



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11607

Hearing Date: January 22, 2021
Decision Issued: February 11, 2021

PROCEDURAL HISTORY

On September 1, 2020, Grievant was issued a Group III Written Notice of disciplinary action with removal for violation of safety rules and falsifying records. On September 1, 2020, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow policy.

On September 28, 2020, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On October 13, 2020, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 22, 2021, a hearing was held by remote conference.

APPEARANCES

Grievant
University Counsel
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notices?

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. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. 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:

Longwood University employed Grievant as a Safety Officer. He had been employed by the University for approximately 18 years. No evidence of prior active disciplinary action was introduced during the hearing.

As a Safety Officer, Grievant was responsible for maintaining the safety of labs and equipment. He helped train students on how to use the University's equipment.

The University had eyewash stations available to students and faculty who might be using harsh or dangerous chemicals. If employees or students had chemicals splash into their eyes, they could pull a lever on the eyewash station to flush the chemicals out of their eyes. The eyewash stations were important safety equipment for the University. The University had over 10 eyewash stations.

Grievant was responsible for inspecting eyewash stations. He was to enter the date of his inspection on a tag attached to each eyewash station. He was to write his initials each time he completed an inspection.

The University received chemicals in containers for use by students and faculty. When Grievant received chemicals, he was supposed to label the containers and record information about the chemicals in the University's electronic database inventory.

In September 2019, Mr. L notified University managers that Grievant was not entering information about purchased chemicals into the University's database.

Between September and November 2019, the Manager developed a Chemical Inventory Policy. Faculty and staff including Grievant were informed of the policy.

In March 2020, Mr. L notified the Manager of problems with the chemical inventory administered by Grievant. Mr. L told the Manager that Grievant was not following the policy and was falsifying records. The Manager instructed Mr. L to meet with Grievant so that Grievant could be re-trained on the policy.

On March 10, 2020, Mr. L and Mr. H met with Grievant to discuss the policy. Grievant was trained to conduct inspections on a monthly basis and to record the inspections on the date of the inspection. Mr. L stressed to Grievant the importance of entering the date and his initials at the time of his inspection. He was to enter this information on each Emergency Eyewash and Shower Test Record tag. Mr. L told Grievant the tag was the only auditable proof that he had completed the task.

On March 12, 2020, the University asked its students to leave the campus because of the coronavirus pandemic. University employees including Grievant retained access to University facilities. Grievant continued to report to work several times per week. Some faculty and staff continued to use the studios where the University had eyewash stations in the event of an emergency.

Mr. O conducted an inspection and audit of Grievant's work areas on July 29, 2020. Mr. O notified the Manager of his findings. On August 3, 2020, the Manager provided Grievant with a copy of Mr. O's notes and instructed Grievant to correct the deficiencies and record his findings. The Manager asked Grievant to complete the assignment by August 17, 2020. Grievant did not complete the assignment.

On July 29, 2020, Mr. O took a picture of the record of inspection for an eyewash station. The picture showed Grievant had last inspected one of the eyewash stations on February 25, 2020. On August 12, 2020, Mr. O took another picture of the record of inspection for that eyewash station. This picture showed that Grievant had filled in the record of inspection to show that he had inspected the eyewash station in March, April, May, June, July, and August 2020.

The July 29, 2020 inspection showed that Grievant was not entering information about materials into the database, materials were not being disposed of properly, and inspections of safety equipment was not being done. Grievant had not placed labels on several containers of materials. Without labels, information about the materials could not be entered into the computer system. Some of the materials had been in the receiving

room since February 2020 without being entered into the inventory. These items were supposed to be entered within one day of receipt.

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 II Written Notice

Failure to follow policy or instructions is a Group II offense.² The University’s Chemical Safety Inventory Policy provided, “chemicals will be segregated and logged in upon arrival.”³ Grievant was responsible for completing this task. An audit conducted on July 29, 2020 showed that Grievant had not timely entered chemicals into the system for a significant period of time. On March 10, 2020, Grievant was instructed to inspect eyewash stations on a monthly basis and to record his inspection on the date of inspection. The July 29, 2020 audit showed Grievant was not inspecting eyewash stations on a monthly basis. The University has presented sufficient evidence to support the issuance of a Group II Written Notice.

Group III Written Notice

“[F]alsification of records” is a Group III offense.⁴ Falsification is not defined by the Standards of Conduct but the Hearing Officer interprets this provision to require proof of an intent to falsify by the employee in order for the falsification to rise to the level justifying termination. This interpretation is less rigorous but is consistent with the definition of “Falsify” found in Blacks Law Dictionary (6th Edition) as follows:

Falsify. To counterfeit or forge; to make something false; to give a false appearance to anything. To make false by mutilation, alteration, or addition; to tamper with, as to falsify a record or document. ***

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.

³ University Exhibit 6.

⁴ See, Attachment A, DHRM Policy 1.60.

The Hearing Officer's interpretation is also consistent with the New Webster's Dictionary and Thesaurus which defines "falsify" as:

to alter with intent to defraud, *to falsify accounts* || to misrepresent, *to falsify an issue* || to pervert, *to falsify the course of justice*.

On March 10, 2020, Grievant was instructed to write on a tag attached to an eyewash station the date he inspected the eyewash station. He was to sign his initials next to the date of his inspection. He was told the tag was the only auditable proof he had completed the inspection. Grievant did not inspect all of the eyewashes on a monthly basis as required. A July 29, 2020 inspection revealed several eyewash inspection record tags without entries for March through July 2020. After Grievant was informed he had not properly inspected the eyewash stations, he went to the eyewash stations and back-dated the tags by writing that he had conducted inspections in March, April, May, June, and July even though he had not inspected the stations in those months and contemporaneously written the dates of inspection as required. The result of his action was to make it appear falsely that he had completely timely inspections of the eyewash stations even though he had not completed such inspections. At the time Grievant was back-dating the tags, he knew or should have known that he had not completed timely inspections. The University has presented sufficient evidence to support the issuance of a Group III Written Notice for falsifying records. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

Grievant argued he had conducted the inspections and written in a separate journal the dates he conducted those inspections. The evidence did not support this assertion.

Grievant argued the disciplinary action given to him was too harsh. He had no prior disciplinary action. The University's discipline is consistent with the Standards of Conduct. Although the University may do so, it is not required to engage in progressive disciplinary action.

Grievant argued he was working in a hostile work environment. Grievant did not present sufficient evidence to support this assertion.

Grievant argued he was not given adequate procedural due process by the University. The University presented evidence that the HR Officer met with Grievant on August 31, 2020 and showed Grievant the two proposed written notices. She asked Grievant to provide her with any information he wished by September 1, 2020 for the University to consider before issuing the disciplinary actions. They met again on September 1, 2020 and Grievant signed the two written notices. The University provided Grievant with adequate notice of the allegations against him. He had an adequate opportunity to present to the Hearing Officer any defenses he could have raised with the University.

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”⁵ 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 University’s issuance to the Grievant of a Group II Written Notice of disciplinary action is **upheld**. The University’s issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is **upheld**.

APPEAL RIGHTS

You may request an administrative review by EDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EDR within 15 calendar days of the date the decision was issued.

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 must also provide a copy of your appeal to the other party 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.

⁵ Va. Code § 2.2-3005.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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.^[1]

[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

^[1] Agencies must request and receive prior approval from EDR before filing a notice of appeal.