



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11696

Hearing Date: August 24, 2021
Decision Issued: September 13, 2021

PROCEDURAL HISTORY

On April 5, 2021, Grievant was issued a Group II Written Notice of disciplinary action with removal for unsatisfactory performance.

On April 23, 2021, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On May 17, 2021, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 24, 2021, a hearing was held by remote conference.

APPEARANCES

Grievant
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:

James Madison University employed Grievant as an Administrative Specialist/Fiscal Tech. Grievant received an overall rating of Contributor on her 2020 annual performance evaluation. Grievant had prior active disciplinary action. On July 30, 2019, Grievant received a Group I Written Notice for unsatisfactory performance. On July 21, 2020, Grievant received a Group II Written Notice for unsatisfactory performance.

University staff issued parking citations to faculty, students, and visitors whose vehicles were improperly parked on campus. Someone who received a citation may appeal the infraction to a University Committee. The Committee consists of faculty, staff, and student volunteers. It met every two or three weeks. A person appealing a citation did not have to pay the citation until the Committee ruled on the appeal and the person was notified of the decision. The University has a database identifying each ticket.

Grievant was responsible for identifying those tickets for the Committee to consider. After the Committee ruled on each ticket under appeal, Grievant was supposed to update the University's database to reflect the Committee's decision. She was to "close" the ticket in the database and remove the ticket from the Committee's docket for review. Grievant was to ensure that people receiving citations were aware of the Committee's conclusion so that they could pay their tickets.

The Committee met on February 17, 2021. The Committee reviewed 117 citations. Following the meeting, Grievant was notified of the results but failed to update the University's database.

The Committee met again on March 8, 2021. Because Grievant had not updated the database to reflect decisions made during the February 17, 2021 meeting, those citations appeared on the Committee's docket on March 8, 2021. The Committee had to review those decisions for a second time.

Upon learning of the error, Grievant did not notify the Office Operations Manager and the Director of Parking Services that she failed to apply the appeals results.

The University issued citations to approximately eight employees from July 1, 2020 to October 21, 2020 that Grievant verified but did not send to the payroll department to be deducted from the employees' paychecks. After being overdue for 90 days, the citation amounts were supposed to be deducted from the employee's paychecks. As a result of Grievant's omission, the University was unable to collect approximately \$840.

The University has a semi-monthly permit deduction reconciliation process. The process begins with a list of employees with current parking permits ("hang tags") with no deductions. The list is to be reviewed to see if there is an error in processing the permit, deduction not keyed, or for what reason the employee has no deduction or no permit. Each payroll period, a payroll employee sends a list of deducted vehicle registration fees to Grievant. Grievant was supposed to save the list to the "N" computer drive of the Parking Services unit.

Grievant was expected to run the vehicle registration process in accordance with Parking Services policy. Payroll Services provided Grievant with a deduction list. Grievant failed to save that list onto the Parking Services shared drive for numerous pay periods.

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."¹ 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."

"[U]nsatisfactory work performance" is a Group I offense.² In order to prove unsatisfactory work performance, the Agency must establish that Grievant was

¹ The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

² See Attachment A, DHRM Policy 1.60.

responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

Grievant's work performance was unsatisfactory. Grievant failed to update the University's database to reflect the outcome of the February 17, 2021 Committee meeting. This resulted in additional work for the Committee and delays in informing ticket recipients of the outcome of their appeals. Grievant did not notify University managers of the error after she became aware of it. Grievant failed to inform the payroll department of citations given to several employees. As a result, the citations were not deducted from their pay checks resulting in a loss of revenue. Grievant failed to reconcile a semi-monthly parking deduction. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.

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 performance. Thus, the University was authorized by policy to elevate the Group I offense to a Group II offense.

Upon the issuance of two active 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 admitted she made mistakes but contended they were not intentional. She testified she thought February 17, 2021 was a snow day, but the Agency established that she was at work on February 17, 2021. It is not necessary for an agency to show intent to violate the Standards of Conduct in order to support the issuance of a Group I Written Notice for unsatisfactory performance. An employee's failure to meet performance standards is a sufficient basis to support a Group I Written Notice for unsatisfactory performance.

Grievant argued that she did not have her "final" meeting with the University prior to receiving disciplinary action. This assertion is not sufficient to alter the outcome of this case. To the extent the University denied Grievant an opportunity to present all of her defenses, she had the opportunity to do so during the hearing process. The hearing process cured any defects in the University's procedural due process.

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"³ 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

³ Va. Code § 2.2-3005.

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 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to 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.^[1]

^[1] 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

Carl Wilson Schmidt, Esq.
Hearing Officer