



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

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 11845**

Hearing Date: October 17, 2022

Decision Issued: November 3, 2022

**PROCEDURAL HISTORY**

The University removed Grievant from employment on April 8, 2022 with the assumption that Grievant was a probationary employee. On June 3, 2022, the Office of Employment Dispute Resolution issued Ruling 2022-5406 qualifying the matter for hearing. On June 21, 2022, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 17, 2022, a hearing was held by remote conference.

**APPEARANCES**

Grievant  
Grievant's Counsel  
University Representative  
Witnesses

**ISSUES**

1. Whether Grievant engaged in behavior giving rise to disciplinary action?
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:

Norfolk State University employed Grievant as an Executive Assistant to the Assistant Vice President (AVP).

Before joining the University, Grievant worked at a Community College in Virginia. She was a classified State employee while working for the College. She began working for the College in January 9, 2012 as the Administrative Assistant to the Dean of Health Professions. Grievant's former supervisor at the College wrote:

The Division of Health Professions office, oversees all aspects of the Regional Health Professions Center. This includes operations, administration and scheduling of 29 full-time employees, approximately 50 adjunct faculty members, over 125 wage employees, hundreds of students, and several hundred thousand dollars annually. At any given moment this division office can have dozens of balls in the air simultaneously and many are always designated as "high priority". [Grievant] handles this stress and tempo with both skill and grace. While by title, she is my "assistant", in reality she is my "partner". She interfaces with the people, keeps me informed, handles her side of the office, and frequently is put in the position to speak for me. While managing all of the task, she always manages to look and conduct herself in a professional manner continually winning the respect of both colleagues and students.

As reflected in the Commonwealth's Personnel Management Information System, Grievant's transfer to the University was described as a classified promotion, with neither a break in State service, nor new probationary period recorded. Grievant's leave balances from the College were transferred to the University.

Grievant ended her employment with the College on June 24, 2021. The University hired Grievant effective June 25, 2021. The type of duties Grievant performed for the College were not materially different from the duties she performed for the University.

The University treated Grievant as a probationary employee.

#### First Incident

In September 2021, the Supervisor was away from the office at a conference in Seattle. At 4 p.m. he called the office telephone number to obtain information from Grievant. No one answered the office telephone. The Supervisor called Grievant's cell phone and spoke with Grievant. Grievant said she had to "catch a flight." The Supervisor was surprised because Grievant had not told him she would be leaving the office early that day. Grievant had not obtained permission from the Supervisor to leave the office early that day.

#### Second Incident

The Supervisor wanted to meet on February 9, 2022 with staff of three departments reporting to him. He wanted to meet with the departments in order. He asked Grievant to coordinate the meeting times and send calendar invitations to each employee. Grievant failed to correctly review calendars and sent invitations that overlapped with existing meetings. She entered the wrong date for one of the meetings. She scheduled meetings out of order. Several of the department employees were confused as to when they would meet with the Supervisor. The Supervisor received calls from several staff who complained about how the meetings were being scheduled. Grievant attempted to correct the error but was unable to do so. On February 8, 2022, the Supervisor asked Grievant to cease sending meeting invitations.

#### Third Incident

On March 14, 2022, Grievant contacted the Travel Agent and asked for flight information about possible flights the Supervisor could take to Las Vegas. Grievant received information from the Travel Agent that showed flights leaving from two airports near the University with one airport being nearest to the University. The Supervisor's practice was to only leave from the airport nearest the University. The Supervisor recognized the error and selected a flight originating from the airport nearest to the University.

#### Fourth Incident

The Supervisor attended a Board meeting and then returned to the office. He asked other staff where was Grievant. Some staff said they thought Grievant went to lunch. After approximately one and a half hours, the Supervisor called or texted Grievant's cell phone number but Grievant did not respond. Grievant returned to the office approximately 30 minutes before it was time to leave work to go home.<sup>1</sup> The Supervisor asked Grievant where she had been. Grievant said she had been in campus dropping something off and then ran into a friend. Grievant said she spoke to her friend and lost track of time. The Supervisor was concerned about Grievant's behavior because if he had received a call from his supervisor seeking assistance, he may not have been able to respond timely.

### **CONCLUSIONS OF POLICY**

The University alleged Grievant was not a classified employee and Grievant engaged in behavior that would support her removal.

Va. Code § 2.2-3001(A) provides, "[u]nless exempted by law, all nonprobationary state employees shall be covered by the grievance procedure." In other words, classified employees may only be removed pursuant to the Standards of Conduct and have the right to challenge that removal through the grievance process. Probationary employees do not have those rights.

