

COMMONWEALTH OF VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution

DECISION OF HEARING OFFICER

In re: George Mason University

Case Number: 12180

Hearing Date: Dec. 10, 2024

Written Closing Argument: Jan.8, 2025

Decision Issued: February 24, 2025

PROCEDURAL HISTORY

George Mason University (hereafter GMU or the Agency) terminated Grievant's employment effective September 9, 2024, for use, impairment and possession of alcohol at work on August 30, 2024, in violation of various agency and state alcohol policies prohibiting alcohol possession, use or impairment in the workplace. At the time of termination, Grievant had approximately 5 years of service with the Agency and no record of discipline. (Written Notice, Grievant's exhibit 704, Agency Ex. 4)

APPEARANCES

Representation by:

■■■■■ advocate for Grievant

■■■■■ Attorney for the Agency

Witnesses:

Six (6) witnesses for the Agency

Grievant's advocate called no independent witnesses and presented Grievant's case through cross examination of the agency's witnesses

Grievant was present but did not testify

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?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, aggravating circumstances existed that would overcome the mitigating circumstances?

EXHIBITS

The Agency submitted a three-ring binder containing 10 exhibits numerically tabbed. Grievant submitted 41 exhibits, numbered 701 to 751, in individual file folders.¹

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its decision to terminate Grievant's 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. Grievant has the burden of raising and establishing any affirmative defenses to the discipline and any evidence of mitigating circumstances related to the discipline. (GPM § 5.9)

For the reasons that follow, I find that the Agency has met its burden of proof that on August 30, 2024, Grievant possessed and used alcohol at work and was impaired from such use. Conversely, I find that Grievant has not met her burden of proof that the agency discharged her in retaliation for blowing the

¹ In order to review the documents to draft this decision, the Hearing Officer placed the exhibits in a three-ring binder.

whistle on her supervisor for disclosing the classroom computer passcode for faculty in an email she sent, in the ordinary course of business, to Grievant on August 23, 2024. (Grievant's Ex. 701)

FINDINGS OF FACT

After carefully reviewing the evidence presented and observing the demeanor of each witness that testified, the Hearing Officer makes the following findings of fact.²

As of September 9, 2024 , when she was fired, Grievant was an administrative assistant at GMU's College of Visual and Performance Art. (CVPA). Grievant's desk was in an open area. Her first level supervisor was in an adjacent office. According to her supervisor, Grievant was the face of the section so it was very important that she projected a professional image.

All witnesses, including Grievant's supervisors testified that they had a positive working relationship with Grievant. Nevertheless, Grievant's own document revealed that she hoped her supervisor "would resign" and "Coworkers don't like her management style." (Grievant's Ex. 711 at p.4)

Based on the witnesses' demeanor and testimony, the Hearing Officer finds that the witnesses harbored no ill will or animosity toward the grievant.

On August 24, 2024, Grievant's supervisor sent an email to her that included the password to access faculty computer stations in classrooms which are used by the faculty to operate the audio-visual systems in the classroom.

The agency acknowledged that sharing the password was a violation of IT security best practices. The supervisor testified that she self-reported the breach. That testimony was not rebutted.

² The Hearing Officer read every exhibit and listened to the entire audio recording of the hearing prior to drafting his opinion.

Several witness testified that prior to this breach a faculty member shared the same password by writing it on a chalkboard in a classroom which would have necessitated changing the password regardless of the supervisor sharing the password by email.

The breach that is the subject of this case was deemed to be minor and caused no significant damage to GMU. Indeed, Grievant's own exhibit confirms that the breach was minor. (Grievant's Ex. 711) That exhibit reveals text messages exchanged between Grievant and the Director of Cyber Security, CVPA between August 23rd to September 1st, 2024. In one exchange on August 27, 2024, the cyber security director told Grievant that "We need to change the password on Friday anyway". Id. at 2nd page of the exhibit)

Despite the assurances of the Cyber Security Director, Grievant, continued to speculate that the breach was a costly mistake. She has offered no proof to support her belief. And by not testifying, or calling the Director, to testify, Grievant avoided the rigors of cross examination³ to bolster her belief that the breach was significant and costly.

