

Issue: Group III Written Notice with Termination (theft); Hearing Date: 08/16/17;
Decision Issued: 08/21/17; Agency: Virginia Tech; AHO: Carl Wilson Schmidt, Esq.;
Case No. 11037; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11037

Hearing Date: August 16, 2017
Decision Issued: August 21, 2017

PROCEDURAL HISTORY

On April 25, 2017, Grievant was issued a Group III Written Notice of disciplinary action with removal for theft and failure to follow policy.

On May 22, 2017, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On June 12, 2017, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On August 16, 2017, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Representative
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:

Virginia Tech employed Grievant as a Housekeeper. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant was responsible for cleaning the bathrooms located inside of student rooms. To get to a bathroom, she had to enter a student's room and walk through the room.

Grievant was instructed by her supervisor not to remove items belonging to students.

Grievant developed friendships with the students living in the student housing. She had a close friendship with the Student and they exchanged text messages.

On November 29, 2016, Grievant entered the Student's room. She observed money on the floor. She picked up \$30 and put it in her pocket. She left the room. At the conclusion of her shift, she went home with the \$30. She did not notify a supervisor or the Student that she had taken \$30 from the room. The \$30 belonged to the Student's Roommate.

After Grievant had finished her shift and left the campus, the Student spoke with Grievant by telephone and then exchanged text messages with Grievant.

On November 29, 2016, the Student wrote:

I'm at dinner right now. Is everything alright?

Grievant wrote:

No ... I have the money ...

The Student wrote:

You do?

Grievant wrote:

Yes, when I opened the door I kicked it and picked it up, I'm sorry ... then I freaked out when you called.

The Student wrote:

I won't tell I promise
Don't worry

Grievant wrote:

I will put it back tomorrow ...¹

Grievant later returned the \$30 to the Roommate.

On April 25, 2017, the University received a complaint about items being stolen in the buildings where Grievant worked. The University began an investigation. Grievant told the Investigator that she took the \$30 but intended to return it the following day. Grievant told the Supervisor that she took the money but had forgotten about it until the Student called her that evening asking about the money.

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

¹ Agency Exhibit 2.

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

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 is a Group III offense.³ Grievant was instructed not to remove student property from the rooms she cleaned. On November 29, 2016, Grievant removed from the Student’s room \$30 that belonged to the Roommate. She took the money with her after her shift ended and she left the Campus. 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, Grievant’s removal must be upheld.

Grievant argued that she removed the money with the intent to return it the following day. Grievant did not testify at the hearing to establish her intentions when she took the money. The evidence showed that Grievant removed the money but once she was confronted by the Student, she decided to return the money. It is difficult for the Hearing Officer to believe that Grievant would have removed money with the intent of returning it and only a few hours later had forgotten about the money until reminded of it because of a call from the Student.

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. 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**.

³ See, Attachment A, DHRM Policy 1.60.

⁴ Va. Code § 2.2-3005.

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]

[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.