



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11761

Hearing Date: March 25, 2022
Decision Issued: April 14, 2022

PROCEDURAL HISTORY

On September 30, 2021, Grievant was issued a Group II Written Notice with removal for failure to follow policy. On September 30, 2021, Grievant was issued a Group III Written Notice of disciplinary action with removal for failure to follow federal regulations.

On October 28, 2021, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On November 15, 2021, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 25, 2022, a hearing was held by remote conference.

APPEARANCES

Grievant
University Representative
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notices?
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:

Norfolk State University employed Grievant as a Media Specialist II. The purpose of his position was:

This position supervises and trains the on-air staff of WNSB. The incumbent of this position monitors and critiques the daily performance of all individuals that performs assigned air-shifts. This individuals also serves to provide a means to communicate and acquire music product for air-play on this radio station. It is also this individual's responsibility to screen and select materials that comply with station and FCC policy.¹

No evidence of prior active disciplinary action was introduced during the hearing.

Grievant began working at an Outside Employer. He informed the University's managers and obtained approval to perform a second job.

On January 3, 2020, the University's Office of Human Resource issued a Campus Announcement stating, "[e]mployees who propose to engage in outside employment are required to report annually in writing the particulars of the employment."²

¹ University Exhibit F.

² University Exhibit C.

Grievant submitted a Request for Outside Employment dated April 21, 2020. The University's Human Resource division received the request on May 13, 2020. On May 13, 2020, the Human Resource Assistant sent Grievant an email, "[y]ou are receiving this email as notification that your request for outside employment has been approved."³

On August 6, 2020, the Dean sent Grievant an email regarding Grievant's Outside Employment: "This request has to be renewed each year. So even though you submitted it a few months ago, it MUST be resubmitted once the fiscal year begins."⁴

Grievant submitted a Request for Outside Employment dated August 10, 2020.⁵

One of Grievant's duties was to, "[m]onitor EAS (Emergency Activation System) in order to maintain FCC and state compliance."⁶ He was the Chief Operator.

The University maintained a Weekly EAS Activity/Station Log to record when the University's radio station received an emergency broadcast signal. An Operator recorded the date and time the signal was received. Grievant was to date and sign the log certifying:

I have reviewed all station operations for the one week period specified above. This review indicates that any required log entries have been made properly and that the station operated within the requirements of the FCC and the stations authorizations, unless noted. Any required corrective action is also noted, and the licensee of the station has been advised of any repetitive unacceptable conditions.⁷

For the weeks of January 6, 2019, July 14, 2019, January 5, 2020, March 7, 2020, and July 4, 2020, the Operator completed the Log on a weekly basis. Grievant as Chief Operator, however, did not review these Logs on a weekly basis. He reviewed them on June 17, 2021.

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

³ See, Grievant's Exhibits.

⁴ University Exhibit B.

⁵ It is not clear whether the University approved the request.

⁶ University Exhibit F.

⁷ University Exhibit D.

disciplinary action.”⁸ 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.”

Group II Written Notice

University Policy 10-10 governs Outside Employment. This policy provides:

All full-time employees of Norfolk State University are required to obtain approval from their supervisor, Vice President, University President and Human Resources prior to engaging in any outside employment. This approval is given on a calendar year (January — December) bases and must be renewed annually.

An employee who proposes to engage in any outside employment, any continuing business activity, or any outside activity that could result in a potential conflict of interest is required to report annually in writing the particulars of the employment.⁹

The University alleged:

On several occasions, you have stated to management officials that you are working part-time at [Outside Employer]. However, you have failed to comply with the NSU (Norfolk State University) Administrative Policy #45-10 Outside Employment. This policy requires prior approval of outside employment annually by management. To date, you have not obtained this approval for this fiscal year (2021) for your part time job. Therefore, this constitutes failure to follow policy (13) and is a Group II violation of the Standards of Conduct policy.

The University has not met its burden of proof to establish that Grievant violated the outside employment policy for several reasons. First, Grievant obtained approval before engaging in outside employment on May 13, 2020. The University knew Grievant had outside employment at all relevant times. Second, the University’s policy and practice differ. Policy 45-10 refers to an annual submission and does not specify that the submission is by fiscal year. University managers disregarded the policy and defined the requirement to be by fiscal year. The University’s fiscal year began July 1, 2020. Grievant submitted requests for outside employment on April 21, 2020 and August 10, 2020 which would be before and after the beginning of the fiscal year on July 1, 2020. Grievant complied with the policy as redefined by the University. Third, it is not clear when the

⁸ The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

⁹ University Exhibit C.

University required employees to submit the request. The University did not appear to consistently require employees to submit the request prior to the beginning of the fiscal year (or calendar year). It appears that Grievant could have submitted the request any time after the fiscal year began. In other words, the time for Grievant to submit his request for the fiscal year beginning July 1, 2021 had not yet passed because the fiscal year had not yet ended. Fourth, the University did not intend to deny Grievant's request for outside employment if it had been submitted as it preferred. The University's expectation was ministerial in nature and of little significance to the University's operations. The Group II Written Notice must be reversed.

Group III Written Notice

DHRM Policy 1.60 lists numerous examples of offenses. These examples "are not all-inclusive, but are intended as examples of conduct for which specific disciplinary actions may be warranted. Accordingly, any offense not specifically enumerated, that in the judgment of agency heads or their designees undermines the effectiveness of agencies' activities, may be considered unacceptable and treated in a manner consistent with the provisions of this section."

47 CFR § 73.1870 governs Chief Operators. Section C provides:

The chief operator is responsible for completion of the following duties specified in this paragraph below. When these duties are delegated to other persons, the chief operator shall maintain supervisory oversight sufficient to know that each requirement has been fulfilled in a timely and correct manner. ***

(3) Review of the station records at least once each week to determine if required entries are being made correctly. Additionally, verification must be made that the station has been operated as required by the rules or the station authorization. Upon completion of the review, the chief operator or his designee must date and sign the log, initiate any corrective action which may be necessary, and advise the station licensee of any condition which is repetitive.

Each time Grievant failed to timely review and approve the Log, he placed the University at risk of being fined up to \$10,000 by the FCC. He created the risk that the University might jeopardize its broadcast license. The University concluded Grievant's behavior undermined the University's activities and warranted a Group III Written Notice. 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 argued that the EAS was designed to automatically receive and send emergency signals and to store logs showing emergency signal transmission. He points out that the University did not fail to send or receive any signal. Grievant asserts that any

technical issues were addressed by the University's Information Technology division. He claimed that reviews were caught up without any violation. The evidence showed that Grievant was disciplined for the risk he created for the University by failing to comply with Federal regulations requiring weekly station record reviews. The absence of fines from the FCC or failure to send and receive emergency signals did not affect that risk.

Mitigation

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"¹⁰ 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 II Written Notice of disciplinary action is **rescinded**. 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 14th St., 12th Floor
Richmond, VA 23219

¹⁰ Va. Code § 2.2-3005.

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]

[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

^[1] Agencies must request and receive prior approval from EDR before filing a notice of appeal.