

Issue: Group III Written Notice with Termination (giving false statements during investigation); Hearing Date: 08/26/15; Decision Issued: 10/01/15; Agency: VCCS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10655; Outcome: Full Relief; **Attorney's Fee Addendum issued 10/21/15 awarding \$9,922.40.**



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10655

Hearing Date: September 8, 2015
Decision Issued: October 1, 2015

PROCEDURAL HISTORY

On June 30, 2015, Grievant was issued a Group III Written Notice of disciplinary action with removal for making false statements.

On July 9, 2015, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On July 28, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The Hearing began on August 26, 2015 and was held open until September 8, 2015 for the submission of closing statements.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
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:

The Virginia Community College System employed Grievant as a Trades Tech IV at one of its Colleges. No evidence of prior active disciplinary action was introduced during the hearing.

On October 3, 2014, Grievant became the Acting Manager of his unit. His relationship as a peer of Ms. V changed to supervising Ms. V. Ms. V had problems with regular attendance when she worked for the prior supervisor. Her attendance worsened when she began reporting to Grievant. On October 31, 2014, Grievant issued Ms. V a Group I Written Notice for her unsatisfactory attendance.

Grievant counseled Ms. V because she had "cussed out" several people. Ms. V told him she had bipolar disorder and was not always taking her medication.

On December 4, 2014, Ms. V left the worksite for several lengthy periods of time. When Grievant confronted her, Ms. V became disrespectful and threatening. In the morning of December 5, 2014, Ms. V was angry with Grievant and threw a mirror owned by the College at Grievant. The mirror hit the floor near Grievant. On December 5, 2014, Grievant reported Ms. V's behavior to College administrators. Ms. V was placed on paid administrative leave and the College began an investigation.

On December 8, 2014, Ms. M and Ms. L interviewed Grievant about the incident. They asked Grievant about his relationship with Ms. V. Grievant was asked:

Q: Please describe your interaction with [Ms. V] prior to this incident?

Grievant described his interaction with Ms. V as “volatile.” He would not say that they were friends. Grievant was asked:

Q: Please explain [Ms. V’s] email where she stated that she would no longer allow you to touch her hair or give her a massage?

Grievant answered that Ms. V would ask the entire team to touch her hair or give her a massage. He had done it before and after he became a manager. Grievant told the investigators he no longer felt comfortable working with Ms. V. He stated that Ms. V had written on her social media page that Grievant had fired her. He said that other people were asking him and his Wife, who was also a College employee, why they fired Ms. V.

On December 12, 2014, Ms. L and Ms. M met with Ms. V to ask her questions about her interaction with Grievant. Ms. V said she told Grievant to stop touching her and that she never wanted to be touched. She claimed Grievant did not stop touching her. He had touched her bottom, grabbed her shirt and breasts and touched her each day. She claimed Grievant showed her “dirty pictures of him and his wife as well as pictures of breasts of employees.” She claimed she had seen his “penis, c-m, and his wife’s a— (all in pictures)” The pictures were on Grievant’s cell phone according to Ms. V. Ms. L and Ms. M did not share with Grievant the details of Ms. V’s allegations.

On December 15, 2014, Grievant wrote about Ms. V, “I would not say that our interactions were always volatile. I have always maintained my cool & a level of professionalism with [Ms. V]. [Ms. V] herself if extremely volatile. It is a delicate situation in dealing with her as she could go off at any moment for any reason. *** There have been times when [Ms. V] would come into my area and would not leave my area unless I touched her newly straightened hair. I fully understand the seriousness of this statement and would like to reiterate the fact that I have NEVER touched anyone for any reason without being asked to do so.”¹

On January 14, 2015, Ms. L and Ms. M interviewed Grievant and asked him, “Do you recall sharing with [Ms. V] any inappropriate pictures?” Grievant replied that he did not share inappropriate pictures with Ms. V. College investigators learned that Grievant had a personal cell phone and not one issued by the College. They elected not to ask Grievant to show them the pictures on his cell phone.

On January 27, 2015, Ms. L and Ms. M issued their report on the investigation regarding December 5, 2014 incident. The report also addressed Ms. V’s allegations of sexual harassment by Grievant and concluded that the allegations were unsubstantiated. The investigators concluded, “[w]hile [Grievant] acknowledges the fact that he has touched [Ms. V’s] hair and massaged her shoulders, the investigation team

¹ Agency Exhibit 4.

included that this conduct was not unwelcome. Other employees from the same department also confirmed that, on occasion, [Ms. V] will ask them to comment on her appearance, to touch her hair and massage her shoulders. However, we agree that as a supervisor, [Grievant] could have exercised better judgment and refrain[ed] from this type of physical contact to avoid any possible misunderstanding.”² This report was not shared with Grievant.

