

Issue: Group III Written Notice with Termination (theft); Hearing Date: 11/01/18;
Decision Issued: 11/20/18; Agency: VSU; AHO: Carl Wilson Schmidt, Esq.; Case
No. 11259; Outcome: No Relief – Agency Upheld; **Administrative Review Request
received 12/02/18; EDR Ruling No. 2019-4820 issued on 01/08/19; 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: 11259

Hearing Date: November 1, 2018
Decision Issued: November 20, 2018

PROCEDURAL HISTORY

On July 9, 2018, Grievant was issued a Group III Written Notice of disciplinary action with removal for:

Received a State Fraud, Waste and Abuse Hotline call to the agency regarding an allegation to have obtained college course textbooks and sold them for profit. Employee in the allegation (investigation) admitted to selling two or three books for \$20 each of which were intended for faculty textbook review.

The Written Notice contained the Code of "72" for "Theft".

On August 3, 2018, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On August 20, 2018, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On November 1, 2018, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Representative
University Party Designee
University'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 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:

Virginia State University employed Grievant as an Administrative Program Specialist II. She began working for the University in 2007. Grievant worked in the Department. Grievant's position Objective was:

Provide administrative and operational support, technical assistance, and office management for the department.¹

Grievant did not teach classes at the University and was not part of the textbook selection process.

One of Grievant's duties was to purchase books for the Department at the discretion of the Department Chair. The Department received desk copies and special copies of textbooks relating to the Department's teaching topics.

¹ Agency Exhibit 3.

Grievant requested pretext photocopies and instructor copies relating to the courses offered by the Department. This occurred when the Department had a new instructor or there was a new course offering. These books were free to the Department and were not purchased using University funds.

Textbook publishers often sent University faculty textbooks to review with the hope that the professor would adopt the textbook for his or her class. The publishers would not expect payment for these sample textbooks. In most cases, if a faculty member decided not to use a sample textbook, he or she would retain the textbook without returning it to the publisher. Sending free textbooks to faculty was a form of marketing for the publishers. The textbooks were promotional materials. Faculty members would not index these free textbooks or record them as University inventory. In some cases publishers would send textbooks to faculty members and require the faculty member to purchase or return the textbooks within a certain time period. This practice varied by publisher and by textbook.

The Virginia Fraud Waste and the Abuse Hotline received a call alleging Grievant “over purchases books and sells them to outside entities.” The University’s Internal Auditor began an investigation.

The Investigator reviewed the University’s “Textbook Adoption and Affordability Policy” and interviewed numerous University employees to gain an understanding of the University’s culture surrounding the textbook review process. The Investigator spoke with Grievant. The context of their discussion was about textbooks.

The Investigator asked Grievant if she sold books. Grievant answered “yes”. Grievant says that she sold two or three books for about \$20 each. The Investigator asked Grievant if she taught at the University. Grievant said “no” but the policy allowed her to sell books. The Investigator asked Grievant to show her policy. Grievant “pulled up” a policy. The Investigator looked at policy and said she had seen it before and that it only applied to teachers.

Grievant told the Investigator that the books came from the publishers addressed to Grievant through the University’s mailroom.

Grievant said the books were her books and they were addressed to her. Grievant said that publishers addressed books to her.

On June 18, 2018, the Investigator issued a report concluding that the allegation was investigated and substantiated.

Professor S testified credibly that there were textbook buyers who came onto the University’s campus towards the end of each semester to solicit faculty for the purchase of textbooks. Textbook buyers would place business cards in the office doors of faculty members requesting contact to purchase textbooks. Some faculty members sold their textbooks to textbook buyers and received cash. They kept the cash because they believed the textbooks belonged to them and not to the University. Professor S did not believe any faculty member would be disciplined for selling textbooks.