DHRM Policy 1.45 governs Probationary Period. Its purpose is:

Establishes guidelines for employees to serve an introductory period of employment to determine if the employee will be granted full classified status.

The policy defined Probationary Period as:

Introductory period of employment that allows the employee and agency to determine if the employee is suited for the job. During the probationary period, employees may be terminated at the pleasure of the appointing authority, without access to the State Grievance Procedure. The normal probationary period is 12 months; however, it can be extended as described in this policy for up to 18 months for performance reasons, if an employee is absent for an extended period of time, or if an employee moves to another position within the last 6 months of the 12-month period.

The policy sets forth Probationary Period Requirements:

All persons who begin either original employment or re-employment in classified positions must serve 12-month probationary periods effective

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<sup>1</sup> The Supervisor wrote Grievant did not return until a "little after five."

from the dates of their employment. This includes employees who transfer from excepted positions to classified positions. EXCEPTIONS: Probationary periods are not required when an employee has been transferred from an excepted position to a covered position by action of the General Assembly, with no substantial change in work assignments.

A New Probationary period is required:

A person who is selected for a position that requires certification following completion of a prescribed training program must complete a new probationary period. Agencies should identify positions having such requirements in their Agency Salary Administration Plans.

Grievant was a classified employee when she joined the University. DHRM Policy 1.45 requires a probationary period for employees beginning either original employment with the State or re-employment, i.e. employment after a break in State service – neither of which applied to Grievant when she began her position at the University. Grievant did not have a break in service. She left the College on June 24, 2021 and began working at the University on June 25, 2021. In addition, Grievant’s position did not require a “certification following completion of a prescribed training program.” Grievant’s duties for the University were not significantly different from her duties when she worked for the College.

Because Grievant was a classified employee when she joined the University, she could only be removed from employment pursuant to DHRM Policy 1.60, Standards of Conduct. The University did not have the authority to change that designation contrary to policy. In other words, every time the University informed Grievant she was a probationary employee, that action was without effect.

The University argued that Grievant did not timely file her grievance and that Grievant’s removal should be upheld. This argument fails because once the matter is qualified for hearing, the Hearing Officer cannot find that the grievance does not qualify for hearing due to untimeliness.

The University asserted Grievant engaged in behavior giving rise to removal. None of the four incidents rise to the level of a Group III offense.

“[L]eaving work without permission” is a Group II offense.<sup>2</sup> As described in the First Incident, Grievant left work at 4 p.m. before her shift ended. Grievant’s behavior rose to the level of a Group II offense.

“[U]nsatisfactory work performance” is a Group I offense.<sup>3</sup> As described in the Second Incident, Grievant attempted to perform one of her work duties and was

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

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

unsuccessful. Her behavior rose to the level of a Group I offense for unsatisfactory work performance.

The Third Incident does not rise to the level of disciplinary action. The University did not establish that Grievant had been instructed to only ask for flights departing from a particular airport.

“[A]buse of state time” is a Group I offense.<sup>4</sup> As described in the Fourth Incident, Grievant was away from her office for approximately two hours. Her absence was an abuse of State time which rises only to the level of a Group I offense.

When all four incidents are considered as a whole, they do not rise to the level of a Group III offense. The University took one disciplinary action which at most rose to the level of a Group II offense. Accordingly, Grievant’s removal must be reversed.

The Virginia General Assembly enacted *Va. Code § 2.2-3005.1(A)* providing, “In grievances challenging discharge, if the hearing officer finds that the employee has substantially prevailed on the merits of the grievance, the employee shall be entitled to recover reasonable attorneys’ fees, unless special circumstances would make an award unjust.” Grievant has substantially prevailed on the merits of the grievance because she is to be reinstated. There are no special circumstances making an award of attorney’s fees unjust. Accordingly, Grievant’s attorney is advised to submit an attorneys’ fee petition to the Hearing Officer within 15 days of this Decision. The petition should be in accordance with the EDR Director’s *Rules for Conducting Grievance Hearings*.

## DECISION

For the reasons stated herein, the University’s removal of Grievant is **rescinded**. The University is ordered to **reinstate** Grievant to Grievant’s same position prior to removal, or if the position is filled, to an equivalent position. The University is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal. The University is directed to provide **back benefits** including health insurance and credit for leave and seniority that the employee did not otherwise accrue.

## 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.

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<sup>4</sup> See, Attachment A, DHRM Policy 1.60.

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.

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.