On February 19, 2015, the HR Director spoke with Grievant by telephone and asked if there was anything else HR needed to know in defending against the allegations of sexual harassment brought my Ms. V. Grievant replied, “[n]o, I have told you everything.”³

On March 11, 2015, Ms. V filed a grievance in which she repeated her allegations of sexual harassment by Grievant. On March 11, 2015, the Deputy Coordinator sent Grievant an email asking:

What was the nature of your personal relationship with [Ms. V]? How long have you known her?

What is your response to allegations that you made sexual advances towards [Ms. V]?

Did you ever share with [Ms. V] content that would be deemed inappropriate and compromising in the workplace, including text messages, sexts, pictures, etc.?⁴

Grievant replied:

[Ms. V] and I were close co-worker[s] at one point years ago, but due to her fluctuation in personality & erratic behavior when she blocked me from [social media website] I never accepted her attempts to re-friend request me. I would say our personal relationship was shaky at best, I have cardinal knowledge of how bad she spoke of me and my wife when not in my presence and I addressed it with her with the simple fact that I could care less what she thought of me or my wife because I knew her personality was to degrade everyone around her in some fashion. I only met with [Ms. V] when she came to work at the medical campus so I would say 6 – 6.5 years. My response to her allegations of me making sexual advances, inappropriate text or sexts are [utterly] not true [and] with no merit.

² Agency Exhibit 7.

³ Grievant testified that the HR Director asked him if he had photos of him and his wife. He said he had photos of him and his wife. Grievant’s response was truthful.

⁴ Agency Exhibit 9.

I [personally] had given [Ms. V] a shoulder massage at her request to do so. [Ms. V] would touch any one at any point with the exception of [Mr. W] because there was no fear of someone saying that you try to make [advances] toward them. Yes, [Ms. V] had asked me to touch her newly straightened hair. Yes, [Ms. V] would on occasions ask me to rub her shoulders. I never came to [Ms. V] and asked her to touch her hair or rub her shoulders at any point, it was always at her request. Before I became the [acting supervisor] [Ms. V] would frequently daily come to my workstation and talk like a sailor. She would talk about just shaving her private area and how bad it now itched while [scratching]. She would invade my personal space by leaning over me to point where she would be touching me and laugh and say oh you don't care nothing bothers you. To me she has always been very unprofessional and unladylike.

On April 2, 2015, the Police Investigator interviewed Grievant while conducting a follow-up investigation to determine whether or not Ms. V had stolen or destroyed State property in connection with her termination. In the course of his interview, he asked Grievant if there is any way Ms. V would be able to produce any "sexual related documentation (photos or videos) for the upcoming hearing that would be included or involved in." Grievant initially stated "no." The police Investigator advised "that is good because it would have been extremely embarrassing or damaging for [Ms. V] to be able to produce those items for the hearing." This statement caused Grievant to sit back and think for a few moments. Grievant said that Ms. V might be able to produce photos. He explained that he had uploaded photos of himself and his wife to a "swingers" website. He explained further that he had shared information about this website with Ms. V's boyfriend, his lifelong friend, and that the Boyfriend may have been able to access the explicit material. Grievant indicated that he had shut down his access and account to that website long before he took the acting supervisor position. The Police Investigator later wrote, "[Grievant] then attempted to log into his account on the website via his phone and met with negative results since his account had been deactivated for so long." Grievant indicated that he had only uploaded around 15 photos.

After a break in the interview, Grievant return to the Police Investigator's office and said he had additional information. He then showed the Police Investigator his cell phone with a close-up photo of a penis entering a vagina. Grievant explained that he was forgetful with his phone and often left it on his desk unattended. His phone was not password-protected. The Police Investigator asked how many additional photos or videos would [Ms. V] have access to. The Police Investigator wrote in his report, "[Grievant] advised by picking up his phone closing out the picture and then scrolling fast through his phone of individual emails accessible via his phone which she indicated contains sexually explicit material. [The Police Investigator] estimated that he observed no less than 50 individual emails that [Grievant] had scrolled past prior to turning the phone away from out of the view of [the Police Investigator]. Grievant said that several times he and Ms. V played jokes on each other. They left their social media webpages open on their computers. They would post messages on each other's social media webpage profiles pretending to be the other individual.

