

Issues: Group II Written Notice (failure to follow policy, disruptive behavior, misuse of State property) and Termination; Hearing Date: 11/14/12; Decision Issued: 11/15/12; Agency: JMU; AHO: Carl Wilson Schmidt, Esq.; Case No. 9935; Outcome: Partial Relief; **Administrative Review**: EDR Ruling Request received 11/20/12; EDR Ruling No. 2013-3485 issued 11/30/12; Outcome: AHO's decision affirmed; **Administrative Review**: DHRM Ruling Request received 11/20/12; DHRM Ruling issued 12/06/12; Outcome: AHO's decision affirmed.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 9935

Hearing Date: November 14, 2012

Decision Issued: November 15, 2012

PROCEDURAL HISTORY

On September 7, 2012, Grievant was issued a Group II Written Notice of disciplinary action with removal for failure to follow instructions and/or policy, disruptive behavior, and unauthorized use of State property or records.

On September 14, 2012, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On October 8, 2012, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The Hearing Officer found just cause to extend the time frame for issuing a decision in this grievance due to the unavailability of a party. On November 14, 2012, a hearing was held at the Agency's office.

APPEARANCES

Grievant
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. 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:

James Madison University employed Grievant as a landscaper until his removal effective September 12, 2012. No evidence of prior active disciplinary action was introduced during the hearing.

On September 7, 2012, Grievant was working on the Agency's campus at the President's house. At approximately 11:45 a.m., Grievant met another employee, Ms. K, in a shed behind the President's house. The shed was used to store mulch and other landscaping items. The shed also contained outdoor chair cushions stacked in a manner to create the appearance of a small bed. Grievant and Ms. K planned to have sexual relations inside the shed and were there for that purpose. Another employee, Grievant's Wife, learned that Grievant and Ms. K planned to meet at the shed to have sex. This upset her. She went to the shed but could not open its door. She knew that Grievant and Ms. K were inside the shed. The Wife grabbed a stick and began to hit the rear window of Ms. K's van that was parked in the driveway. The Wife broke out the rear window of the van. She then hit and broke the right side mirror of the van. Grievant and Ms. K opened the door to the shed. Grievant grabbed the Wife and instructed Ms. K to leave.

The Agency's Police Department was notified that the Wife was headed towards the shed and intended to kill someone. Three police officers were dispatched to the

shed behind the President's house. When they arrived, Grievant was holding his Wife with his arms wrapped around her from the back. They were fighting each other. Officer W yelled to Grievant to take his hands off of the woman and Grievant did so immediately. The Wife ran past Officer W and to the side of the van parked in the driveway. The Wife attacked Ms. K. One of the police officers restrained Ms. K and the conflict ended.

Grievant admitted to the Sergeant that he and Ms. K had met at the shed several other times in the past. When the Sergeant asked what they planned to do during their meeting that day, Grievant said that they probably were going to have sex.

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."¹ 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."

There is ample evidence to support the issuance of a Group III with removal. The Agency, however, chose to issue Grievant a Group II Written Notice. Being inside a shed owned by the Commonwealth with the intent of having sexual relations with a coworker constitutes misuse or unauthorized use of State property, a Group II offense.² Grievant's behavior was disruptive because it provoked a response on State property from his Wife. Disruptive behavior is a Group I offense. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

The Agency has not presented sufficient evidence to support Grievant's removal. Grievant did not have prior active disciplinary action. Upon the issuance of a Group II Written Notice, an agency may suspend an employee for up to 10 workdays. An agency does not have the authority to remove an employee based upon a single Group II Written Notice. In this case, the Agency elected to issue Grievant a Group II Written Notice and, thus, did not have the authority to remove him from employment.

The supervisor issuing the Group II Written Notice testified. It appears that the decision to issue a Group II with removal was made by human resource employees or other managers working for the Agency. Those individuals did not testify. It is unclear why the Agency did not issue a Group III Written Notice if it intended to remove Grievant from employment or why it attempted to remove Grievant using a single Group II Written

¹ The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

² See, Attachment A, DHRM Policy 1.60.

Notice. It is clear, however, that the Agency issued only a Group II Written Notice and identified offense codes normally associated with Group II or Group I offenses. It is also clear that Grievant received the Group II Written Notice and filed a grievance challenging that written notice. The Hearing Officer lacks the authority to increase disciplinary action and must address the disciplinary action as originated by the Agency.

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 Employment Dispute Resolution...”³ 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 II Written Notice of disciplinary action is **upheld**. The Agency’s decision to remove Grievant is **rescinded**. The Agency is ordered to reinstate Grievant to Grievant’s same position prior to removal, or if the position is filled, to an equivalent position. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal and credit for leave and seniority that the employee did not otherwise accrue.

APPEAL RIGHTS

You may file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

1. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

³ *Va. Code § 2.2-3005.*

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. 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 may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must provide a copy of all of your appeals to the other party, EDR, 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.

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.⁴

[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

⁴ Agencies must request and receive prior approval from EDR before filing a notice of appeal.

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of
James Madison University

December 6, 2012

The James Madison University has requested an administrative review of the hearing officer's decision in Case No. 9935. For the reason stated below, we will not interfere with the application of this decision. The agency head of the Department of Human Resource Management (DHRM), Ms. Sara R. Wilson, has directed that I conduct this administrative review.