The Department Chair credibly testified that University faculty received textbooks from publishers and then resold those textbooks for cash. She testified that publishers sent textbooks to faculty at their work and home addresses as marketing tools. If a faculty member did not adopt the textbook, the textbook was the property of the faculty member. She testified that textbook buyers would come to a faculty member's office door and ask if the faculty member had any textbooks for sale. The textbook buyer would then go to the next faculty member's door to ask again for textbooks. The Department Chair testified that if a publisher sent a teacher an instructor copy (a copy with test answers), the publisher would usually mark the book as "not for resale."

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."² 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."

Theft or unauthorized removal of State records or property is a Group III offense.³

On August 15, 2007, the University implemented Policy 1600 which governs Textbook Adoption and Sales and Bookstore. This policy provides:

No employee of Virginia State University or its contractors shall demand or receive any payment, loan, subscription, advance, deposit of money, services or anything, present or promised, as an inducement for requiring students to purchase a specific textbook required for coursework or instruction; with the exception that employees or contractor employees may receive (i) sample copies, instructor's copies, or instructional material, not to be sold;

On January 19, 2018, the University amended this policy to add:

Faculty may not engage in the sale of instructional materials to students without the written approval from the appropriate Dean and may not engage in the sale of instructional materials in violation of University's Bookstore Operations Exclusivity requirements. *Noncompliance with this policy may result in disciplinary action up to and including termination.*

The University's Postal Services policy provides:

² The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

³ See, Attachment A, DHRM Policy 1.60.

Incoming Personal Mail

All mail addressed to our physical address is the property of Virginia State University. For this reason you should not have personal mail sent to the University.

In order to establish theft or unauthorized removal of University property, the University must establish its ownership of the property. Grievant's duties included receiving textbooks from the University's mailroom. When she received textbooks she received them in her capacity as a University employee. She received the textbooks on behalf of the University. She received the textbooks through the University's mailroom where items received became the property of the University under the University's policy. The University has established that the textbooks Grievant received were University property.

Grievant did not have the authority to sell textbooks and receive cash for those textbooks. Grievant admitted to selling two or three textbooks and receiving approximately \$20 for each textbook. Grievant has admitted to the unauthorized removal of University property. Unauthorized removal of State property is a Group III offense. Accordingly, the University has presented sufficient evidence to support the issuance of a Group III Written Notice for unauthorized removal of State property. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Thus, the University's decision to remove Grievant must be upheld.

Grievant asserted at the hearing that the books she sold belong to her daughters who were students at the University. This assertion is not believable. The context of Grievant's discussion with the Investigator was about the University's policies and practices governing textbook resale. Grievant did not tell the Investigator that the books she resold were one she had purchased for her daughters.

Grievant argued that the University's textbook policies were not valid because they had not been approved by the Faculty senate. The University's policies appeared to be enacted by appropriate University authorities. In addition, a portion of the University's textbook policy mirrors the language of Va. Code § 23.1-1308(A) which provides:

No employee of a public institution of higher education shall demand or receive any payment, loan, subscription, advance, deposit of money, services, or anything, present or promised, as an inducement for requiring students to purchase a specific textbook required for coursework or instruction. However, such employee may receive (i) sample copies, instructor's copies, or instructional material not to be sold and (ii) royalties or other compensation from sales of textbooks that include such instructor's own writing or work.

The University's policies were available on the University's intranet and Grievant had adequate notice of those policies.

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”⁴ 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.

The inconsistent application of disciplinary action is a basis for mitigating disciplinary action. It is clear that the University treated Grievant differently from how it treated faculty members. A Department Chair is a position of sufficient stature for the Hearing Officer to conclude that the University was aware that some University faculty were routinely and blatantly violating the University’s textbook policy by selling textbooks they received from publishers for cash that they kept. In order for this different treatment to result in mitigation, Grievant must show that she was a similarly situated employee.

Grievant was not similarly situated to University faculty. She did not hold a teaching position. Publishers did not send her textbooks in order to persuade her to adopt the textbooks for University classes. Grievant would not have any reason to believe she was receiving a “marketing gift” from a publisher. There is no basis to mitigate the disciplinary action against Grievant because the University did not treat her differently from similarly situated employees.

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

⁴ Va. Code § 2.2-3005.

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]

[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

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