Ms. V's grievance hearing was held on April 23, 2015. Ms. V did not present copies of any sexual explicit pictures as evidence.

Following Ms. V's grievance hearing, the College's HR Business Partner, Ms. F, conducted an investigation into allegations arising during the hearing. Allegations were made that Grievant showed Mr. W and Mr. A pictures that could be deemed inappropriate for the work place due to sexual content. Ms. F concluded:

[Grievant] did not show [Mr. A] pictures that could be deemed inappropriate for the workplace.

[Grievant] may have shown [Mr. W] a picture that could be deemed inappropriate for the workplace. [Mr. W] only briefly observed the picture from a distance. He was unable to attest to whether the picture had sexual content. Consequently, it cannot be determined if the picture was truly inappropriate for the workplace.⁵

CONCLUSIONS OF POLICY

The College's conclusions that Grievant was untruthful during its investigation rests on a comparison of Grievant's statements made to investigators on December 8, 2014, December 15, 2014, January 14, 2015, February 19, 2015, with Grievant's statements made to the Police Investigator on April 2, 2015 and Grievant's subsequent statements. The College asserts that Grievant was consistently asked the same or similar questions by College investigators and only revealed the truth to a College Police Investigator on April 2, 2015. The College concluded that Grievant's answers prior to April 2, 2015 were untruthful.

On June 15, 2015, the Agency presented Grievant with an Intent to Issue a Group III Written Notice with termination. In that document, the Agency alleged Grievant was asked four questions:

1. If you were in possession of naked photos of other employees at the college.
2. If you had ever shown explicit photos to other employees, specifically [Ms. V].
3. If you had any relationship with [Ms. V] outside of work (i.e. friends, significant other).
4. If you had any knowledge or evidence of anything that [Ms. V] alleged in her sexual harassment complaint.

⁵ Grievant Exhibit 18.

None of these questions (as written) were asked of Grievant.⁶

Question 1. Prior to April 2, 2015, Grievant was not asked if he was in possession of naked photos of other employees. On January 14, 2015, Grievant was asked, “Do you recall sharing with [Ms. V] any inappropriate pictures?” On March 11, 2015, Grievant was asked if he “share[d] with [Ms. V] content that would be deemed inappropriate and compromising in the workplace, including text messages, sexts, pictures, etc.?” Sharing pictures is different from possessing pictures. Prior to April 2, 2015, Grievant was not asked if he possessed naked photos of other employees.⁷ The College has not established that Grievant answered this question untruthfully.

Question 2. Grievant was asked if he recalled sharing with Ms. V any inappropriate pictures. Grievant was asked if shared with Ms. V “content that would be deemed inappropriate and compromising in the workplace, including text messages, sexts, pictures, etc.?” It is not clear that the College investigators asked if Grievant had shared sexually explicit pictures with anyone other than Ms. V.

Ms. V did not testify at the hearing. The College did not establish that Grievant had “shared” any inappropriate pictures with Ms. V. Grievant has not admitted to sharing any inappropriate pictures with Ms. V. The College has not established that Grievant showed sexually explicit photos to Ms. V or other employees. The fact that it may have been possible for Ms. V to have seen sexually explicit pictures on Grievant’s phone or through a website in 2012 does not mean he made a decision to share the photos with her.

Question 3. Grievant was asked about his “interaction” with Ms. V prior to the incident. He was asked if his relationship changed when he became the acting manager. Grievant was asked, “What was the nature of your personal relationship with [Ms. V]? How long have you known her?”

⁶ In some instances, the College claimed that the questions were asked verbally of Grievant by the investigators including the former HR Director. The former HR Director did not testify. The investigator’s notes did not always reflect the precise questions they asked of Grievant. The written questions asked of Grievant were not the same as the questions to which the College claimed Grievant was untruthful. It is difficult for the Hearing Officer to simply “take the word” of the College that the questions were asked as claimed when the precise wording of each question is key to determining whether Grievant was untruthful.

⁷ In any event, the College has not established that Grievant was in possession of sexually explicit pictures prior to April 2, 2015. Grievant testified that in 2012 he used his previous cell phone to take sexually explicit pictures and then posted them to a “swingers” website. He removed the pictures from his cell phone. He deactivated his account with the website. During questioning by the Police Investigator about the possibility Ms. V may have sexually explicit pictures, Grievant recovered the password to the website and accessed the pictures on his new cell phone. He then showed the pictures to the Police Investigator. The College investigators had the opportunity to ask Grievant to show them the pictures on his cell phone but they elected not to do so because the phone was not the College’s property. Only after retrieving the pictures from the website in April 2015 was Grievant in possession of sexually explicit pictures.

