

Issue: Group III Written Notice with Termination (failure to follow instructions, unauthorized use of State property, unauthorized removal of State property, falsifying records and deceitfulness); Hearing Date: 06/07/17; Decision Issued: 10/12/17; Agency: UVA; AHO: Carl Wilson Schmidt, Esq.; Case No. 10972; Outcome: No Relief – Agency Upheld; **Administrative Review: Ruling request received 10/27/17; EEDR Ruling No. 2018-4639 issued 11/17/17; Outcome: AHO's decision affirmed.**



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10972

Hearing Date: June 7, 2017
Decision Issued: October 12, 2017

PROCEDURAL HISTORY

On January 17, 2017, Grievant was issued a Group III Written Notice of disciplinary action with removal for failure to follow instructions, unauthorized use of State property or records, unauthorized removal of State property, falsifying records, and deceitfulness.

Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On February 22, 2017, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On June 7, 2017, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's Counsel
Witnesses

ISSUES

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

The University of Virginia employed Grievant as an Information Technology Specialist III. Grievant had been employed by the University for approximately 23 years. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant began reporting to the Supervisor in the fall of 2015.

Grievant worked in the Unit's desktop support image now team. Grievant was responsible for purchasing mobile devices. He had autonomy regarding mobile device procurement and distribution. When an employee needed a cell phone or an upgrade to a cell phone, Grievant would initiate the request to obtain a new cell phone by contacting Ms. J who worked with VITA.

Grievant was the primary contact for upgrading and maintaining electronic hardware including computers, mobile devices, peripherals, and servers. He was responsible for keeping an accurate and timely inventory of Unit Strategic Systems and Support equipment.

Grievant was in possession of cell phones and MIFI devices¹ owned by the University and previously assigned to Unit employees. He used Unit cell phones and phone lines and MIFI devices. Grievant testified he kept a stock of phones not assigned to any particular person so that if an employee came to him asking for another cell phone, he would be able to take the SIM card from that employee's old phone and put it into the new cell phone. Grievant had physical possession and control over several cell phones and MIFIs.

On March 14, 2016, Grievant walked past Mr. Ro and overheard Mr. Ro say he had a problem with his cell phone. Mr. Ro was referring to his personal cell phone. Grievant asked Mr. Ro if he wanted a cell phone he had. Grievant said he intended to throw away the cell phone. Grievant said the cell phone was Ms. Ca's cell phone. Mr. Ro said he wanted the cell phone and asked if it was ok with Mr. G. Grievant left briefly and then returned and said it was ok.² Grievant gave him the cell phone. Grievant transferred Mr. Ro's SIM card into the Unit's phone and gave it back to Mr. Ro. Mr. Ro used the Unit's cell phone as his personal cell phone because he believed Grievant was authorized to give him the cell phone.³

On June 10, 2016, the Supervisor sent Grievant an email stating:

I hope this message finds you well. I have some questions regarding the inventory. In our meeting with [name] the other week, I mentioned that we need an update on the Inventory list for mobile devices. And I also noticed that we don't have the loaner laptops with the appropriate designee. Please be sure to have both of those updated by Monday close of business. Just to give you some feedback: this is the second time I am requesting for the mobile device inventory to be updated. As I wrote you in previous emails, you are responsible for keeping an updated inventory list with accurate information.⁴

On June 24, 2016, the Supervisor sent Grievant an email stating, in part:

4) Inventory. On your inventory listing, there is no indication to whom the mobile devices and loaner laptops have been assigned. Your performance keeping an updated and accurate inventory listing has been

¹ A MIFI device is connected to a cell phone carrier and serves as a "hotspot" for employees to access the internet with their laptops.

² Mr. G did not authorize Grievant to give the phone to Mr. Ko.

³ Grievant's action was contrary to the University's policy requiring disposal of surplus property using the University's contract vendor.

⁴ Agency Exhibit 13.

inconsistent over the past several months. I want to remind you that this was your responsibility.⁵

On July 29, 2016, Grievant drafted a spreadsheet entitled "Departmental Inventory." He listed four iPad2 devices with their serial numbers and locations at the University. He did not list any cell phones or MIFIs.

Grievant left the Unit on July 29, 2016 to take another position with the Second Unit at the University of Virginia. Grievant completed a Knowledge Transfer Template to benefit the Unit he was departing. Grievant was asked, "What equipment was assigned to you for use? Where is the equipment?" Grievant responded, "Laptop, Monitor and Phone, [Location]".⁶ The Supervisor went to Grievant's office and verified Grievant had left his laptop, monitor, and office phone. If Grievant had mentioned he possessed several cell phones, the Supervisor would have obtained them from Grievant.

