



COMMONWEALTH OF VIRGINIA

Department Of Human Resource Management

Office of Employment Dispute Resolution

DECISION OF HEARING OFFICER

In re:

Case number: 12229

Hearing Date: May 12, 2025

Decision Issued: June 5, 2025

PROCEDURAL HISTORY

On November 14, 2024, Grievant was issued a Group II Written Notice of disciplinary action for leaving work without permission.

On November 15, 2024, 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 the matter advanced to hearing. On January 27, 2024, the Office of Employment Dispute Resolution assigned this matter to the Hearing Officer. On May 12, 2025, a hearing was held at Agency offices in Richmond, Virginia.

During the hearing the Agency objected to the relevance of Grievant's Exhibits 7, 7a, 8, 8a, 8c, 8c1, 9a, 9b, 9c1, 13, and 13a. The Grievant withdrew his request that Exhibits 9a, 9b, and 9c, be admitted into the record. The Hearing Officer admitted the Grievant's exhibits into the record, with the exception of Exhibits 9a, 9b, and 9c which Grievant withdrew. The Agency's exhibits were admitted into the record without objection.¹

APPEARANCES

Grievant
Grievant's Advocate
Agency Advocate
Agency Party Designee
Witnesses

¹ See Hearing Recording at 6:20:27-6:40:19 and Hearing Recording at 3:32:55-3:55:32.

ISSUES

1. Whether Grievant engaged in the behavior described in the Group II 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:

Grievant is a Section Manager in a Division of the Department of Transportation. Grievant has been employed by the Agency for approximately 28 years. As the Section Manager, Grievant supervised two full-time employees and had, in the past, supervised a wage employee.² At the time of the events relevant to this case, Grievant reported to Supervisor and Supervisor reported to Director. Director reported to Chief.

Grievant's regular, scheduled work hours were 8:30 am to 5:00 pm Monday through Friday each week.³

On Friday, October 11, 2024, Grievant met with Supervisor for their weekly "catch-up" meeting. The meeting started at approximately 11:00 am. Grievant and Supervisor discussed Grievant's tasks and projects. Eventually, the discussion turned to Employee-1's upcoming parental leave. Employee-1 was expected to begin parental leave the following week. Grievant advised Supervisor that Employee-1 had recently learned that the parental leave policy may allow him to take some of his parental leave on an intermittent basis rather than in one continuous leave period. Grievant wanted to know

² Hearing Recording at 29:04-29:21.

³ Agency Ex. at 66 and Hearing Recording at 43:31-43:58.

whether Division management would approve intermittent leave as an option for Employee-1. Grievant expressed his belief that it may be beneficial to the Agency and Employee-1 if Employee-1 used some of his parental leave intermittently rather than being out of the office continuously for the entire leave period. Supervisor asked Grievant what Employee-1's plan for intermittent leave would be. Based on the testimony of Grievant and Supervisor, there was a back and forth between Grievant and Supervisor with Grievant asking Supervisor whether Division management would be amenable to approving intermittent leave for Employee-1 and Supervisor requesting a plan for what was being proposed for intermittent leave before approving its use. Grievant described Supervisor as talking over him and questioning the information he was relaying to her from Human Resources staff. Grievant felt "disappointed" and frustrated during the discussion. The meeting ended when Grievant told Supervisor that he was "done" with her and that he was going to "HR." Grievant left Supervisor's office.⁴

At 11:28 am, after Grievant had exited her office, Supervisor sent an email to Director to make him aware of Grievant's departure from their meeting. Supervisor wrote:

Just an FYI . . . [Grievant] said that he was requesting to be removed from his current job. He was headed to HR and said that he was done with me. I can fill you in later.⁵

Grievant testified that at the time he left Supervisor's office, he only intended to leave Supervisor's office and go to the Human Resources Department. Grievant testified that he had no intention at that time to leave work early.

