

Issues: Group III (violation of drug/alcohol policy), Group II (disruptive behavior), Group II (unethical conduct), Group I (unsatisfactory performance), and Termination; Hearing Date: 03/31/15; Decision Issued: 04/20/15; Agency: VCU; AHO: Carl Wilson Schmidt, Esq.; Case No. 10556; Outcome: Partial Relief.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10556

Hearing Date: March 31, 2015

Decision Issued: April 20, 2015

PROCEDURAL HISTORY

On January 12, 2015, Grievant was issued a Group III Written Notice of disciplinary action for unauthorized possession and consumption of alcohol in the workplace and providing it to another employee. She received a Group II Written Notice for disruption in the workplace. She received a Group II Written Notice for unethical conduct. She received a Group I Written Notice for unsatisfactory job performance. Grievant was removed from employment effective January 13, 2015.

On February 3, 2015, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On February 16, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 31, 2015, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency Advocate
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:

Virginia Commonwealth University employed Grievant as a Grants Administrator. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant was working on a grant proposal with a submission deadline of December 19, 2014 at 5:00 p.m.

On December 19, 2014, Grievant took a bottle of whiskey to her office. She consumed some of the whisky and sent an email to other staff inviting them to come to her office and bring a cup. Ms. W went to Grievant's office. Grievant offered the whiskey to Ms. W. Ms. W refused because she did not feel comfortable consuming alcohol at work. Ms. W went to the Associate Dean's office to report the incident. Ms. W indicated she believed Grievant had also contacted Ms. P to come to Grievant's office.

Ms. P went to Grievant's office before Ms. W complained to the Associate Dean. Grievant offered her the whiskey. Ms. P felt pressure to accept the offer and poured whiskey in her cup and left with the whiskey. She did not drink the whisky but had the cup on her desk when the Associate Dean spoke with her.

The Associate Dean went to Grievant's office and sat down in a chair to speak with Grievant. The Associate Dean said that allegations had been made that she had

alcohol in her office and that the allegations were serious. He asked Grievant if she had any alcohol in her office and if she had been consuming alcohol. Grievant paused for ten to twenty seconds and then said she did not have any alcohol in her office and that she had not given any alcohol to anyone. The Associate Dean asked Grievant again if she had alcohol and again said the allegations were serious. Grievant again paused for ten or twenty seconds and said she did not have alcohol and that the Associate Dean could “look around.” The Associate Dean did not see a black bag that he had been told contained alcohol so he left Grievant’s office. He called an Employee Relations employee and reported his observation. She suggested he return to Grievant’s office and ask Grievant to open her desk drawers.

The Associate Director returned to Grievant’s office and asked Grievant if he could look in her drawers and cabinets. Grievant said “go ahead, look around.” He asked her if she had any alcohol in her office. Grievant paused and said “no.” The Associate Dean motioned to several bags in Grievant’s office and asked if she had any alcohol in the bags. Grievant paused and then pointed to a bag behind her door and said “well, in there.” The Associate Dean asked Grievant if the alcohol was located there and Grievant said “look in the bag.” The Associate Dean opened the bag and found the bottle of whiskey.

The Associate Dean told Grievant it was against VCU policy to be consuming alcohol on campus and asked if she was aware of the policy. Grievant said she was aware of the policy. He instructed Grievant to leave the building immediately. Grievant said that she was working on a grant that had to go out that day. The Associate Dean told her not to worry about the grant and that she needed to leave immediately. After Grievant left, the Associate Dean found a coffee cup on Grievant’s desk containing whiskey.

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.”

Group III Written Notice

VCU’s Drug and Alcohol Policy provides:

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

The University is committed to protecting the health, safety, and welfare of its members and the public served by the University through both policy enforcement and education. All employee and students are subject to the provision of this policy.

