Notices, an agency may remove an employee. Grievant has now accumulated at least two active Group II Written Notices. Accordingly, the University's decision to remove Grievant must be upheld.

Grievant argued that his absences were excused under the Family Medical Leave (FML) policy. DHRM Policy 4.20 governs Family Medical Leave and allows an employee to receive up to 12 weeks of unpaid family and medical leave on the basis of:

- The prenatal care for or the birth of a child, and to care for the newborn child.
- Placement of a child with the employee for adoption or foster care.
- To care for the spouse, son, daughter or parent with a serious health condition.

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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.

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

- Because of a serious health condition which renders the employee unable to perform the functions of his/her position.
- Because of any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a covered military member on active duty, or has been notified of an impending call or order to active duty in support of a contingency operation.

Grievant has the burden of proof to establish his defenses. The evidence showed that when Grievant requested FML, the University did not count his absences against him. On April 11, 2019 and May 1, 2019, the evidence does not show that Grievant requested FML for those dates. Even if Grievant had requested FML for those dates, it is not clear he would have qualified. Grievant did not testify and the record does not explain the nature of Grievant's medically-related absence. Grievant must show he was absent because of a serious health condition which renders the employee unable to perform the functions of his/her position. Not every illness is a serious health condition. Without knowing the reason for Grievant's absence, the Hearing Officer cannot conclude that Grievant was absent because of a qualifying FML reason.

Grievant argued the University unfairly targeted him for disciplinary action. The evidence showed that University managers took disciplinary action against Grievant because he continued a pattern of poor attendance.

*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 III Written Notice of disciplinary action is **reduced** to a Group II Written Notice. The Agency's decision to remove Grievant is **upheld** based on the accumulation of disciplinary action.

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<sup>4</sup> *Va. Code § 2.2-3005.*

## 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.