Grievant left Supervisor's office and walked by Director's office on his way to the Agency's Human Resources office. Grievant decided to "circle back" to speak with Director about Grievant's meeting with Supervisor. Director's office door was open, but Director was participating in a virtual meeting. Grievant stood in Director's doorway and motioned to get Director's attention. Grievant pointed at Director and said, "I'm done with her." Grievant then left Director's office. Grievant testified that at the time he left Director's office, he had no intention to leave work early.⁶

Grievant then walked to the Agency's Human Resources Department and requested to speak with a human resources staff person. HR-supervisor met with Grievant. HR-supervisor and Grievant had not met before October 11, 2024. HR-supervisor met with Grievant for approximately 10 minutes. Grievant told HR-supervisor about his conversation with Supervisor regarding parental leave. HR-supervisor recalled that Grievant seemed upset and frustrated by the conversation with Supervisor. While he was meeting with HR-supervisor, Grievant decided that he was going to leave work and go home. Grievant stated his intention to leave work to HR-supervisor. Grievant did not ask HR-supervisor to advise Supervisor of his intention to leave work and HR-supervisor did not tell Grievant that he would notify Supervisor of Grievant's intentions. HR-supervisor did not authorize or give permission to Grievant to leave work early.⁷

⁴ Hearing Recording at 32:10-40:00, 5:27:50-5:45:16.

⁵ Agency Ex. at 5.

⁶ Hearing Recording at 4:30:00-4:36:33, 5:27:50-5:46:36.

⁷ Hearing Recording at 4:16:20-4:24:56, 5:45:15-5:35:55, 6:04:00-6:08:27 and see Agency Ex. at 14.

Grievant testified that after he left the Human Resources Department to return to his office he felt “funny” in a way that he had never felt before and that he did not like. Grievant described himself as being on “autopilot” and feeling like he needed to “get out of here and out of her presence” and that he was trying to “prevent stuff” and “diffuse stuff.” Grievant packed up his things and left work. Grievant did not notify Supervisor that he was leaving work or obtain her permission to do so. Grievant did not notify Director or anyone else in his chain of command that he was leaving work. Grievant did not obtain permission from Supervisor or anyone in his chain of command to leave work early or otherwise change his work schedule that day. Grievant testified that after he left work, he went home and went to bed.⁸

Supervisor recalled that approximately 15 or 20 minutes after Grievant had ended their meeting and left her office, she observed Grievant walk by her office door as though he was returning to his office which was located a couple of offices down the hallway from Supervisor’s office. Grievant did not stop by Supervisor’s office to inform her that he would be leaving work for the day or that he was feeling “funny” or ill.⁹

By noon on October 11, 2024, Supervisor realized that Grievant may have left work for the day because she observed that his laptop was gone, and his office lights were turned off.¹⁰

Grievant did not return to work on October 11, 2024. Grievant did not notify and obtain permission from Supervisor or anyone else in his chain of command to change his work schedule or leave work early. After Grievant left work on October 11, 2024, he did not notify Supervisor or anyone else in his chain of command that he had been feeling “funny” or ill which had caused him to leave work early on that day.¹¹

Due to the weekend and a state holiday, the next workday for Grievant was Tuesday, October 15, 2024. At some point on that day Grievant reported his use of sick leave for the time he had missed from work into the Agency’s time and leave tracking system. Grievant did not otherwise notify Supervisor or anyone else in his chain of command that he had departed work early on Friday, October 11, 2024, to provide a reason for his early departure or to seek approval for that change to his work schedule.¹²

CONCLUSIONS OF POLICY

Whether Grievant engaged in the behavior and whether the behavior constituted misconduct

The preponderance of the evidence showed that Grievant engaged in misconduct when he left work early without permission on October 11, 2024.

⁸ Hearing Recording at 5:46:36-5:53:55, 6:04:00-6:08:27, 6:10:40-6:20:27.

⁹ Hearing Recording at 41:20-42:25

¹⁰ Hearing Recording at 43:31-43:58 and see 4:30:00-4:36:33.

¹¹ Hearing Recording at 43:31-43:58, 47:54-51:01, 4:30:00-4:36:33, 6:04:00-6:08:27.

¹² Hearing Recording at 47:54-51:01, 5:46:36-5:54:45, 5:57:29-6:01:55, 6:04:00-6:08:27.