On August 30, 2024, Grievant was at her workstation. The area was essentially deserted as it was the Friday before Labor Day and workers and visitors who would normally frequent the location had taken the long weekend off. Grievant's first level supervisor was in her office meeting with an employee who suggested that she check Grievant's work area.⁴ She did and determined that Grievant reeked of alcohol and was possibly impaired.

Grievant's supervisors, joined by an Employee Relations Specialist, interviewed Grievant. They all testified that there was a strong odor of alcohol coming from Grievant, her face was red and several identified that her hands were shaking. Two of them who regularly interacted with Grievant testified that her behavior was unusual and different from her normal behavior. This included

³ The Hearing Officer does not question Grievant's right to not testify.

⁴ The parties dispute whether the employee informed Grievant's supervisor that he smelled alcohol in Grievant's work area. The dispute is of no moment because the Grievant's supervisor went immediately to the work area and observed Grievant's demeanor and recognized the strong smell of alcohol. Moreover, her supervisor testified that the clear implication from the heads up was that the employee had smelled alcohol in Grievant's work area.

not engaging in conversation with them and the manner in which she was sitting at her desk and during the meeting. This evidence was not rebutted by Grievant because she did not testify and otherwise did not offer rebuttal evidence.

At the meeting, Grievant stated "I don't know who you people are," referring to the Human Resource individual and the Director of the School of Art, both of whom she had interacted with before. The Director worked in the same office as her. In addition, Grievant abruptly got up and left the meeting and then the office signaling her intention to go home even though the workday had not ended which was unusual and not consistent with her normal behavior or her work responsibilities. This evidence was not rebutted.

In the interest of public safety for other road users, people on campus, and Grievant herself, the Human Resource participant, as is routine in the circumstances presented called GMU Police Department for assistance. The Assistant Chief of Police (hereafter the officer) interviewed Grievant as she was sitting in her car that was parked on campus with her keys in her hand getting ready to drive off of GMU's campus.

The officer persuaded Grievant to get out of the car and she interviewed her. The officer testified to her interactions with Grievant and how based on her training as a police officer she assessed that Grievant was impaired. This included her observations of Grievant's demeanor and appearance, including her eyes being blood shot, and pupils constricted, and her behavior and a strong smell of liquor.

The officer testified that she administered a breath test to Grievant. She explained that Grievant gave a partial sample which resulted in a BAC of .058. Based on this reading and her observations, she concluded that Grievant was impaired due to consumption of alcohol and could not drive her car home.

The officer testified that given her observations; she determined that she had sufficient basis to arrest Grievant for being drunk in public. She did not do so because she persuaded Grievant to take an Uber taxi.

The officer testified that she subsequently found a brown liquid in a mug on Grievant's desk, which she identified as hard alcohol based on the smell. She also testified that another officer smelled the liquid and confirmed that it was alcohol (he believed it to be Captain Morgan's Spiced Rum). (See, Agency Ex. 4) The officer secured the evidence and maintained the chain of custody. The liquid was entered into evidence at the hearing.⁵

Grievant was not charged criminally. The matter was handled administratively. The officer wrote up the violation in an incident report and referral to GMU's Employee Relations. (Agency Ex. 4,5)

GMU also presented evidence that Grievant made inconsistent statements regarding her consumption of alcohol, which both suggests impairment on the day in question and undermines her credibility. Grievant told the officer that she did not drink, then she changed her statement to she did not drink that day, and then later admitted to having a glass of wine at lunch. (Agency Ex. 3,4) Grievant's lack of candor about her consumption of alcohol continued after the incident, including in an email sent on October 23, 2024 to the Hearing Officer and others stating that she "had not recreationally consumed alcohol" on the day in question. (Agency EX. 9) This statement is contrary to her own admission to having a glass of wine with lunch on the day in question.

