



# ***COMMONWEALTH of VIRGINIA***

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

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

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

In re:

**Case Number: 11493**

Hearing Date: April 20, 2020

Decision Issued: May 4, 2020

#### **PROCEDURAL HISTORY**

On December 18, 2019, Grievant was issued a Group III Written Notice of disciplinary action with removal for intentionally damaging State property.

On January 14, 2020, Grievant timely filed a grievance to challenge the University's action. The matter proceeded to hearing. On February 3, 2020, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 20, 2020, a hearing was held by telephone conference.

#### **APPEARANCES**

Grievant  
Grievant's Representative  
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:

Longwood University employed Grievant for approximately 12 years. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

The Office had a wall-mounted air-conditioning unit attached to the bottom half of a wall separating the Office from a hallway. A person standing in the hallway could push the air-conditioning unit through the wall into the Office and create an opening in the wall. A person could then crawl through the opening and gain access to the Office interior.

Mr. P worked in the Office. University records for the Department of Environmental Quality were contained in the office cabinet as well as some personnel records. Drawings and training materials were also kept in the Office. The Office was not designated as a restricted area.<sup>1</sup> Employees were not told they could only enter the Office with Mr. P's permission. Mr. P sometimes left the Office unlocked. Employees would use the computer inside the Office to check their email.

Mr. P learned that employees were entering the Office when he was not there. Mr. P would lock his door and when he returned on the following day, he noticed that his

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<sup>1</sup> After the incident, the University posted a sign indicating the entry into the Office was restricted.

door was unlocked. He was the only one with a key to the Office. He was told that someone was pushing in the air-conditioning unit. Mr. P had an operator use a board and screws to secure the air-conditioning unit to the wall so that someone could not push the unit into the Office.

Grievant arrived to work on December 6, 2019 to begin his 11 p.m. shift. He went to the Office to retrieve his cell phone charger, which he left in the Office the night before. Grievant was adamant about obtaining his cell phone charger because he cared for an ill relative and needed to be accessible in the event of an emergency. He was scheduled to be off from work during the following weekend and did not want to spend the entire weekend without his charger. The Office door was locked.<sup>2</sup> Mr. P was no longer at work.

Grievant used his hands to push the air-conditioning unit away from the wall to gain access to the Office. According to Mr. P, he was told by an operator that Grievant “forcefully pushed in” the unit. Mr. P said, “It was kicked in; it was not simply sliding something out of the way; it was pushing this thing in and nothing going to stop me; it was violent act.”

Following the incident, the University reinstalled the air-conditioning unit and repaired the sheet rock. Two employees worked a few hours to complete the task. The cost to repair the damage to the wall was approximately two hundred dollars. The University did not assert that Grievant caused any damage to the air-conditioning unit.

## **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>3</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.”

“[W]illfully or recklessly damaging state records/property” is a Group III Offense. On December 6, 2019, Grievant damaged State property. The damage was to sheet rock on a wall holding an air-conditioning unit in place. Grievant’s action was not willful. His action was not designed to destroy the sheet rock. His action was designed to gain access to the Office. Grievant’s action was reckless. Once the unit was secured in place by a board, removal of the unit was no longer a matter of simply pushing it through the hole in the wall. Grievant should have recognized this and stopped trying to push the

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<sup>2</sup> Grievant was not notified that the Office would be locked.

<sup>3</sup> The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

unit. Instead he engaged in a “violent act” of “kicking in” the unit. Grievant’s action was sufficient to establish the University’s assertion that he recklessly damaged State property. 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, the University’s decision to remove Grievant must be upheld.

Entering an office by pushing an air-conditioning unit through a wall is an inappropriate way to enter an office and justifies some disciplinary action. The University could have issued a lesser level of disciplinary action and properly corrected Grievant’s behavior. The University, however, chose to issue a Group III Written Notice with removal because of the force Grievant used to remove the unit that resulted in damage. The University’s discipline is consistent with its burden of proof under the Standards of Conduct.

Grievant argued that the University discriminated against him. For example, Grievant asserted he was passed over for promotion at least three times. No credible evidence was presented to show that the University discriminated against him because of any protected class. It appears that other more qualified candidates received the positions he sought.

*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.

The Hearing Officer does not agree with the University’s decision to remove Grievant. Upon discovering employees were accessing the Office afterhours, the University should have informed employees to discontinue such access. Grievant’s objective was not to steal something from inside the Office or engage in inappropriate behavior once he was inside the Office. Grievant’s objective was to retrieve a cell phone charger that belonged to him to ensure he would be accessible to a family member in need. Grievant revealed his action to another employee and offered to pay for the damages. He did so prior to the University discovering the damage. The University’s ability to mitigate disciplinary action is more expansive than the Hearing Officer’s

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<sup>4</sup> Va. Code § 2.2-3005.

authority. The Hearing Officer can mitigate disciplinary action only if it exceeds the limits of reasonableness. In this case, the University has established it met the requirements of the Standards of Conduct and its discipline was consistent with the authority given to it under the Standards of Conduct. In light of the standard set forth in the Rules, 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**.

## 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>

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<sup>[1]</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.

[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