Grievant took two cell phones and two MIFI devices to his new position in the Second Unit. Grievant moved the billing and possession of MIFI 3756 and MIFI 3351 to the Second Unit in August 2016. He took the MIFIs to the Second Unit because if his coworkers went to a trade show, up to 15 employees could use a MIFI to access the internet. PTAO was an internal billing number. Grievant changed the PTAO for these items to the Second Unit. He did not tell any employee working in the Unit that he had cell phones and MIFIs and that he was taking with him to the Second Unit or that he was changing the PTAO.

Phone line 7509 had been assigned to Ms. Ca. When Ms. Ca left the University in January 2016, her cell phone and SIM card were returned to Grievant. Grievant used the phone to call his wife on August 27, 2016, August 29, 2016. Grievant's wife called him on August 29, 2016 and August 30, 2016 using that phone line.

Phone line 9289 had been assigned to Mr. H, until 2009. On October 25, 2016, an employee called that line to confirm whether it was still in use. Grievant answered the call. Grievant stated that he was using the phone line.

Mr. G was a Human Resources Vice President. Mr. G contacted the Supervisor in October 2016 and asked to upgrade his cell phone. This surprised the Supervisor because the Supervisor was not aware that the Unit had any cell phones. The Supervisor asked Mr. D to handle the request. Mr. D contacted Ms. J and they discovered that Mr. G's phone had been upgraded in May 2016. It seemed strange to them that Mr. G would seek another upgrade only a few months later.

⁵ Agency Exhibit 13.

⁶ Agency Exhibit 2.

The University began an investigation. In October 2016, Unit managers realized that four iphones and two mobile MIFI devices were missing. During the investigation, Unit managers discovered that two additional iphones from 2015 were missing.

IMEI numbers are unique serial numbers given to each iphone. The last three digits of that number are used in this decision. Grievant was involved in the Unit's purchasing of the following iphones:

IMEI Number	Date Upgrade Ordered	Upgraded Item
257	3/7/2016	Iphone 6s 64GB
875	5/13/2016	Iphone 6s plus 128GB
285	5/13/2016	Iphone 6s plus 128GB
418	5/16/2016	Iphone 6s plus 128GB
449	4/27/2016	Iphone 6
249	4/27/2016	Iphone 6

On October 12, 2016, Unit managers learned that the Unit had active cell phone lines assigned to employees as follows:

Last four digits of telephone number	Assigned person
3495	Mr. Ko
0999	Ms. TG
2278	Mr. Ga
7509	Ms. Ca

The Agency held a predetermination meeting on December 12, 2016. Grievant met with the Supervisor and two other employees. Grievant presented one MIFI device and one cell phone (IMEI 418). Grievant was unable to find the second MIFI. Grievant said he transferred his iphone (IMEI 418) and Unit telephone number 9289 to the Second Unit in August 2016.

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 disciplinary action."⁷ 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."

⁷ The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

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.”

Deceitfulness is not listed as an offense in the Standards of Conduct. In the University’s judgment, “deception” is a Group III offense. The University’s judgment is consistent with the Standards of Conduct. Deception is similar to falsification and neglect of duty.

In the University’s judgment, Grievant’s behavior constituted deception justifying the issuance of a Group III Written Notice. The University has presented sufficient evidence to support the conclusion that Grievant was deceptive. Grievant was in possession of several cell phones and two MIFI devices. He was using at least one of the cell phones and phone lines. He knew he was obligated to maintain an inventory on mobile devices such as cell phones and MIFIs. Grievant drafted a Departmental Inventory and listed iPad2s but no cell phones or MIFIs. Grievant completed a Knowledge Transfer Template which asked, “What equipment was assigned to you for use?” Grievant had assigned at least one cell phone and phone line to himself. He did not disclose any cell phones or MIFI devices on the Knowledge Transfer Template. Grievant transferred at least one cell phone and two MIFIs to the Second Unit. Grievant knew or should have known that the managers of the Unit would have wanted to know of his action.

The University alleged that Grievant took and kept several cell phones. Grievant argued that all cell phones ultimately were located and, thus, there was no basis for disciplining Grievant. Whether Grievant kept the cell phones and only later returned them when no one was watching or had a surrogate return them does not affect the outcome of this case. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for deception regardless of whether the cell phones were taken by Grievant or simply lost somewhere in the University’s offices.

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”⁸ 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

⁸ Va. Code § 2.2-3005.

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 the Grievant of a Group III Written Notice of disciplinary action with removal is **upheld**.

APPEAL RIGHTS

You may request an administrative review by EEDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EEDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Equal Employment and 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 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]

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

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer