



COMMONWEALTH OF VIRGINIA

Department Of Human Resource Management

Office of Employment Dispute Resolution

DECISION OF HEARING OFFICER

In re:

Case number: 12207

Hearing Date: February 27, 2025

Decision Issued: March 31, 2025

PROCEDURAL HISTORY

On October 29, 2024, Grievant was issued a Step 3 – Performance Warning and Suspension, Performance Improvement Counseling Form “for making inappropriate comments, and for a continued pattern of disruptive and unprofessional behavior while operating a motor vehicle” related to events that occurred while Grievant was driving a shuttle Van on September 30, 2024. Grievant was suspended for 40 hours.¹

On October 30, 2024, Grievant timely filed a grievance to challenge the University’s action. The outcome of the final management resolution step was not satisfactory to the Grievant and the matter advanced to hearing. On December 2, 2024, the Office of Employment Dispute Resolution assigned this matter to the Hearing Officer. On February 27, 2025, a hearing was held remotely using the Microsoft TEAMS platform.

APPEARANCES

Grievant
University Advocate
University Party Designee
Witnesses

¹ University Ex. 1.

ISSUES

1. Whether Grievant engaged in the behavior described in the Step 3 – Performance Warning and Suspension, Formal Performance Improvement Counseling Form?
2. Whether the behavior constituted misconduct?
3. Whether the University's discipline was consistent with law (e.g., free of unlawful discrimination) and policy?
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:

Grievant is a Lead Transporter for the University's Medical Center. Grievant has been employed by the University for approximately 21 years. As a Lead Transporter, Grievant monitors the patient transport system. Grievant also drives a regular shuttle bus route transporting patients, employees, and visitors to various Medical Center facilities. Recent evaluations of Grievant's performance showed that his performance was satisfactory to the University.²

On the afternoon of September 30, 2024, Grievant was on duty driving a University Van along his regular shuttle route. Witnesses during the hearing described the weather that afternoon as "pouring rain" and "storming."

Rider-3 testified that she called the Control Center multiple times that afternoon to request that they tell the shuttle driver to not leave the N-Ridge stop early that day. Rider-3 also testified that she did so consistent with a conversation she previously had with Grievant when he told her that it was okay to call the number if she was concerned the shuttle may leave early without her.³

² Grievant's Ex.1; Agency Ex 7.

³ Hearing Recording at 41:54-42:50.

The route that Grievant drove that afternoon was a loop that began and ended at the Medical Center's Hospital.⁴ During the stop at the Hospital, Rider-1 boarded the Van, and the Van departed the Hospital at approximately 4:30 p.m. The next stop along the route was the W-Complex. Rider-2 boarded the Van at the W-Complex and the Van departed by approximately 4:35 p.m. Grievant testified that because he was ahead of the shuttle schedule, he departed from his normal route and drove the Van directly to the N-Ridge stop so that Rider-2 could exit the Van ahead of schedule.⁵

As Grievant drove the Van from W-Complex to N-Ridge, Grievant received a call from the University Control Center at 4:38 p.m. Grievant then received two calls from Transporter-A at 4:39 p.m. and 4:40 p.m. Grievant received another call from the Control Center at 4:44 p.m. and then two more calls from Transporter-A at 4:45 p.m. and 4:46 p.m. Over the period of approximately nine minutes, Grievant had received six calls. Grievant did not answer the calls because he was driving. Grievant testified that before exiting the Van, Rider-2 commented about the number and frequency of the calls and questioned why someone would repeatedly call Grievant in that manner.⁶ Rider-2 exited the Van at the N-Ridge stop. Rider-1 also observed that Grievant's phone rang several times and testified that Grievant seemed to be irritated because someone kept calling him "back-to-back." Rider-1 testified that as the Van pulled up to the N-Ridge stop, Grievant said that he was going to call the person who had been calling him repeatedly. According to Rider-1, when Grievant called the person back, she could hear some of the conversation. Rider-1 heard the person on the phone with Grievant telling Grievant to not leave a location because someone would be getting in the Van, and she heard Grievant respond "ok" and the person said something Rider-1 could not hear and to which Grievant responded "ok."⁷

Rider-3 boarded the Van at the N-Ridge stop. Rider-3 testified that she boarded the Van at approximately 4:45 p.m.⁸ Grievant next drove the Van to the regular stop at TCH. Grievant exited the Van at TCH. Both Rider-1 and Rider-3 testified that before exiting the Van at TCH Grievant said, "someone is going to pay for this."⁹ Rider-3 recalled that Grievant made the statement loudly and aggressively and she described Grievant as upset and "storming" off the Van.¹⁰ Rider-1 and Rider-3 remained on the Van. Grievant testified that he entered the Medical Center building at TCH to use the restroom and then get a snack.¹¹

After Grievant exited the Van, Rider-3 asked Rider-1 what was going on. Rider-1 told Rider-3 that "someone had called." Rider-3 told Rider-1 that call was about her. Rider-3 thought that Grievant's reaction was because she had caused trouble for Grievant. Rider-3 had called the Control Center to request that they tell Grievant not to leave the

⁴ Hearing Recording at 2:03:55-2:13:58.

⁵ Hearing Recording at 2:03:55-2:13:58.

⁶ Hearing Recording at 1:33:34-1:36:15.

⁷ Hearing Recording at 20:14-21:31.

⁸ Hearing Recording at 48:30-50:41.

⁹ Hearing Recording at 21:31-22:03, 43:23-43:40.

¹⁰ Hearing Recording at 43:23-43:40.

¹¹ Hearing Recording at 2:03:55-2:13:58.

N-Ridge stop early because it was the last shuttle she would be able to catch that day. Rider-3 told Rider-1 that she was going to get off the Van. Rider-3 believed that Grievant was an aggressive driver and that if he was upset, then she was not comfortable riding in the Van while he was driving. Rider-1 suggested that Rider-3 get off the Van at the O-Center stop with Rider-1 and Rider-1 offered to give Rider-3 a ride from the O-Center to the Hospital.¹²

After getting a snack, Grievant re-boarded the Van. Rider-1 observed that Grievant was still “irritated” and described his demeanor as “huffing and sighing.” Consistent with the shuttle schedule, Grievant departed the TCH stop by 4:53 p.m. Grievant next drove back to the N-Ridge stop and departed that location by 4:56 p.m.

Rider-1 testified that during the ride, Grievant “took off faster and stopped harder.”¹³ Rider-3 described Grievant’s driving as fast and aggressive and the ride as “bumpy” and “scary.” Rider-3 described Grievant’s driving as faster than she believed was safe for the weather conditions and recalled Grievant driving through a very large puddle faster than she considered safe for the conditions.¹⁴ Rider-3 testified that she “regretted that she stayed on the [Van].”¹⁵

Grievant drove the Van to the O-Center. Rider-1 and Rider-3 exited the Van at the O-Center stop. Rider-4 boarded the Van at the O-Center and the Van departed the O-Center by approximately 5:01 p.m.¹⁶

Although Rider-1 and Rider-3 had never met each other before September 30, 2024, Rider-3 accepted Rider-1’s offer of a ride to her shuttle stop at the Hospital so that she did not have to stay on the Van with Grievant driving.¹⁷ After Rider-1 and Rider-3 exited the Van at the O-Center stop, Rider-1 and Rider-3 walked to Rider-1’s vehicle and Rider 1 drove Rider-3 from the O-Center to the Hospital.¹⁸

On the morning of October 1, 2024, Transporter-B was driving the shuttle as part of his training to drive the shuttle route. Grievant was a passenger on the shuttle that morning. Rider-1 also was a passenger on the shuttle that morning. While Rider-1 was on the shuttle, Rider-1 and Grievant had a conversation that Transporter-B described as “heated” or a little loud at times.¹⁹ According to Grievant, Rider-1 told him that he should not “say stuff” with people on the bus and described her team as perfect. Grievant felt that she belittled him. Grievant responded to Rider-1 that her team “must be robots” because “I’m human and I get upset sometimes.”²⁰

¹² Hearing Recording at 22:02-23:22, 43:40-45:00.

¹³ Hearing Recording at 23:20-23:45 and University Ex. at 5A.

¹⁴ Hearing Recording at 51:13-53:46.

¹⁵ Hearing Recording at 45:00-45:17, 52:25-53:46.

¹⁶ Hearing Recording at 2:03:55-2:13:58.

¹⁷ Hearing Recording at 44:24-45:00.

¹⁸ Hearing Recording at 23:45-24:25, 44:24-45:00.

¹⁹ Hearing Recording at 1:06:16-1:08:02.

²⁰ Hearing Recording at 1:06:16-1:08:02, 1:44:40-1:45:30, 1:58:55-2:02:06. and see University Ex. 2 at 2-7.

At some point on October 1, 2024, Rider-1 contacted the University's Manager of Transportation and Distribution Services to report Grievant's behavior while he drove the Van on September 30, 2024. Rider-1 followed up with an email to the Manager of Transportation and Distribution Services on October 2, 2024.²¹

Grievant was placed on administrative leave on October 1, 2024, while the University investigated the incident.

On October 29, 2024, Grievant was issued a Step 3 – Performance Warning and Suspension, Performance Improvement Counseling Form with a 40-hour suspension “for making inappropriate comments, and for a continued pattern of disruptive and unprofessional behavior while operating a motor vehicle.”²² The University noted that a documented conversation had been held with Grievant on August 25, 2023, regarding allegations of unprofessional conduct for discussing political beliefs and race with a shuttle passenger.²³

CONCLUSIONS OF POLICY

The University Medical Center has adopted Employee Standards of Performance and Conduct.²⁴ The Medical Center expects each employee to perform their duties and conduct themselves in a manner which enables all employees to work together in achieving Medical Center goals.

