

Issues: Group II Written Notice (violation of drug/alcohol policy, unauthorized use of State property, and theft), and Termination (due to accumulation); Hearing Date: 08/12/14; Decision Issued: 08/14/14; Agency: NSU; AHO: Carl Wilson Schmidt, Esq.; Case No. 10407; 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: 10407

Hearing Date: August 12, 2014
Decision Issued: August 14, 2014

PROCEDURAL HISTORY

On May 21, 2014, Grievant was issued a Group II Written Notice of disciplinary action for violating safety rules, violating drug and alcohol policy, unauthorized use of State property or records, and theft. Grievant was removed from employment based on the accumulation of disciplinary action.

On June 5, 2014, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On July 8, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 12, 2014, 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:

Norfolk State University employed Grievant as a Housekeeper. He had prior active disciplinary action. He received a Group II Written Notice with a ten workday suspension on March 31, 2014.

The Agency's Building was State property. Grievant was responsible for performing work in the Building. Room 105 of the building was a storage room. The storage room was approximately 20 feet by 8 feet in size. The storage room was intended to store cleaning items including mops, wax, and cleaning equipment such as floor strippers. Personal items of employees were not normally kept in the storage room.

In the fall of 2013, Grievant was found by the Police Officer and Police Sergeant in the Building in Room 105. He told them he worked in the Building. The police officers contacted a supervisor who told them that Grievant was not supposed to be in the Building outside of work hours. The Police Sergeant instructed Grievant to leave the Building and warned him that he was not supposed to be in the Building after his work hours.

On March 10, 2014, the Manager entered the Building to inspect the work performed by Grievant. The Manager observed that Grievant had placed many of his personal items in Room 105. The Manager instructed Grievant to remove his personal items from Room 105 and told him he was not to store personal items in Room 105.

On April 14, 2014, Supervisor B gave Grievant a memorandum with the subject of "work schedule". The memorandum stated in part, "your work schedule is 3:00 p.m. until 11:30 p.m., Tuesday thru Saturday. *** If you do not adhere to your approved work schedule of 3:00 pm. until 11:30 p.m., it will result in disciplinary action."¹

On Sunday May 4, 2014, Grievant was inside the Building in room 105. While the Police Officer was conducting a building check, she observed Grievant and became suspicious because the Building was supposed to be vacant. She asked Grievant why he was in the Building and he said he was working. She observed many personal items belonging to Grievant including shoes, backpack, coat, hat, and empty food containers. Grievant had a bag inside a desk in the room. The bag contained prescription medication showing his name on the bottles.

Grievant was instructed to leave. He picked up his coat, backpack and other items and left the Building.

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."

Unauthorized use of State property is a Group II offense. Failure to follow a supervisor's instructions is a Group II offense.³ Grievant was instructed not to be in the Building after his work hours and not to store his personal items in Room 105. Grievant's work hours did not include Sunday. On Sunday May 4, 2014, Grievant was in the Building using Room 105 to store his personal items without permission and without authorization. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for unauthorized use of State Property. Grievant had prior active disciplinary action consisting of a Group II Written Notice. Upon the accumulation of two Group II Written Notices, an agency may remove an employee. Accordingly, the Agency's decision to remove Grievant must be upheld.

¹ Agency Exhibit D.

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 did not violate the Alcohol and Drug Policy and did not engage in theft. The Agency did not present a list or other description of safety rules and, thus, Grievant did not violate a safety rule.

Grievant argued that he was working at the Building. No credible evidence was presented to support this allegation. The evidence showed that Grievant had been instructed to be in the Building only during his regular work hours and that working after his regular shift required approval from his supervisor. Grievant had not been authorized by a supervisor to work beyond the hours of his regular shift. Grievant had no authority to be in the Building on May 4, 2014.

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 II Written Notice of disciplinary action is **upheld**. Grievant’s removal is **upheld** based on the accumulation of disciplinary action.

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

⁴ Va. Code § 2.2-3005.

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.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.