



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

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 11707**

Hearing Date: October 18, 2021  
Decision Issued: November 8, 2021

**PROCEDURAL HISTORY**

On March 15, 2021, Grievant was issued a Group II Written Notice of disciplinary action with a three workday suspension for excessive tardiness, unsatisfactory performance, and internet/computer misuse.

On April 14, 2021, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On June 21, 2021, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 18, 2021, a hearing was held by remote conference.

**APPEARANCES**

Grievant  
Agency Party Designee  
Agency Representative  
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 Department of Corrections employs Grievant as an Office Services Assistant at one of its locations. She has been employed by the Agency for approximately 26 years.

Grievant's workstation was the front reception desk in the office. Grievant's work schedule began at 8:15 a.m. and ended at 5 p.m. with a one hour lunch break. She was supposed to make an entry in Google calendar showing her arrival time each day. Grievant was entitled to take 15 minute breaks at 10:15 a.m. and 1 p.m. She was expected to report to work on time in order to ensure that visitors were greeted without delay.

Grievant received a Notice of Improvement Needed/Substandard Performance on July 31, 2019 regarding, "continued incidents of you leaving the front desk unattended", "continued visitation with staff in the reception area", and "continued use of personal cell phone." On October 18, 2019, the Agency continued this Notice through January 2020.

On February 14, 2020, Grievant received a Group I Written Notice for "failure to follow a supervisor's instructions and correct the performance deficiencies set forth in the Notice of Improvement Needed/Substandard Performance issued on July 31, 2019."

On November 4, 2020, Grievant did not sign in or out in the electronic log. On November 13, 2020, Grievant signed in at 8:37 a.m. On November 17, 2020, Grievant signed in at 8:20 a.m. On November 18, 2020, Grievant signed in at 8:17 a.m. On December 1, 2020, Grievant signed in at 8:16 a.m. On December 4, 2020, Grievant signed in at 8:50 a.m. On December 14, 2020, Grievant signed in at 8:19 a.m. On January 11, 2021, Grievant signed in at 8:30 a.m. On January 12, 2021, Grievant signed in at 8:25 a.m. On January 13, 2021, Grievant signed in at 8:25 a.m. On January 19, 2021, Grievant signed in at 8:30 a.m.

Grievant was responsible for answering telephone calls without assistance from others. If she was unable to answer telephone calls, she would ask for assistance, "telephone coverage." Grievant requested assistance with telephone coverage on November 9, 2020, November 13, 2020, November 17, 2020, November 23, 2020, December 1, 2020, January 11, 2021, January 12, 2021, January 13, 2021, January 19, 2021, January 20, 2021, January 22, 2021, and February 16, 2021.

### **CONCLUSIONS OF POLICY**

Unacceptable behavior is divided into three groups, according to the severity of the behavior. Group I offenses "include types of behavior less severe in nature, but [which] require correction in the interest of maintaining a productive and well-managed work force." Group II offenses "include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal." Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."<sup>1</sup>

Excessive tardiness and unsatisfactory performance are Group I offenses.<sup>2</sup> Grievant was tardy 11 times from November 4, 2020 to January 19, 2021. She showed a pattern of tardiness justifying the issuance of disciplinary action. Grievant asked for telephone coverage 12 times from November 9, 2020 to February 16, 2021. She was expected to perform her duties without seeking telephone coverage. Grievant did not show she needed telephone coverage for a business-related reason. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice. In the absence of sufficient prior disciplinary action, the issuance of a Group I Written Notice does not support an employee's suspension.

The Agency alleged Grievant should receive a Group II Written Notice. If Grievant violated the Agency's policy governing internet usage, then the Agency would be justified to issue a Group II Written Notice for failure to follow policy. The Agency did not establish that Grievant acted contrary to the Agency's internet usage policy. Employees are entitled

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<sup>1</sup> See, Virginia Department of Corrections Operating Procedure 135.1.

<sup>2</sup> See, Virginia Department of Corrections Operating Procedure 135.1.

to occasional and incidental personal use of the Agency's internet and computer systems. The Agency did not establish that Grievant spent an excessive amount of time accessing the internet through the Agency's computer systems.

The Agency would be justified in elevating a Group I offense to a Group II offense if an employee engaged in a repeated violation of the same offense. Although the February 14, 2020 Group I Written Notice cites the offense code for unsatisfactory performance, Grievant was not disciplined for unsatisfactory performance. On February 14, 2020, Grievant received a Group I Written Notice for "failure to follow a supervisor's instructions and correct the performance deficiencies set forth in the Notice of Improvement Needed/Substandard Performance issued on July 31, 2019." The Notice addressed: "continued incidents of you leaving the front desk unattended", "continued visitation with staff in the reception area", and "continued use of personal cell phone." The March 15, 2021 Written Notice is not for a repeat of the same offense. Thus, there is no basis to elevate the Group I offense to a Group II Written Notice.

The Agency alleged Grievant worked beyond her shift without permission on January 21, 2021. The Agency did not present sufficient evidence to support this allegation.

The Agency presented evidence that Grievant made an excessive number of personal phone calls. She was not disciplined for this behavior. She was disciplined for requesting assistance with phone coverage.

The March 15, 2021 Written Notice refers to behavior from November 4, 2020 to February 16, 2021. The Agency presented evidence of behavior outside of this time period. On March 9, 2021, Grievant received a Due Process Notice addressing the issues of excessive tardiness, unsatisfactory performance because Grievant requested assistance with phone coverage, did not date stamp mail consistently, and engaged in computer/internet misuse. Only Grievant's behavior on or before February 16, 2021 is relevant.

Grievant asserted, "it feels like racism." No credible evidence was presented to show Agency employees acted based on race. Agency managers took disciplinary action against Grievant because they believed Grievant had engaged in behavior giving rise to 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

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<sup>3</sup> Va. Code § 2.2-3005.

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. Grievant asserted but did not establish that other employees engaging in similar behavior were treated differently from how she was treated. 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 II Written Notice of disciplinary action is **reduced** to a Group I Written Notice. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of suspension. The Agency is directed to provide **back benefits** including health insurance and credit for leave and seniority that the employee did not otherwise accrue during the period of suspension.

## 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.