



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

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 11695**

Hearing Date: November 5, 2021  
Decision Issued: November 29, 2021

**PROCEDURAL HISTORY**

On March 15, 2021, Grievant was issued a Group III Written Notice of disciplinary action with removal for falsifying records.

Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On May 3, 2021, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 5, 2021, a hearing was held by remote conference.

**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 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 a Safety Tech. He had been employed by the University for approximately 11 years. Grievant had prior active disciplinary action. Grievant received a Group II Written Notice with a five workday suspension on July 22, 2020 for failure to follow instructions and policy.

The University owned a Van that it assigned to Grievant so that Grievant could travel to different locations on the University's grounds to perform work duties. His work shift was from 7 a.m. to 3:30 p.m.

On January 13, 2021 at 9:13 a.m., Grievant went to the University Stadium to work on the suppression system. He remained there until 9:36 a.m.

Grievant's van was damaged. On January 13, 2021 at 1:15 p.m., Grievant reported to the Supervisor that his University vehicle was damaged. He told the Supervisor the damage occurred while the vehicle was parked near the University Hospital. The Supervisor reported the accident to his manager and the University Police.

Grievant claimed he parked the vehicle and noticed the damage when he returned to the vehicle. Grievant provided information for a State Vehicle Crash Report stating:

Parked vehicle at loading dock to do work at [University Hospital]. Returned to vehicle to find damage. Damage was not there this morning. Took vehicle to car wash and wiped it down.<sup>1</sup>

An auto repair shop estimated the damage to the vehicle to be \$4,688.45 to repair the side loading door, side panel, rear bumper, and wheels.

The University required employees in Grievant's unit to complete Time Card Summary Reports. The University used the Reports to allocate labor costs among different departments at the University. Grievant routinely submitted Time Card Summary Reports which indicated his location and amount of work performed on specific dates.

Grievant completed a Time Card Summary Report indicating he worked 8 hours on January 13, 2021. He reported working 3.5 hours repairing the suppression system at the University Stadium.

The University had a GPS tracking device attached to many of its vehicles. Grievant operated a vehicle the University tracked daily.

The University used its GPS tracking system to determine the location of Grievant's vehicle on January 13, 2021. Grievant was in 12 locations. He was at the University Hospital location three times and the car wash twice.

The University began an investigation which included a University Police Officer. Grievant was repeatedly asked which locations he drove on January 13, 2021. Grievant did not reveal all of the locations he drove the vehicle that day. He did not reveal he had driven the vehicle to the car wash twice. He did not disclose that he had driven the vehicle to the Store where he stayed for approximately 23 minutes. He did not disclose he had driven the vehicle to the University stadium. He later disclosed some but not all of these locations to University managers.

University managers obtained video surveillance footage for all of the locations where the vehicle was parked during the day. None of the footage showed damage occurring to the vehicle.

## **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

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<sup>1</sup> Agency Exhibit p. 14.

<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.

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.”

“[F]alsification of records” is a Group III offense.<sup>3</sup> The University alleged Grievant falsified the Police Report because Grievant knew how the damage occurred but falsely claimed he did not know. The evidence supports the University’s assertion for several reasons. First, Grievant was unable to identify when and where the vehicle was located when the damage occurred. He wiped down the vehicle two times during the day and should have observed the damage by the time he left the Car Wash at 9:03 a.m. University managers watched surveillance video of the locations where Grievant went after leaving the Car Wash and they did not observe any vehicle hitting Grievant’s vehicle. Second, Grievant failed to disclose locations to which he travelled on January 13, 2021. This suggests he was not completely forthcoming when answering questions about the incident. Grievant did not present testimony to rebut the University’s assertion. Accordingly, the University has established that Grievant falsified the Police Report by providing false information to the University Police Officer.

The University alleged Grievant falsified his Time Card Summary Report because he reported spending approximately 3.5 hours at the University Stadium when he actually spent approximately 23 minutes there. The evidence showed that Grievant failed to properly account for his time spent at the University Stadium. The discrepancy between 23 minutes and over three hours is so great as to support the University’s claim that Grievant must have known he was not accurately reporting his time when he claimed to have worked over three hours at the University Stadium.

Based on the evidence presented, the University has established that Grievant falsified records thereby justifying 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.

Grievant argued that he did not know when or where the damage occurred. Grievant did not present evidence to support this assertion. Grievant argued that the Supervisor instructed him to “spread out” time among other job assignments. Grievant called several employees as witnesses to establish that the Supervisor told them to “spread out” their time. None of the employees confirmed Grievant’s assertion.

*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

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

<sup>4</sup> *Va. Code § 2.2-3005.*

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  
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