



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11561

Hearing Date: September 21, 2020

Decision Issued: November 12, 2020

PROCEDURAL HISTORY

On May 19, 2020, Grievant was issued a Group III Written Notice of disciplinary action with removal for taking food and drinks without authorization.

On June 16, 2020, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On July 6, 2020, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 21, 2020, a hearing was held by video conference.

APPEARANCES

Grievant
Agency Party Designee
Agency 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:

Richard Bland College employed Grievant as an Assistant Director of one of its Units. She joined the College in October 2019. She was responsible for overseeing daily operations in the Unit. No evidence of prior active disciplinary action was introduced during the hearing.

The College sent its students home in response to the corona virus pandemic. Approximately a dozen international students remained on Campus due to travel restrictions. The international students lived in the Hall. Several staff lived in the Hall.

Prior to the pandemic, students bought meal plans to receive food from the cafeteria. Employees also could purchase food from the cafeteria. Once the pandemic began, the College kept its cafeteria open to prepare food for the students and staff staying on Campus. The College decided to provide meals as a courtesy to students and staff living in the Hall. Grievant was given a ticket that enabled her to receive one meal per day.

Two dining staff would bring three meals per day Monday through Thursday and nine meals on Friday for each international student. The meals included assorted drinks such as milk, juice, and soda. Cases of 24 drinks were brought to the office in the Hall. Staff would roll a cart with food and drinks from the office and deliver the meals to students in the Hall. Some of the students declined to take all of the meals allowing

some drinks and food to accumulate in the Hall office. There were trays and cases of sodas left in the office that students and staff did not want with their meals. Cafeteria staff would return to the Hall each day or on the following day to pick up trays to be used the next day as well as left-over food.

On April 3, 2020, April 8, 2020, April 14, 2020, April 15, 2020, and April 24, 2020, Grievant removed trays of food and cases of drinks from the Campus and took them home.¹ Grievant obtained assistance from others to move the items into her vehicle. For example, on April 24, 2020, an employee and Grievant's Husband assisted with loading food and drinks into his vehicle. Grievant had asked her Husband to assist with taking food trays and drinks so she could attend to other family members.

The College estimated Grievant took soda cases with a total cost of approximately \$125.

Grievant did not have permission to remove these items.

The College Police investigated the matter and concluded it did not meet the threshold for criminal prosecution and should be treated as a personnel matter.

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."

"[U]nauthorized removal of state records/property" is a Group III offense.³ The College provided meals and drinks to its international students. If those students declined to eat or drink the food provided to them, that food remained the property of the College. Nothing in the College's actions showed the College intended food designed for international students could be taken by other staff. Grievant removed food trays and drinks belonging to the College without permission from College managers. The College 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.

¹ The sodas were unopened and not likely to expire within a short time period.

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.

Grievant argued that the meals were not the College's property and were the property of the staff for whom they were prepared. She argued these meals and drinks were not State property because they were given to employees who gave them to Grievant instead of discarding them. Grievant did not consider the food to be "extra" or "reserve" food because it was not prepared for specific events, it was prepared for individuals.

It is not clear Grievant has established the facts of her defense. The amount of food taken by Grievant suggests it was more than merely an occasional unwanted staff meal given to Grievant. Grievant took cases of drinks. It is unlikely the College gave specific cases of drinks to specific students only for them to decide to transfer those cases to Grievant.

Grievant argued that she did not steal any food because she knew she was under camera surveillance. The College did not establish that Grievant formed an intent to steal food. It is not necessary, however, for the College to establish that Grievant intended to steal food in order to support the issuance of its Group III Written Notice. The College established that its food was taken without authorization.

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.

Grievant argued the College retaliated against her because she complained about a police officer. Grievant did not present sufficient evidence to support this assertion. The College's disciplinary action appears to be based on the conclusion that Grievant acted contrary to the Standards of Conduct and not as a means of retaliating against Grievant.

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**.

⁴ *Va. Code § 2.2-3005.*

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

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.