Grievant did not dispute that he left work early on October 11, 2024, without obtaining permission to leave early. Grievant argued that his decision to leave work early was unanticipated and that he requested approval for his leave of absence by reporting his use of sick leave for that period in the Agency's time and leave tracking system on October 15, 2024, which, according to Grievant, was as soon as possible after his use of sick leave began. Grievant testified that his decision to leave work was unplanned and due to the fact that he felt "funny" and as though he "needed to get out." Grievant also described being on "auto-pilot" as he left and "in a fog" until Tuesday, October 15, 2024. Grievant also appeared to argue that based on prior practice he did not believe he had to request permission before taking unplanned leave because Supervisor had, in the past, approved his use of unplanned leave with short notice and Supervisor did not always respond immediately or before he had started the leave.

The Standards of Conduct set forth the expectation that employees will report to work as scheduled and will seek approval from their supervisor in advance of schedule changes, including the use of leave and late or early arrivals and departures.¹³ Even if Grievant left work because he was feeling "funny" or ill, Grievant was required to seek Supervisor's permission to adjust his schedule prior to leaving work. If Grievant felt so unwell that he could not take the time to notify Supervisor that he was ill and needed to take sick leave, or he could not wait for permission to leave due to illness, then Grievant was required to notify Supervisor of his unplanned need to use leave as soon as possible after the leave use began.¹⁴ In this case, there was no evidence that Grievant made any effort to request permission to leave work early or use sick leave either before he left work or as soon as possible after he left work on October 11, 2024. There was no evidence that Grievant's illness prevented him from requesting permission to leave before he left work on October 11, 2024. The evidence showed that after Grievant left the Human Resources Department, he walked by Supervisor's office in order to retrieve his laptop from his office before leaving for the day. If Grievant believed that further in-person interaction with Supervisor would aggravate his feelings of illness, he could have requested permission to leave work by sending Supervisor, or someone else in his chain of command, an instant message, text message, or email consistent with their past practice. Even if Grievant felt too ill to wait for permission to take leave prior to his departure from the office, there was no evidence that he could not have provided notification of his unplanned need to take leave and requested permission to use sick leave as soon as possible after his leave use began, that is, either after he arrived home or at some time later that same day.

To the extent that Grievant appeared to argue that he satisfied the requirement that he request to take unplanned sick leave as soon as possible after the use of the leave began by reporting his leave use in the Agency's leave and time tracking system when he returned to work on October 15, 2024, this Hearing Officer is not persuaded. There was no evidence that Grievant's illness or anything else, prevented him from notifying Supervisor of his unplanned need to take leave on October 11, 2024 and prior to his return to work on October 15, 2024. Even if this Hearing Officer were to accept Grievant's argument that after Grievant returned to work on October 15, 2024, was the earliest it

¹³ See DHRM Policy 1.60, Standards of Conduct.

¹⁴ See DHRM Policy Guide, Leave Policies.

was possible for him to request permission to use leave for the period after he left work on October 11, 2024, Grievant's reporting of his leave use in the Agency's time and leave tracking system did not satisfy the requirement that he notify and obtain permission from Supervisor prior to using leave, or as soon as possible after the leave use began. Although reporting time and leave into the Agency's tracking system also may have been required, the evidence showed, and Grievant testified that the appropriate mechanism for requesting permission from Supervisor to adjust his work schedule was to communicate directly with Supervisor. It was not to report the leave use in the Agency's time and leave tracking system. On other occasions when Grievant's leave was unplanned, consistent with their practice, Grievant communicated directly with Supervisor, usually by instant message, to request permission to take the leave. He did not just enter the leave into the Agency's time and leave tracking system to request permission to change his work schedule. Further, the evidence showed that Grievant's past practice had been to notify Supervisor by instant message when he needed to unexpectedly take leave either immediately prior to, at the time of, or shortly after the needed leave period began. That Supervisor was liberal with approving such leave requests did not relieve Grievant of his responsibility to notify Supervisor and seek her permission before leaving work or as soon as possible thereafter.¹⁵

The Agency has met its burden of proving by a preponderance of the evidence that Grievant engaged in misconduct when he left work early without permission on October 11, 2024.