Based on the totality of the evidence, the Hearing Officer finds that Grievant was impaired and was in possession of alcohol in the workplace on August 30, 2024, as charged in the Group 111 Notice.

Grievant was aware of policies prohibiting the use or possession of alcohol or impairment from such use and violation of the policies may result in discharge. (See GMU's Policy 2219, Agency Ex. 2; DHRM Policy 1.05 (GMU Ex. 1) The evidence clearly demonstrates that Grievant was notified of the policies when she began working at GMU and reminded of GMU's policy on May 3, 2024. (See. GMU exhibits 8, 10)

⁵ The written notice erroneously states that "The content was tested, and it was confirmed to be alcohol in the mug". That statement was not supported by evidence. The evidence presented confirms that alcohol was determined primarily by smell.

Grievant was provided her applicable due process notice of the charge she faced and the possibility of discharge. Agency witnesses testified that Grievant never provided any reasons to mitigate the charge. Instead, she contended, as she did at the hearing, that she was fired for complaining that her supervisor disclosed the password to access faculty computer stations in classrooms in an email to Grievant and other employees. Her arguments did not persuade management to mitigate the proposed discharge, and the Group Notice was issued.

The Hearing Officer finds that the Agency personnel acted in accordance with the alcohol abuse policies discussed in this decision.

ANALYSIS AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging, and training state employees. It also provides for a grievance procedure. The Act balances the need for the orderly administration of state employees and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989)

Code § 2.2-3000 (A) sets forth the Commonwealth's grievance procedure and provides in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints.... To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

“In disciplinary actions, the agency must present its evidence first and show by a **preponderance of evidence** that the disciplinary action was warranted and appropriate under the circumstances. Grievance Procedure Manual. **The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline** (GPM) § 5.8.

APPLICABLE POLICIES

According to the Written Notice, GMU discharged Grievant for violating Department of Human Resources (DHRM) Policy 1.60, Standards of Conduct, DHRM Policy 1.05, Alcohol and Other Drugs, and University Policy 2219, Employee Drug and Alcohol Policy. (Agency Ex. 7).

DHRM Policy 1.60 “sets forth the Commonwealth’s Standards of Conduct and the disciplinary process that agencies must utilize to address unacceptable behavior, conduct, and related employment problems in the workplace, or outside the workplace when conduct impacts an employee’s ability to do his/her job and/or influences the agency’s overall effectiveness.” (Grievant’s Ex. 734) When an employee’s conduct “is of an especially serious nature, a first offense may warrant significant discipline, including termination” (Id. at p.3) Prior to taking discipline “management must consider” appropriate enumerated factors including the following:

- **Whether the ...disciplinary action is consistent with state and agency standards of conduct.**
- **The nature, severity, and consequences of the offense.**
- **Whether the offense constitutes a violation of a policy, procedure, rule, or law**
- **Previous counselling, whether verbal or written, that addressed the same or similar misconduct.**
- **Whether the offense relates to the employee’s job duties and the employee’s ability to perform satisfactorily.**

- **How issues with similarly situated employees have been addressed.**
- **Mitigating factors that compel a reduction in the disciplinary action to promote the interests of fairness, equity and objectivity**

Expectations for supervisors and managers include, but are not limited to:

- **Seek guidance from Human Resources prior to administering disciplinary actions or removing employees from the workplace.** (Id. at p. 5)

Expectations for employees include at the very least:

- **Report to work as scheduled and seek approval from the supervisor, in advance for any changes to the established work schedule, including the use of leave and late or early arrivals and departure.**
- **Comply with the letter and spirit of all state and agency policies and procedures ... and Commonwealth of Virginia laws and regulations.** (Id)

To assist management in the assessment of the appropriate action, offenses are organized into three groups (Group I, Group II, and Group III) according to the severity of the misconduct or behavior. It is a severe infraction when any employee uses alcohol in their workspace on campus, stores alcohol in a mug on their desk, and is inebriated. which would warrant a Group III penalty of discharge.

