



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

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 11463**

Hearing Date: February 20, 2020

Decision Issued: March 11, 2020

**PROCEDURAL HISTORY**

On September 30, 2019, Grievant was issued a Group III Written Notice of disciplinary action with removal for absence in excess of three days without approval. The University issued a revised Group III Written Notice on January 3, 2020.

On October 2, 2019, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On December 9, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 20, 2020, a hearing was held at the Agency's office.

**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 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:

The University of Virginia employed Grievant as a Quality Assurance Inspector. An essential function of her job was to be present on the University's campus to inspect Facilities to ensure University staff are properly cleaning University Buildings.

Grievant was injured at work on June 4, 2019. Grievant submitted a claim for short-term disability to the Third Party Administrator. On June 21, 2019, Ms. R sent Grievant a letter advising Grievant:

because you have worked for the University for at least 12 months and meet the hours of service requirement in the 12 months preceding your disability leave, you are also eligible for the Family and Medical Leave (FMLA). FMLA and STD leave run concurrently. \*\*\* Keep in contact with supervisor about your leave status. This includes notification when you return date may change as a result of filing a claim extension, etc.<sup>1</sup>

Grievant was on short-term disability from June 4, 2019 through August 11, 2019.

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<sup>1</sup> Agency Exhibit 5.

On August 6, 2019, the Manager sent Grievant an email indicating she had not received any communication from Grievant since July 17, 2019 and that she had left Grievant a voice message. Grievant replied, “[a]ll additional information has been sent to [Third Party Administrator] who then forwards to UVA HR. The last date is through 08/08. \*\*\* Please let me know if you haven’t received this information and I will have it forwarded to you.”<sup>2</sup>

She did not return to work on August 12, 2019 and did not contact the Supervisor regarding her status.

On August 13, 2019, Ms. R received a doctor’s note dated August 7, 2019 indicating Grievant should remain out of work for three weeks.

The Third Party Administrator notified Ms. M that on August 8, 2019, Grievant requested an extension of benefits until September 4, 2019. On August 28, 2019, the Third Party Administrator denied Grievant’s request.

On August 28, 2019, Ms. R sent Grievant an email indicating the University was notified by the Third Party Administrator that Grievant’s claim from August 12, 2019 through September 4, 2019 was denied. She informed Grievant, “we would expect that you return to work.”<sup>3</sup>

Ms. M sent Grievant a certified letter dated August 30, 2019 advising Grievant’s last day of approved leave was August 11, 2019. Ms. M wrote:

It is imperative that you return to work immediately with a doctor’s note indicating your ability to do so or provide a written request with appropriate supporting documentation for a formal leave of absence for management’s consideration. \*\*\* Failure to do so by Friday, September 6, 2019 may result in additional action up to and including termination in accordance with the Standards of Conduct.<sup>4</sup>

On September 4, 2019, Ms. R sent Grievant an email asking, “is your doctor returning you to work as of tomorrow, 9/5/19?”<sup>5</sup>

On September 10, 2019, Ms. B sent Grievant an email:

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<sup>2</sup> Agency Exhibit 7.

<sup>3</sup> Agency Exhibit 7.

<sup>4</sup> Agency Exhibit 7. Grievant did not receive the letter. She received a copy of the letter attached to an email sent by Ms. B on September 10, 2019.

<sup>5</sup> Agency Exhibit 8.

As of today, September 10, 2019, our records indicate that we have not heard [a] response from you in regard to your return to work, nor have you communicated with your direct supervisor [Manager] as is required throughout the short-term disability leave process. \*\*\* At this time, we require that you respond within 24 hours to your direct supervisor. Failure to do so will be viewed as a violation of “3 days absent without authorization.” This is a serious offense considering that you’ve been out on unapproved leave since August 12, 2019, and could result in separation of employment.

Ms. B attached a copy of Ms. M’s August 30, 2019 letter to Ms. B’s email to Grievant.

On September 10, 2019, Grievant sent the Manager an email indicating she had not received a letter via certified mail and had spoken with Ms. R on September 4, 2019 to provided updated information regarding her status. Grievant wrote:

[a]t this point, I have no additional information to provide other than I am not in a position to return to work. I cannot sit, stand or walk for extended periods of time. \*\*\* In addition to the foot injury, I have a back injury. \*\*\* I am happy to work remotely, however, the department wasn’t willing to accommodate that previously. If that accommodation can now be met, please let me know and provide any tasks that are available.<sup>6</sup>

Grievant was seen by a doctor on September 11, 2019. The doctor wrote a note, “[s]he will begin PT for back pain, date to return to work to be determined after assessment.”<sup>7</sup>

On September 11, 2019, Grievant sent the Manager an email indicating she had not received the certified letter and did not know she had a deadline of September 6, 2019 to respond. She wrote, “[m]y health restrictions don’t allow me to perform my current position or modified duties in office at this time.”<sup>8</sup>

Following a predetermination meeting, the University decided to remove Grievant from employment.

## **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

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<sup>6</sup> Agency Exhibit 8.

<sup>7</sup> Agency Exhibit 8.

<sup>8</sup> Agency Exhibit 8.

disciplinary action.”<sup>9</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.”

“Absence in excess of three days without authorization” is a Group III offense.<sup>10</sup> Grievant was issued a Group III Written Notice on September 30, 2019 with an effective date of removal of October 2, 2019. Grievant did not return to work on University Grounds after June 4, 2019. Grievant’s short-term disability ended on August 28, 2019. Her Family Medical Leave ran concurrently with her short-term disability. She did not have any available sick leave balances. Grievant was absent from work in excess of three work days without authorization. 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 was not able to return to work without restrictions. Grievant asserted she could work remotely if the University would accommodate her needs. The evidence showed that an essential function of Grievant’s job was to be present on the University’s Grounds to conduct inspections. The University was not able and, thus, not obligated to accommodate Grievant’s request.

*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>11</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 University’s issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is **upheld**.

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<sup>9</sup> The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

<sup>10</sup> See, Attachment A, DHRM Policy 1.60.

<sup>11</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.