B. Policy Enforcement for Employees

1. Pursuant to the Commonwealth of Virginia Policy on Alcohol and Other Drugs, employees are prohibited from engaging in the following acts:

a. the unlawful or unauthorized manufacture, distribution, dispensation, possession or use of alcohol or illicit drugs in the workplace, on the University property or as part of any University activity.

4. Violation of any of the foregoing prohibitions may subject an employee to disciplinary action including, but not limited to, dismissal or suspension, in accordance with the Employee Standards of Conduct

The Agency has the discretion to determine what level of discipline to impose. Attachment A, DHRM Policy 1.60, Standards of Conduct, provides, “[f]inally, violations of Policies 1.05, Alcohol and Other Drugs, 2.30, Workplace Harassment, or 2.05, Equal Employment Opportunity, may, depending on the nature of the offense, constitute a Group I, II, or III offense.”

On December 19, 2014, Grievant possessed alcohol while at work. She offered the alcohol to other staff. The Agency 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 a lesser level of discipline would be more appropriate. Although the Agency could have issued disciplinary action without removal, the Agency’s judgment that the offenses rise to the level of a Group III offense with removal is confirmed because Grievant consumed and also offered alcohol to other staff.

Group II Written Notice for Disruptive Behavior

The Agency argued that Grievant should receive a Group II Written Notice for disruption in the workplace because she invited co-workers into her office and offered them alcohol. One employee interrupted her work duties to complain. One employee

was made to feel uncomfortable. Three other employees had to assist with finishing the grant that was due that day. Other staff had to be involved in the disciplinary progress.

The Group II Written Notice must be reversed because the Agency has not established a separate basis for taking disciplinary action. Grievant's behavior of inviting other employees to consume alcohol was already included within the facts and basis for discipline under the Group III Written Notice. The interruptions in work duties experienced by other staff were the logical result of Grievant's behavior and were not separate actions by Grievant. Grievant desired to finish her work on the grant but was prevented from doing so by the Associate Dean who asked her to leave the workplace.

Group II Written Notice for Unethical Conduct

Unethical conduct is a Group III offense.² Untruthfulness is a Group III offense because it is similar to falsification of records which is a Group III Offense. When asked whether she was in possession of alcohol, Grievant lied several times. Her actions were untruthful and unethical thereby justifying the issuance of a Group III offense. The Agency mitigated the disciplinary action to a Group II Written Notice and that action must be upheld.

Group I Written Notice for Unsatisfactory Job Performance

The Agency issued Grievant a Group I Written Notice for unsatisfactory job performance because she failed to complete and submit a grant assigned to her. There is no basis to take disciplinary action for unsatisfactory job performance. Grievant did not complete her work duties because she was instructed to leave the facility even though she expressed a desire to complete her duties. Grievant's failure to complete her duties was the consequence of being caught bringing alcohol to the workplace and has been addressed by the Group III Written Notice. Grievant did not engage in a separate act giving rise to a Group I Written Notice.

Mitigation

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-

² See, DHRM Policy 1.60(B)(2)(c).

³ Va. Code § 2.2-3005.

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 further the disciplinary action.⁴

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**. The Agency's issuance to the Grievant of a Group II Written Notice for disruptive behavior is **rescinded**. The Agency's issuance to the Grievant of a Group II Written Notice with removal for unethical conduct is **upheld**. The Agency's issuance to the Grievant of a Group I Written Notice for unsatisfactory job performance is **rescinded**.

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:

⁴ The Agency could have taken disciplinary action against Ms. P for possessing alcohol. The Agency did not take disciplinary action against Ms. P because it did not believe she consumed the alcohol. In addition, the primary reason Ms. P was in possession of alcohol was because Grievant gave it to her. Based on these facts, the Hearing Officer cannot conclude that the Agency singled out Grievant for disciplinary action. Insufficient evidence was presented for the Hearing Officer to believe that the Agency treated other employee possessing alcohol differently.

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.⁵

[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

⁵ Agencies must request and receive prior approval from EDR before filing a notice of appeal.