



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

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 11689**

Hearing Date: July 9, 2021  
Decision Issued: July 29, 2021

**PROCEDURAL HISTORY**

On March 2, 2021, Grievant was issued a Group II Written Notice of disciplinary action for not being fully truthful about performing his work duties. On March 25, 2021, Grievant was issued a Group III Written Notice of disciplinary action for falsifying records.

On April 1, 2021, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On April 26, 2021, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 9, 2021 a hearing was held by remote conference.

**APPEARANCES**

Grievant  
Agency Party Designee  
Agency 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 Virginia Department of Transportation employed Grievant as a Transportation Operator II at one of its locations. He began working for the Agency in July 2017. Grievant had prior active disciplinary action. On March 26, 2020, Grievant received a Group I Written Notice for unsatisfactory performance. On February 8, 2021, Grievant received a Group I Written Notice for failure to follow instructions.

Snow fell in the Commonwealth on January 15, 2021 and January 16, 2021. Grievant was assigned responsibility to drive a truck to plow snow from roadways. He had an assigned route he was expected to follow. If he finished his route early, Agency managers expected Grievant to assist other employees plowing their routes. Grievant's shift began at 8 p.m. on January 15, 2021 and ended at 8 a.m. on January 16, 2021. The Agency was "one truck down" during Grievant's shift.

The radio in Grievant's truck was not working so the Agency provided Grievant with a hand-held radio. The Supervisor attempted to reach Grievant by radio. Grievant did not respond to the Supervisor's radio calls. The Supervisor drove the length of Grievant's assigned route and could not find Grievant.

On January 16, 2021 from 1:38 a.m. until 4:51 a.m., Grievant was at Headquarters not performing work duties. While at the Headquarters, Grievant spent approximately an hour watching television shows on his computer tablet.

Grievant requested School Assistance and Volunteer Service Leave in order to meet with a school principal on March 5, 2021 regarding Grievant's child. The Supervisor asked Grievant to provide a document confirming his absence on March 5, 2021 in order to justify using leave.

Grievant asked the School Principal for a letter and the Principal gave Grievant a letter. The Principal's letter stated:

This is to inform you [Grievant] has spent time assisting his children with virtual learning and picking up food.<sup>1</sup>

The Principal's letter did not indicate Grievant had volunteered for the entire day. Grievant read the letter and decided to alter the Principal's letter. Grievant amended the Principal's letter to state:

This is to inform you [Grievant] has spent time assisting his children with virtual learning at home and time picking up food for the entire day of Friday March 5, 2021.<sup>2</sup>

When the Supervisor confronted Grievant with the altered letter, Grievant admitted to altering the letter because the altered letter included the information the Supervisor needed to approve School Assistance and Volunteer Service Leave. Grievant also admitted he did not meet with any Principal or teacher that day. Instead, he picked up food and a package from the school and returned home to care for his children.

During a due process meeting, Grievant claimed the Principal gave him permission to alter the letter. The Manager spoke with the Principal who stated that he did not give Grievant permission to alter the letter.

## **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

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<sup>1</sup> Agency Exhibit p. 18.

<sup>2</sup> Agency Exhibit p. 16.

<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.

acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.”

### Group II Written Notice

“[U]nsatisfactory work performance” is a Group I offense.<sup>4</sup> In order to prove unsatisfactory work performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

On January 16, 2021, Grievant failed to work for over 3 hours during his 12 hour shift. He spent approximately one hour watching television shows on his computer tablet. He did not attempt to assist other employees as expected by the Agency. His work performance was unsatisfactory to the Agency and constituted a Group I offense.

An agency may issue a Group II Written Notice (and suspend without pay for up to ten workdays) if the employee has an active Group I Written Notice for the same offense in his or her personnel file.

Grievant had prior disciplinary action for unsatisfactory work performance. Grievant’s work performance was unsatisfactory on January 16, 2021. The Agency has established Grievant repeated the offense of unsatisfactory performance thereby justifying the issuance of a Group II Written Notice.

Grievant argued he followed the practices of other employees and there was simply a failure of communication. Although Grievant established that other employees would return to Headquarters to take breaks, he did not establish that other employees routinely took breaks in excess of three hours without providing assistance to other employees. The Agency’s decision to issue disciplinary action is supported by the evidence.

### Group III Written Notice

“[F]alsification of records” is a Group III offense. Grievant submitted a document to the Agency to obtain School Assistance and Volunteer Service Leave. Grievant obtained a letter written by a Principal. He changed the letter without permission to claim he was engaged in activities for the entire day. Grievant presented the revised letter to the Agency and falsely represented that the letter was authored by the Principal. Once received, the amended letter was an official State record. Grievant had falsified the record 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, Grievant’s removal must be upheld.

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<sup>4</sup> See Attachment A, DHRM Policy 1.60.

Grievant argued that he was truthful when he was asked questions. When he was asked the proper question, he gave the proper answers, according to Grievant. The Agency established, however, that Grievant intentionally altered the Principal's letter in order to obtain approved leave. His action was the falsification of a record that justified the Agency's disciplinary action.

### Mitigation

*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>5</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 Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is **upheld**. 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.

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<sup>5</sup> Va. Code § 2.2-3005.

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*

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.