



# ***COMMONWEALTH of VIRGINIA***

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

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

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

In re:

**Case Number: 11439**

Hearing Date: January 14, 2020

Decision Issued: January 15, 2020

#### **PROCEDURAL HISTORY**

On October 2, 2019, Grievant was issued a Group III Written Notice of disciplinary action with removal for dishonesty.

On October 3, 2019, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On October 21, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 14, 2020, a hearing was held at the Agency's office. Grievant was notified of the date, time, and location of the hearing, but did not appear.

#### **APPEARANCES**

Agency 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 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 Accountant in one of its Units. He was entrusted with maintaining confidential financial information. He had been employed by the University for approximately 11 years. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant wanted to attend a football game at College C between College C and another school. The game was sold out and Grievant would have to pay a premium to obtain a ticket to the game. He decided to contact College C and obtain media credentials which meant he would receive a free ticket to the event.

On September 2, 2019, Grievant applied to College C for media credentials for the football game between College C and another school. He used an internet-based form to falsely claim to be a reporter from UVA Today. He listed his UVA email address as part of his contact information. On September 8, 2019, Grievant "pitched" a story to College C that he was writing an article to compare the football programs of UVA, College C, and another school.

On September 12, 2019, Grievant sent emails to College C asking for a status update on his request for media credentials. An Assistant Athletic Director for College C contacted the Associate Vice President overseeing UVA Today to inquire about Grievant's request after finding no stories written by Grievant and learning from the UVA

website that Grievant was an accountant. The Associate Vice President replied to the Assistant Athletic Director that UVA Today did not have any employees planning to attend the football game.

On September 12, 2019, the Associate Vice President contacted Grievant to inquire about Grievant's request for media credentials. Grievant entered College C's media credentialing system using his UVA computer and redacted his contact information. He entered fictitious contact information into the system. Grievant falsely responded to the Associate Vice President that, "I have no idea what this is about. My initial thought is a phishing scam or mistaken identity."<sup>1</sup>

On September 16, 2019, the AVPA met with Grievant for a predetermination meeting. Grievant falsely denied requesting the credentials from College C and said that someone else must have hacked into his computer.

On September 17, 2019, Grievant sent the AVPA an email with the subject, "I am Sorry and I was Wrong." He apologized for not being "open and transparent." He explained that he "made the extremely poor decision to try and secure entry to the game on [date] by entering my information into the [College C] media credential website on Monday, September 2 ...."

On September 24, 2019, a second predetermination meeting was held. Grievant referred to his actions as "frivolous and silly."

## **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 1.60 lists numerous examples of offenses. These examples "are not all-inclusive, but are intended as examples of conduct for which specific disciplinary actions may be warranted. Accordingly, any offense not specifically enumerated, that in the judgment of agency heads or their designees undermines the effectiveness of agencies' activities, may be considered unacceptable and treated in a manner consistent with the provisions of this section."

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<sup>1</sup> Agency Exhibit 9.

<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.

The University argues that Grievant should receive a Group III Written Notice for dishonesty. Although dishonesty is not listed as an offense, dishonesty is consistent with a Group III offense for falsifying records. Accordingly, dishonesty is a Group III offense. Grievant displayed dishonesty. He misrepresented to College C that he was a reporter for UVA Today. When questioned by the University, Grievant misrepresented his involvement and knowledge of his actions. The University 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's apology showed that he recognized his mistake. An apology, however, is not normally sufficient, in itself, to reduce 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

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

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<sup>3</sup> Va. Code § 2.2-3005.

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.