

Issue: Group III Written Notice with Termination (other issue – loss of Master keys);
Hearing Date: 01/21/16; Decision Issued: 02/10/16; Agency: College of William and
Mary; AHO: Carl Wilson Schmidt, Esq.; Case No. 10728; Outcome: No Relief –
Agency Upheld.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10728

Hearing Date: January 21, 2016
Decision Issued: February 10, 2016

PROCEDURAL HISTORY

On November 3, 2015, Grievant was issued a Group III Written Notice of disciplinary action with removal relating to the loss of master keys and attempts to locate them.

On November 13, 2015, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On November 23, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 21, 2016, a hearing was held at the Agency's office.

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. 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 College of William and Mary employed Grievant as a Building Services Manager. She had approximately six supervisory employees reporting to her and approximately 100 employees in her chain of command.

On April 30, 2013, Grievant received a copy of the Agency's Key Control Policy for Custodial Staff.

On May 22, 2015, Grievant obtained seven master keys from Mr. D. The keys opened all interior doors in 85 resident halls and provided access to eleven apartment buildings housing students across the Agency's Campus.

On Friday August 14, 2015, Mr. W was working in a building with Mr. G. Mr. W needed to gain entry through a locked door. Mr. G told Mr. W to locate Grievant and obtain the master key. Mr. W found Grievant and told her a door was locked and he needed a key to get in. Grievant brought the master keys to the front door of N Hall and gave them to Mr. W. She did not open the doors for Mr. G or Mr. W.

Mr. W used the keys and told Mr. G he would return the keys to Grievant. Mr. G said Mr. W should not return the keys because Mr. G would return them to Grievant. Mr. W gave the keys to Mr. G. Mr. G and Mr. W took a break to attend a pancake breakfast. They went to S Hall. Grievant was already at the breakfast in the kitchen of S Hall. Mr. W sat down at a table with other staff. Mr. G took the keys to Grievant and

handed them to her. Mr. G left Grievant and walked and sat down with Mr. W. Mr. G told Mr. W he returned the keys to Grievant.

Grievant realized she had lost the keys. She instructed her staff to look for the keys. Several employees looked for the keys in and around S Hall but the keys were not located. On August 14, 2015, Grievant called the police dispatcher and asked if any keys had been turned in to the police department. Grievant did not tell the Dispatcher that the keys were master keys to the resident buildings. On August 15, 2015, Grievant again instructed her staff to look for the missing keys.

On August 25, 2015, Grievant met with the Unit Director for their regular scheduled meeting. The Unit Director observed Grievant's keys and joked about the number of keys she had hanging from her belt. Grievant touched her keys and said that his question reminded her that she needed to tell him something. She told the Unit Director that she had lost or misplaced a set of master keys. The Unit Director explained the importance of the master keys and said they needed to begin searching for the keys immediately. The Unit Director told Grievant to notify Mr. D that the keys he had given her were missing. Grievant said she would do so and left the Unit Director's office. The Unit Director spoke with Mr. D by telephone and discussed the missing keys. Mr. D asked that police report be filed immediately. The Unit Director called Grievant by telephone and sent her an email asking that she file a report with the William and Mary Police Department. He stressed the importance of finding the keys and told Grievant every resource would be made available to do so.

On August 26, 2015 at approximately 9 a.m., the Unit Director called Grievant to see if she had filed a police report as instructed. Grievant had not filed a police report. The Unit Director told her to file the report with the police immediately. At approximately 10 a.m., Grievant filed a report with the Police Department disclosing the loss of the master keys.

On August 27, 2015 at 7:42 p.m., the Chief of Police sent an email to students informing them a set of master keys was missing and informing them of his decision to increase security personnel and patrols on Campus as a result of the loss.

Despite extensive searches through the Agency's Campus, the master keys were never located. The Agency had to re-core and re-key every door lock in every resident hall, dorm, and apartment building on Campus. The cost to make these changes exceeded \$600,000.

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.”

The Agency’s Key Control Policy for Custodial Staff provides:

2.3 The individual to whom keys are issued is personally responsible for their use until returned. Custodians shall personally sign for keys and shall **not** transfer or loan keys to other custodians, students, faculty, staff, contractors, or vendors.

2.4 Custodians must maintain strict personal control over keys and key rings at all times. Do **not** leave keys or key rings lying or hanging unattended on custodial carts.

2.7 Damaged, lost or missing keys or key rings must be reported immediately to a supervisor who will notify Campus Police, the Director of Building Services, and the Director of Operations & Maintenance. (Emphasis original).

Failure to follow policy is a Group II offense.² Grievant did not maintain strict personal control over the master keys. She did not immediately report that the keys were lost. She failed to comply with the Agency’s policy.

In certain extreme circumstances, an offense listed as a Group II Notice may constitute a Group III offense. Agencies may consider any unique impact that a particular offense has on the agency. By losing and failing to immediately recover the seven master keys, Grievant compromised the security of students and created a potential for theft from Agency buildings. For eleven days, Agency managers were unaware that the Agency’s ability to provide security for its students and buildings had been compromised. The Agency had to spend approximately \$600,000 to restore security on the Campus. The Agency’s decision to elevate the disciplinary action to a Group III Written Notice is supported by the impact on the Agency resulting from Grievant’s breach of policy. 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 did not intend to lose the keys. She expected to find the keys eventually because she had lost keys in the past and then found them later. Grievant’s arguments are not sufficient to alter the disciplinary action.

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.

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”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 III Written Notice of disciplinary action with removal is **upheld**.

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:

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:

³ Va. Code § 2.2-3005.

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.