Whether the Agency's discipline was consistent with law and 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."¹⁶ 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." Leaving work without permission is a Group II offense.¹⁷

State employees are expected to report to work as scheduled and seek approval from their supervisors prior to initiating any changes to their established work schedule, including the use of leave and late or early arrivals and departures. The misconduct of leaving work without permission is serious and significant as by its nature such misconduct undermines organizational structure, efficiency, and trust. Chief testified that such misconduct may disrupt the normal work operations at the Agency as Grievant and other employees work in teams and other team members, including management, co-workers, and staff would not know that Grievant was unavailable and unable to perform his work duties or respond to the work needs of other team members.¹⁸ In this case, Grievant left work before noon without permission and without notifying anyone in his chain of command that he would be unavailable for work matters for the remainder of his scheduled workday.

¹⁵ See Grievant Ex. 12.c.

¹⁶ See DHRM Policy 1.60, Standards of Conduct.

¹⁷ See DHRM Policy 1.60, Standards of Conduct, Attachment A.

¹⁸ Hearing Recording at 2:43:56-3:20:58.

Grievant, at times, appeared to argue that the Agency's disciplinary action may have been the result of retaliatory or discriminatory motives. The Agency showed that it had business reasons for its discipline of Grievant based on Grievant's misconduct and Grievant offered no evidence that would suggest that those reasons were mere pretext for retaliation or discrimination.

Grievant testified to his belief that work-related stressors have impacted his health and may have caused him to be ill on October 11, 2024. Grievant provided information regarding treatment he received on November 7, 2024, for pain and a burning sensation in his neck. Grievant did not appear to argue that a disability impacted his behavior, however, to the extent such argument had been made, it is important to note that while the Americans with Disabilities Act requires employers to provide reasonable accommodations for an employee's disability, it does not broadly shield employees from disciplinary action for their own misconduct. In this case, as noted above, even accepting that Grievant became ill while at work, there was no evidence that he could not, at that time or shortly thereafter, notify Supervisor or someone else in his chain of command that he had become ill and request permission to leave work early and use sick leave for the remainder of the workday.

The preponderance of the evidence showed that the Agency's discipline was consistent with law and policy.

Mitigation

Grievant appeared to argue that the Agency's discipline was too harsh, and that the Agency did not appropriately consider mitigating circumstances, including that he was feeling "funny," "traumatized," and "on autopilot" when he left work on October 11, 2024.

The Standards of Conduct provide that an Agency may reduce the level of a disciplinary action if there are mitigating circumstances, such as conditions that compel a reduction to promote the interests of consistency, equity and objectivity, or based on an employee's otherwise satisfactory work performance.

The Agency did not expect Grievant to work when he was emotionally or physically unable to do so. The Agency reasonably expected Grievant to provide notification and obtain permission to leave work. Grievant had the ability to contact Supervisor or someone else in his chain of command by email, instant message, text message, telephone call, or in-person. On October 11, 2024, Grievant made no effort to notify Supervisor or anyone else in his chain of command that he was ill and needed to leave work early. In this case, Supervisor and Chief both credibly testified that they considered mitigation and determined that it was not appropriate to reduce the discipline in this case. Chief testified that she considered reducing the discipline because she had provided counseling to another employee in the past for not communicating their leave use. Chief determined that Grievant and the other employee were not similarly situated, however, because, unlike the other employee, Grievant had received a prior verbal counseling which included, among other things, counseling about leaving the office early without prior approval from Supervisor. Although Grievant disputed the underlying basis and

appropriateness of the verbal counseling, Grievant did not dispute that he had received the counseling and a copy of Supervisor's notes of their discussion which included reference to the counseling about leaving work early without prior approval.¹⁹

That the Agency could have mitigated the discipline but determined that it was inappropriate to do so in this case is not a basis for this Hearing Officer to determine that the Agency's discipline was unreasonable.

Virginia 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...."²⁰ 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 Grievant of Group II Written Notice 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.

¹⁹ Agency Ex. at 10-16, Grievant's Ex. at 3b, 3c1, 3c2, 3d and see Hearing Recording at 44:03-58:25, 1:48:26-2:37:10, 2:43:56-3:32:55.

²⁰ 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.²¹

Angela Jenkins

Angela Jenkins, Esq.
Hearing Officer

²¹ 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.