The Agency has not established that Grievant was untruthful about any material aspect of his relationship with Ms. V. Grievant disclosed that his current relationship with Ms. V was volatile and that he did not consider her a friend. He said that they were close co-workers at one point years ago. Grievant said he and Ms. V had been friends on a social media website but he declined to continue that relationship. He admitted to touching her hair and giving her a massage at her request. The College's questions did not focus on Grievant's relationship with Ms. V outside of work. It is not clear that he was asked prior to April 2, 2015, about his relationship with Ms. V outside of work.

Question 4. Grievant was not shown Ms. V's sexual harassment complaint. Grievant was not informed of the specific allegations Ms. V made during her interview with College investigators on December 8, 2014. Grievant was shown Ms. V's grievance challenging the written notice she received. In her grievance, Ms. V alleged she was a victim of sexual and racial harassment caused by Grievant. She claimed Grievant made inappropriate remarks, touched her inappropriately, and created a hostile work environment. She claimed Grievant invaded her personal space. She did not allege she had seen "dirty pictures of him and his wife as well as pictures of breasts of employees." The College cannot discipline Grievant for failing to respond to details of Ms. V's sexual harassment complaint that had not been told to Grievant. Questions such as "is there was anything else HR needed to know" involved judgment and speculation on Grievant's part as to how the College intended to defend the sexual harassment claim.

In conclusion, the Hearing Officer cannot conclude that Grievant was untruthful to the College's investigators as alleged. There is no basis for disciplinary action.

Attorney's Fees

The Virginia General Assembly enacted *Va. Code § 2.2-3005.1(A)* providing, "In grievances challenging discharge, if the hearing officer finds that the employee has substantially prevailed on the merits of the grievance, the employee shall be entitled to recover reasonable attorneys' fees, unless special circumstances would make an award unjust." Grievant has substantially prevailed on the merits of the grievance because he is to be reinstated. There are no special circumstances making an award of attorney's fees unjust. Accordingly, Grievant's attorney is advised to submit an attorneys' fee petition to the Hearing Officer within 15 days of this Decision. The petition should be in accordance with the EDR Director's *Rules for Conducting Grievance Hearings*.

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 **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:

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.⁸

[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

⁸ Agencies must request and receive prior approval from EDR before filing a notice of appeal.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

ADDENDUM TO DECISION OF HEARING OFFICER

In re:

Case No: 10655-A

Addendum Issued: October 21, 2015

DISCUSSION

The grievance statute provides that for those issues qualified for a hearing, the Hearing Officer may order relief including reasonable attorneys' fees in grievances challenging discharge if the Hearing Officer finds that the employee "substantially prevailed" on the merits of the grievance, unless special circumstances would make an award unjust.⁹ For an employee to "substantially prevail" in a discharge grievance, the Hearing Officer's decision must contain an order that the agency reinstate the employee to his or her former (or an objectively similar) position.¹⁰

To determine whether attorney's fees are reasonable, the Hearing Officer considers the time and effort expended by the attorney, the nature of the services rendered, the complexity of the services, the value of the services to the client, the results obtained, whether the fees incurred were consistent with those generally charged for similar services, and whether the services were necessary and appropriate.

Grievant's attorney devoted 62.8 hours to representing Grievant and obtaining his reinstatement. The hourly rate permitted by EDR for attorneys in Grievant's location is \$158. Accordingly, the Hearing officer will award Grievant \$9,922.40.

AWARD

Grievant is **awarded** attorney's fees in the amount of \$9,922.40.

⁹ Va. Code § 2.2-3005.1(A).

¹⁰ § 7.2(e) Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004. § VI(D) *EDR Rules for Conducting Grievance Hearings*, effective August 30, 2004.

APPEAL RIGHTS

If neither party petitions the DHRM Director for a ruling on the propriety of the fees addendum within 10 calendar days of its issuance, the hearing decision and its fees addendum may be appealed to the Circuit Court as a final hearing decision. Once the DHRM Director issues a ruling on the propriety of the fees addendum, and if ordered by DHRM, the hearing officer has issued a revised fees addendum, the original hearing decision becomes “final” as described in §VII(B) of the *Rules* and may be appealed to the Circuit Court in accordance with §VII(C) of the *Rules* and §7.3(a) of the *Grievance Procedure Manual*. The fees addendum shall be considered part of the final decision. Final hearing decisions are not enforceable until the conclusion of any judicial appeals.

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer