



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

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 11690**

Hearing Date: August 9, 2021  
Decision Issued: August 10, 2021

**PROCEDURAL HISTORY**

On April 1, 2021, Grievant was issued a Group II Written Notice of disciplinary action with removal for excessive tardiness.

On April 15, 2021, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On April 27, 2021, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 9, 2021, a hearing was held by remote conference.

**APPEARANCES**

Grievant  
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:

James Madison University employed Grievant as a Housekeeping Team Leader. She had been employed by the University for approximately 15 years. Grievant had prior active disciplinary action. On September 3, 2019, Grievant received a Group II Written Notice with a four workday suspension for excessive tardiness and absences.<sup>1</sup>

Grievant's work shift began at 6 a.m. If she expected to be late, she was to notify the Supervisor at approximately 5:30 a.m.

When Grievant was late for work she was expected to complete a "Request for Absence" form to obtain approval for being tardy.

On February 9, 2021, Grievant reported to work one hour late. She wrote the name of her dog on the Request for Absence form because she had to wait for her dog's veterinarian's office to open before reporting to work.

On March 2, 2021, Grievant reported to work one-half hour late. Grievant wrote "personal issue" on the Request for Absence form.

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<sup>1</sup> The University asserted Grievant had an additional prior active Group II Written Notice issued on November 2, 2018. The Written Notice states its expiration on November 2, 2020. The University had the authority to choose an earlier expiration date than permitted by policy and did so in this case.

On March 16, 2021, Grievant reported to work one hour late. Grievant wrote, "Late. Time change. I hate it" on the Request for Absence form. Grievant was late to work because she did not change her clock to reflect the change to day light savings time.

On March 18, 2021, Grievant reported to work three-quarters of an hour late. Grievant wrote "Car battery" on her Request for Absence form. She was unable to report to work on time because of a problem with the battery in her 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 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."

Tardiness is a Group I offense.<sup>3</sup> Grievant displayed a pattern of tardiness by being late to work four times from February 9, 2021 to March 18, 2021. 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 a prior active Group II Written Notice for tardiness issued on September 13, 2019. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

Upon the accumulation of two Group II Written Notices, an agency may remove an employee. Grievant has accumulated two active Group II Written Notices. Accordingly, the University's decision to remove Grievant must be upheld.

Grievant presented a note from a doctor purporting to excuse her tardiness due to "recent worsening of her chronic medical condition." The University disregarded the medical note because Grievant's explanations for her tardiness did not relate to a medical condition. The Hearing Officer gives greater weight to Grievant's explanations for her tardiness than to the doctor's note. The University's assessment is supported by the evidence. Grievant did not present testimony in support of the opinion reflected by her medical professional. There is no reason to excuse Grievant's tardiness based on a medical condition.

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<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.

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

Grievant argued the disciplinary action was excessive and the University could have taken disciplinary action without removal. Although the University could have taken lesser disciplinary action, the University's discipline in this case is consistent with the Standards of Conduct and must be upheld.

*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. 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 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>4</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.