In the procedural history of this case, the hearing officer wrote the following:

On September 7, 2012, Grievant was issued a Group II Written Notice of disciplinary action with removal for failure to follow instructions and/or policy, disruptive behavior, and unauthorized use of State property or records.

The relevant facts of this case are as follows:

James Madison University employed Grievant as a landscaper until his removal effective September 12, 2012. No evidence of prior active disciplinary action was introduced during the hearing.

On September 7, 2012, Grievant was working on the Agency's campus at the President's house. At approximately 11:45 a.m., Grievant met another employee, Ms. K, in a shed behind the President's house. The shed was used to store mulch and other landscaping items. The shed also contained outdoor chair cushions stacked in a manner to create the appearance of a small bed. Grievant and Ms. K planned to have sexual relations inside the shed and were there for that purpose. Another employee, Grievant's Wife, learned that Grievant and Ms. K planned to meet at the shed to have sex. This upset her. She went to the shed but could not open its door. She knew that Grievant and Ms. K were inside the shed. The Wife grabbed a stick and began to hit the rear window of Ms. K's van that was parked in the driveway. The Wife broke out the rear window of the van. She then hit and broke the right side mirror of the van. Grievant and Ms. K opened the door to the shed. Grievant grabbed the Wife and instructed Ms. K to leave.

The Agency's Police Department was notified that the Wife was headed towards the shed and intended to kill someone. Three police officers were dispatched to the shed behind the President's house. When they arrived, Grievant was holding his Wife with his arms wrapped around her from the back. They were

fighting each other. Officer W yelled to Grievant to take his hands off of the woman and Grievant did so immediately. The Wife ran past Officer W and to the side of the van parked in the driveway. The Wife attacked Ms. K. One of the police officers restrained Ms. K and the conflict ended.

Grievant admitted to the Sergeant that he and Ms. K had met at the shed several other times in the past. When the Sergeant asked what they planned to do during their meeting that day, Grievant said that they probably were going to have sex.

Based on the evidence before him, the hearing officer concluded the following:

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.” 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.”

There is ample evidence to support the issuance of a Group III with removal. The Agency, however, chose to issue Grievant a Group II Written Notice. Being inside a shed owned by the Commonwealth with the intent of having sexual relations with a coworker constitutes misuse or unauthorized use of State property, a Group II offense. Grievant's behavior was disruptive because it provoked a response on State property from his Wife. Disruptive behavior is a Group I offense. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

The Agency has not presented sufficient evidence to support Grievant's removal. Grievant did not have prior active disciplinary action. Upon the issuance of a Group II Written Notice, an agency may suspend an employee for up to 10 workdays. An agency does not have the authority to remove an employee based upon a single Group II Written Notice. In this case, the Agency elected to issue Grievant a Group II Written Notice and, thus, did not have the authority to remove him from employment.

The supervisor issuing the Group II Written Notice testified. It appears that the decision to issue a Group with removal was made by human resource employees or other managers working for the Agency. Those individuals did not testify. It is unclear why the Agency did not issue a Group III Written Notice if it intended to remove Grievant from employment or why it attempted to remove Grievant using a single Group Written Notice. It is clear, however, that the Agency issued only a Group II Written Notice and identified offense codes normally associated with Group II or Group I offenses. It is also clear that Grievant received the Group II Written Notice and filed a grievance challenging that written notice. The Hearing Officer lacks the authority to increase disciplinary action and must address the disciplinary action as originated by the Agency.

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 Employment Dispute Resolution...” 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 nonexclusive 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.

The hearing officer wrote the following as his decision:

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group II Written Notice of disciplinary action is upheld. The Agency’s decision to remove Grievant is rescinded. The Agency is ordered to reinstate Grievant to Grievant’s same position prior to removal, or if the position is filled, to an equivalent position. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal and credit for leave and seniority that the employee did not otherwise accrue.

DISCUSSION

Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. By statute, the DHRM has the authority to determine whether the hearing officer’s decision is consistent with policy as promulgated by DHRM or the agency in which the grievance is filed. The challenge must cite a particular mandate or provision in policy. This Department’s authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer’s assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

In each instance where a request is made to this Agency for an administrative review, the party making the request must identify with which human resource policy, either state or agency, the hearing decision is inconsistent or is misinterpreted. In its request to this Department for an administrative review, the University contends that it terminated the grievant under the provisions of DHRM Policy No. 1.60, Standards of Conduct, by issuing him a single Group II Written Notice.

According to DHRM Policy No. 1.60, an agency may terminate an employee upon receipt of a combination of four active Group I Written Notices or two active Group II Written Notices or one active Group III Written Notice or various combinations of the above. In the instant case, while the agency contends that even though the grievant’s behavior was so

outrageous as to warrant termination, it issued the Group II notice in trying to match the grievant's behavior with the examples in the policy. In making his decision, the hearing officer saw no evidence that the grievant had any other active written notices; therefore, he directed that the agency rescind the disciplinary action and reinstate the grievant. This agency cannot disagree with the hearing officer's decision. Thus, we will not interfere with the application of the application with this decision.

Ernest G. Spratley
Assistant Director,
Office of Equal Employment Services