All employees shall:

- Treat others with respect, courtesy, and dignity, and shall conduct themselves in a professional and cooperative manner,
- Adhere to all Medical Center policies; Medical Center and departmental clinical practice guidelines, protocol orders and standard operating procedures; and to such Health System and University policies as applicable.
- Adhere to the [University] Code of Ethics.
- Perform job duties as assigned by the supervisor, spending the workday efficiently and effectively performing such duties while demonstrating an awareness of priorities.
- Perform their tasks safely and responsibly in accordance with department and supervisory expectations.
- Maintain professional boundaries with patients, their families, and Medical Center employees and other colleagues.

The University's progressive performance improvement counseling steps include, informal counseling (Step One), formal written counseling (Step Two), performance

²¹ Hearing Recording at 24:40-25:20, 28:43-30:19, 1:26:45-1:29:42, and University Ex. 5A.

²² University Ex. 1.

²³ See University Ex. 1 at 1-2 and Ex. 6 at 6A-1. The Formal Performance Improvement Counseling Form also referenced “documented conversations” as occurring on November 15, 2023, and December 22, 2023, but no evidence of such “documented conversations” were provided at the hearing or included in the record.

²⁴ See Employee Standards of Performance and Conduct Medical Center HR Policy.

warning and/or suspension (Step Three), and termination (Step Four). Serious Misconduct generally will be addressed at Step 2 or Step 3 and Gross Misconduct generally will result in termination.

Serious Misconduct refers to acts or omissions having a significant impact on patient care or business operations.

Suspension generally accompanies a Step 3 - Performance Warning. An employee may be terminated if the employee's Serious or Gross Misconduct has significant or severe impact on patient care or Medical Center operations.

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

The preponderance of the evidence showed that Grievant engaged in misconduct on September 30, 2024, while he was on duty driving the shuttle Van when he became visibly upset and stated loudly and aggressively that "someone is going to pay for this" and then drove the Van in a manner that was described as fast, aggressive, and "scary."

Grievant admitted that he was upset because of the repeated calls he received in a short period of time while he was trying to drive the Van during poor weather conditions. Grievant denied, however, that he said that "someone is going to pay for this." According to Grievant he said that he was "going to have to figure out how to deal with this tomorrow" referencing speaking with his Supervisor about the repeated calls from the Control Center and Transporter-A. Grievant testified that he was not upset with Rider-3 and had no issue or concern with Rider-3 calling the Control Center to ensure she would be able to get a ride on the shuttle. Grievant also testified that he did not speed or drive aggressively that day. Grievant argued that although Rider-1 and Rider-3 may have perceived his driving to be fast for the road conditions or aggressive, there was no other evidence that he drove aggressively or above the speed limit on that day or any other day. Grievant argued that Rider-1 and Rider-3 may have misperceived his driving as aggressive because they did not have his level of familiarity with the route and the posted speed limits in the area.

Grievant's frustration with the multiple, repeated calls from the Control Center and Transporter-A during poor weather conditions may be understandable and may explain his behavior, but it does not excuse his behavior. Rider-1 and Rider-3 both credibly testified that Grievant was visibly upset and said, "someone is going to pay for this." They also both credibly testified regarding Grievant's fast and aggressive driving after he made that statement. Rider-1 observed that Grievant was still "irritated" and described his demeanor as "huffing and sighing." Rider-1 also described that Grievant "took off faster and stopped harder."²⁵ Rider-3 testified that she felt "extremely intimidated" because she did not know who was going to pay for that phone call but she knew that if she stayed on the bus until her stop she would be the only one on the bus with Grievant and that he eventually would figure out that she had been the cause of the phone call.²⁶ Rider-3

²⁵ Hearing Recording at 23:20-23:45 and University Ex. 5 at 5A-1-5A-2.

²⁶ Hearing Recording at 44:24-48:11.

described Grievant's driving as fast and aggressive and the ride as "bumpy" and "scary" and as a result that she "regretted that she stayed on the [Van]."²⁷

Grievant appeared to argue that Rider-1's testimony was not credible because Rider-1 was angry with Grievant following their discussion on October 1, 2024. That Grievant and Rider-1 may have argued on October 1, 2024, does not make her testimony any less credible, particularly when her testimony was consistent with, and corroborated by, the testimony of Rider-3.

Grievant also argued that the University inappropriately considered undocumented conversations or suggestions of complaints about his driving without other evidence. The University did cite two "documented conversations" in the Formal Performance Improvement Counseling form for which the University provided no documentation or other evidence. This Hearing Officer did not consider reference to those "conversations" as evidence.

