



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

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 11477**

Hearing Date: March 6, 2020 and  
March 26, 2020  
Decision Issued: March 27, 2020

**PROCEDURAL HISTORY**

On November 20, 2019, Grievant was issued a Step 4, Formal Performance Improvement Counseling Form with removal for driving a Medical Center vehicle on a suspended license.

On December 4, 2019, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On December 30, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 6, 2020, a hearing was held at the Agency's office. Additional evidence was taken on March 26, 2020.

**APPEARANCES**

Grievant  
Agency Party Designee  
Agency's Representative  
Witnesses

**ISSUES**

1. Whether Grievant engaged in the behavior described in the Formal Performance Improvement Counseling Form?
2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy?
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 Medical Center employed Grievant as a Licensed Practical Nurse. No evidence of prior active disciplinary action was introduced during the hearing.

Agency employees were required to have valid driver's licenses when they operated Agency vehicles. Every year, the Agency contacted the Department of Motor Vehicles (DMV) to determine whether its employees had valid driver's licenses. Employees were required to notify their supervisors of changes in their license status.

The Agency contacted DMV and determined that Grievant's license was suspended effective June 8, 2019. The Agency verified that DMV sent Grievant a notice on May 9, 2019 via first class mail. Grievant did not respond to the notice and her license was ordered suspended.

Grievant operated Agency vehicles approximately 13 to 15 times from June 8, 2019 to October 24, 2019. She did so without a valid driver's license.

The Agency held a predetermination meeting on October 24, 2019. During that meeting, Grievant told Agency managers that she did not know her license was suspended until that moment. Grievant said she planned to visit the DMV that afternoon to resolve the matter.

The Agency held a second predetermination meeting on October 30, 2019 to provide Grievant with an opportunity to submit documentation or an explanation related to her suspension. Grievant provided DMV records showing that her licenses was temporarily reinstated effective October 28, 2019 through November 27, 2019. Grievant explained that she owned a Ford Explorer which her son insured under his policy. She said the Ford Explorer was no longer operable and that she knew she should have turned in the tags to DMV but forgot. Grievant said her son cancelled the insurance on the Ford Explorer effective May 1, 2019 resulting in Grievant owning an uninsured vehicle. Grievant claimed she did not receive any notification from DMV of the suspension.

On November 7, 2019, the Manager contacted a DMV representative who explained that when DMV receives notification that a vehicle does not have insurance, DMV mails a notice to the owner. The notice gives the vehicle owner the option to either show proof of insurance, turn in the vehicle tags, or pay the uninsured motorist fee. If the vehicle owner fails to respond, the license is suspended.

On February 18, 2020, Grievant held a hearing with a DMV Hearing Officer. The Hearing Officer issued a Hearing Decision dated February 18, 2020. The DMV Hearing Officer found that, “[y]ou provided evidence sufficient to cancel the order of suspension.” The DMV Hearing Officer concluded:

I have decided you showed cause why the order of suspension (Order) issued on May 9, 2019, pursuant to Va. Code 46.2-706 and 46.2-707 should not be enforced. Therefore, that Order is hereby canceled.

DMV mailed the Hearing Decision to Grievant’s P.O. Box on February 20, 2020. The Local Post Office took the letter and had a mail carrier deliver it to Grievant’s home address. Grievant had had problems receiving mail at her P.O. Box especially from DMV and she had asked the Local Post Office staff to deliver letters from DMV to her physical address. Grievant did not present the DMV Hearing Decision to this Hearing Officer during the March 6, 2020, grievance hearing because Grievant was not in possession of the document.

During the March 6, 2020 grievance hearing, Grievant testified she was “not seeking her job back.” She wanted a reversal of the Agency’s prohibition against being rehired.<sup>1</sup>

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<sup>1</sup> Upon reversal of a Step 4 Formal Performance Improvement Counseling Form with removal, an employee is entitled to reinstatement with back pay and benefits. Since Grievant only seeks removal of the disciplinary action and restoration of the ability to be rehired, the Hearing Officer will only address those remedies.

## CONCLUSIONS OF POLICY

Policy 701 sets forth the Agency's Standards of Performance for its employees. Progressive performance improvement counseling steps include an information counseling (Step One), formal written performance improvement counseling (Step Two), suspension and/or performance warning (Step Three) and ultimately termination (Step Four). Depending upon the employee's overall work record, serious misconduct issues that may result in termination without prior progressive performance improvement counseling.

Medical Center Human Resource Policy 104 governs Conditions of Employment. Employees are required to have valid driver's licenses to operate Agency vehicles. Failure of an employee to report a "change in license status may result in disciplinary action up to and including termination."<sup>2</sup> Under Medical Center Policy 0260 governing Fleet Management, "Drivers whose licenses are suspended or revoked for any reason must notify their supervisors and shall not operate a Medical Center vehicle."<sup>3</sup>

The Agency's disciplinary action rests on the validity of the DMV order suspending Grievant's license. Cancellation of an order is the same as rescinding the order. A rescission of an order means the order is reversed as if the order was never entered in the first place. The effect of the DMV Hearing Officer's decision to cancel Grievant's order of suspension is to eliminate the suspension as if the suspension never happened. Thus, Grievant was not operating a State vehicle without a valid driver's license. The reason for disciplinary action no longer exists and the Step 4 Formal Performance Improvement Counseling Form must be reversed.

The DMV Hearing Officer's decision was issued prior to the grievance hearing and sent to Grievant's PO Box address prior to the hearing. The Agency argued that the DMV Hearing Decision was not new evidence and should not be considered as evidence.

Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the hearing ended. However, the fact that a party discovered the evidence after the hearing does not necessarily make it "newly discovered." Rather, the party must show that:

- (1) the evidence is newly discovered since the date of the Hearing Decision;
- (2) due diligence on the part of the party seeking reconsideration to discover the new evidence has been exercised;
- (3) the evidence is not merely cumulative or impeaching;
- (4) the evidence is material;
- and (5) the evidence is such that is likely to produce a new

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<sup>2</sup> Agency Exhibit 3.

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

outcome if the case were retried, or is such that would require the Hearing Decision to be amended.

The DMV Hearing Decision existed prior to the grievance. Grievant did not discover the document until after the grievance hearing. There is no reason to believe Grievant was not diligent in obtaining the document. The evidence is not merely cumulative or impeaching. The document is material and changes the outcome of this decision. Accordingly, the Hearing Officer will consider the DMV Hearing Decision as new evidence.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Step 4 Formal Performance Improvement Form with removal is **rescinded**. The Agency is **ordered** to make Grievant eligible for rehire.

## 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.