



# ***COMMONWEALTH of VIRGINIA***

## ***Department of Human Resource Management***

### **OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

#### **DECISION OF HEARING OFFICER**

In re:

**Case Number: 12106**

Hearing Date: May 17, 2024

Decision Issued: May 20, 2024

#### **PROCEDURAL HISTORY**

On March 7, 2024, Grievant was issued a Group III Written Notice of disciplinary action with removal for failing to maintain civility in the workplace.

On March 12, 2024, Grievant timely filed a grievance to challenge the University's action. The matter advanced to hearing. On March 25, 2024, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 17, 2024, a hearing was held by video 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 University'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 University 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 Mason. He had been employed by the University for approximately seven years. Grievant had prior active disciplinary action. On May 20, 2022, Grievant received a Group I Written Notice for disruptive behavior.

Grievant received a counseling letter on June 1, 2021 because of disrespectful and unprovoked outbursts directed towards a coworker. Grievant received an overall rating of "Highly Effective" for his 2022 annual performance evaluation, but the evaluation noted, "[s]ometimes his brash nature can cause other workers job related stress."<sup>1</sup>

Grievant regularly worked with Mr. H who was a Mason Assistant. They were expected to work cooperatively because they worked with tools that could cause injury if mishandled. Mr. H was quiet and shy. He was not known to act aggressively at work.

On February 1, 2024, Grievant and Mr. H were working at a building job site. Three University vehicles including a van were backed into parking spaces in front of the building.

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<sup>1</sup> University Exhibit p. 45.

Mr. H placed his cell phone on the floor of the van. When Mr. H was out of the vehicle, Grievant took the cell phone and placed it on the seat with the charger. Grievant locked the sliding door of the vehicle. Grievant later claimed he wanted to joke with Mr. H and make him go around the vehicle to get access to his phone.

Mr. H told Grievant to leave his phone alone. Grievant said, "I don't give a d—n about your phone. You don't need your phone; you should be working." Grievant called Mr. H a mother—ker, a—hole, and other names. Grievant and Mr. H were standing in between two vehicles. Grievant moved closer to Mr. H and Mr. H put his hand out in front of his chest. Mr. H did not have room to go around Grievant. A few feet behind Mr. H was a parking bar and a fence. Grievant grabbed Mr. H's hand and pushed Mr. H down to the ground as they argued. This caused Mr. H's hard hat to fall off his head and hit the ground. Mr. H got up from the ground. Mr. H yelled, "Don't touch me! Don't put your hands on me ever again!" Mr. H grabbed Grievant's jacket with two hands and shoved Grievant against the truck. Grievant pushed Mr. H back. Mr. H tried to grab Grievant again but was unable to grip Grievant's clothes. Grievant pushed Mr. H back again. Grievant said they needed to stop or they would both get in trouble. Mr. H and Grievant calmed down.

Mr. H received a Group III Written Notice with a five workday suspension. The University decided to remove Grievant from employment because he had prior disciplinary action and a written counseling regarding his interactions with other employees.

## **CONCLUSIONS OF POLICY**

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "generally have a minor impact on agency business operations but still require intervention."<sup>2</sup> Group II offenses include, "acts of misconduct, violations of policy, or performance of a more serious nature that significantly impact the agency's services and operations." Group III offenses include, "acts of misconduct, violations of policy, or performance that is of a most serious nature and significantly impacts agency operations."

DHRM Policy 1.60, Standards of Conduct, Attachment A provides:

Workplace violence is any physical action, verbal or written threat of physical violence, harassment, intimidation, or other threatening disruptive behavior directed towards colleagues, supervisors/managers, contractors/vendors, customers/public, or other Agency stakeholders either at or outside of the workplace. It ranges from threats and verbal aggression to physical assaults and even homicide. Destruction of or acts of violence towards state property and equipment and verbal or written threats of violence (direct or indirect) are also acts of violence.

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<sup>2</sup> DHRM Policy 1.60, Attachment A.

DHRM Policy 2.35 governs Civility in the Workplace. This policy provides:

- The Commonwealth strictly forbids harassment (including sexual harassment), bullying behaviors, and threatening or violent behaviors of employees, applicants for employment, customers, clients, contract workers, volunteers, and other third parties in the workplace.
- Behaviors that undermine team cohesion, staff morale, individual self-worth, productivity, and safety are not acceptable.

Any employee who engages in conduct prohibited under this policy or who encourages or ignores such conduct by others shall be subject to corrective action, up to and including termination, under Policy 1.60, Standards of Conduct.

On February 1, 2024, Grievant moved Mr. H's cell phone without Mr. H's permission, angrily cursed at Mr. H, and pushed Mr. H to the ground with sufficient force to cause Mr. H's hard hat to fall off. Grievant's behavior of pushing Mr. H constituted physical violence. The University has established that Grievant engaged in workplace violence.

Workplace violence is a Group III offense. The University has presented sufficient evidence to support 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 claimed Mr. H yelled at him and entered his personal space. Grievant claimed Mr. H pushed him first and then Grievant pushed Mr. H in self-defense. When Grievant pushed Mr. H, Mr. H lost his balance and fell down. This caused Mr. H's hard hat to fall off. When Mr. H got up, Mr. H placed both hands on Grievant's collar and shoved Grievant against the truck. Mr. H then let go of Grievant. They both talked and calmed down.

The Hearing Officer can assume for the sake of argument that Grievant's version of the incident is true. The outcome of this case does not change with that assumption. Grievant initiated the conflict by moving Mr. H's phone without permission and locking the van sliding door to delay Mr. H's entry into the van. Once Grievant and Mr. H began to argue, Grievant was in a position to move away from Mr. H instead of pushing Mr. H. Grievant could have de-escalated the conflict by removing himself from the conflict without retaliating against Mr. H. Instead of withdrawing from the conflict, Grievant pushed Mr. H down and stood over Mr. H. Grievant was an active participant in the physical conflict with Mr. H regardless of who was the first to push the other one.

The University took disciplinary action against Mr. H even though the University believed Grievant was the aggressor. It was appropriate for the University to distinguish

between Grievant and Mr. H based on prior disciplinary action and counseling. Even if the University believed Mr. H was the aggressor, it is likely the University would have issued Grievant a Group III Written Notice. In other words, the outcome of this case remains the same regardless of whether Grievant was the first to push Mr. H or Mr. H was the first to push Grievant.

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 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 University’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>3</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*

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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.