When Grievant said "someone is going to pay for this" and then drove fast and aggressively, Grievant's behavior was inappropriate, unprofessional, and disruptive. Grievant's behavior caused Rider-1 and Rider-3 to be reasonably uncomfortable and concerned about their safety as passengers in the vehicle Grievant was driving.

The University has met its burden of proving that Grievant engaged in misconduct.

Whether the University's discipline was consistent with law and policy

The University has shown that Grievant's misconduct on September 30, 2024, was Serious Misconduct that impacted University operations. Serious Misconduct may be addressed at the Step 2 or the Step 3 level. Pursuant to University policy, suspension generally accompanies a Step 3 - Performance Warning.

Supervisor and Transporter-B both credibly testified regarding the priority shuttle drivers must give to ensuring passenger safety.²⁸ Further, Supervisor testified regarding the importance for shuttle drivers to ensure that their customers, the University's patients, employees, and visitors feel comfortable and safe while on the shuttle Van.²⁹

The nature of Grievant's misconduct was to undermine passengers' confidence in the safety of the University's shuttle service. The evidence showed that Grievant's behavior was unprofessional and disruptive. Two passengers riding in the shuttle Van credibly testified that Grievant stated that "someone is going to pay for this," and that Grievant was "irritated" and upset and drove fast and aggressively for the weather conditions. Grievant's behavior reasonably caused them concern for their safety as passengers in the Van. Rider-3 testified that she regretted staying on the Van for as long as she did because the ride was "bumpy" and "scary." Rider-3 also testified that based on Grievant's comment and his behavior on that day, she felt safer riding with Rider-1, a

²⁷ Hearing Recording at 45:00-45:17, 52:25-53:46.

²⁸ Hearing Recording at 1:04:14-1:05:14, 1:20:03-1:20:42.

²⁹ Hearing Recording at 1:20:03-1:20:42.

stranger, than staying in the Van while Grievant drove.³⁰ Significantly, Rider-3 has not ridden the shuttle since September 30, 2024, because of her experience on the shuttle that day.³¹

Grievant argued that the discipline was too harsh because the incident was based on a misunderstanding, and he did not threaten anyone. The events of that afternoon may have been due to a misunderstanding, but it was a misunderstanding created by Grievant's behavior. Although Grievant may not have intended his statement to be a threat, the preponderance of evidence showed that his behavior reasonably caused passengers on the Van to be uncomfortable and have a reasonable concern for their safety as passengers in the Van while Grievant was driving that afternoon.

Grievant argued that a Step 3 – Performance Warning with suspension was too harsh a discipline for a good employee with a long record of good service and no prior formal discipline. Grievant argued that the University failed to engage in progressive discipline. Although agencies are encouraged to engage in progressive disciplinary action, agencies are not required to do so. The University elected to issue Grievant a Step 3 – Performance Warning and Suspension, Performance Improvement Counseling Form and has presented sufficient evidence to support its decision.

The University's discipline was consistent with law and policy.

Other Defenses

Grievant argued that he did not have access to a University transportation log that would have provided him with the names of potential witnesses, Rider-2 and Rider-4, who may have corroborated his description of events. It is not clear when Grievant may have requested access to such a log from the University, but Grievant did not request that the Hearing Officer order the University to produce such a log prior to the hearing. Further, even if Rider-2 and Rider-4 had testified during the hearing, their testimony would not have changed the outcome of this case. The evidence showed that Rider-2 exited the Van before Grievant said "someone is going to pay for this" and Rider-2 was not on the Van during the events that led to the disciplinary action. To the extent Rider-2 may have testified that the repeated calls Grievant received from the Control Center and Transporter-A may reasonably have been frustrating and upsetting to Grievant, even accepting such testimony would not change the outcome of this case. Although such testimony may help to explain Grievant's behavior, it does not excuse it. Grievant argued that Rider-4 may have testified that Grievant's driving was not aggressive while she was a passenger in the Van. The evidence showed, however, that Rider-4 was not in the Van while Rider-1 and Rider-3 were in the Van and during the events that gave rise to the disciplinary action. Rider-4's observations of Grievant's driving after Rider-1 and Rider-3 exited the Van would not refute their credible testimony as to their experience and Grievant's behavior while they were in the Van.

³⁰ Hearing Recording at 44:24-48:11.

³¹ Hearing Recording at 44:24-48:11.

Mitigation

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....”³² 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 Grievant of Step 3 – Performance Warning and Suspension, Performance Improvement Counseling Form 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

³² Va. Code § 2.2-3005.

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.³³

Angela Jenkins

Angela Jenkins, Esq.
Hearing Officer

³³ 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.