DHRM Policy 1.05 (Agency Ex. 1) prohibits the unauthorized possession or use of alcohol in the workplace and being impaired in the workplace. The purpose of the policy is **“to establish and maintain a work environment free from the adverse effects of alcohol... that could undermine the productivity of the Commonwealth’s workforce and could create a serious threat to the welfare and safety of fellow employees and to Virginia’s citizens”.**

Violations of the policy include:

- **Use or possession of alcohol ... in the workplace.**
- **Impairment in the workplace from the use of alcohol ...**

Consequences of policy violations include the following:

- **Employees are encouraged to seek help for alcohol ... problems. However, any employee who commits any violation , as described in the section above, shall be subject to the full range of disciplinary action, including discharge.**
- **The severity of disciplinary action for violations of this policy shall be determined on a case-by-case basis.**
- **Mitigating circumstances may be considered in determining the appropriate discipline including whether the employee voluntarily admits to, or seeks assistance for, an alcohol ... problem.**

DHRM Policy 1.05 at p. 3)

GMU Policy 2219 (Agency Ex. 2) also “prohibits unauthorized ... possession, and use of alcohol ... in the workplace. The policy also prohibits the impairment of an employee in the workplace due to the use of alcohol...” The policy clearly states that each of the following constitutes a violation of the policy:

- **The unlawful or unauthorized ... possession or use of alcohol ... in the workplace.**
- **Impairment in the workplace from the use of alcohol ...**

“Supervisors must report and document any incident relating to the possible abuse of alcohol ... to the Director of Employee Relations, Human Resources and Payroll...” The policy holds supervisors accountable for promptly responding to policy violations. The Policy states that “any supervisor who knowingly disregards the requirements of this policy, or who is found to have deliberately misused the policy in regard to subordinates, shall be subject to disciplinary action, up to and including discharge.”

Grievant Engaged in the conduct described in the Written Notice

The Findings of Fact that are carefully articulated above demonstrate that Grievant possessed and used alcohol in the workplace on October 30, 2024. The findings of fact also demonstrate that Grievant was impaired from such use on that day. This conclusion is supported by evidence in the record especially the testimony of the police officer who is experienced and received training to recognize and assess impairment. (See Agency's written closing argument at fn. 1 at p. 5).

Grievant's denial that she used alcohol, then admitted in the same interview that she had a glass of wine at lunch that day and later stating that she did not use alcohol recreationally that day significantly impairs her credibility regarding her use of alcohol. Grievant offered no evidence to bolster her credibility. She did not testify herself or called any witness to support her changing explanations. Nor did she deny that the liquid found in her mug was alcohol.

The Agency's discipline was consistent with law and policy.

Virginia's and GMU's policies unequivocally prohibit the unauthorized possession, and use of alcohol in the workplace. The policies also prohibit alcohol impairment in the workplace. Therefore, having determined with the assistance of a trained police officer that Grievant was impaired in her work area and had alcohol in her mug on her desk, agency officials were required to promptly respond and impose appropriate discipline which they did.

GMU has therefore proved that Grievant engaged in misconduct as described in the applicable policies. GMU has also proved that Grievant was disciplined in accordance with the relevant policies.

Grievant has not provided any evidence that at least one similarly situated employee outside her protected class as a whistleblower committed the same or similar offenses and was not fired.

Grievant did not contest at the hearing that impairment at work and possession of alcohol at work violates DHRM and GMU's policies.

In sum, Grievant has provided no evidence that the discipline she received violated any law or policy.

Grievant has not proved that she was fired in retaliation for her complaint against her First level supervisor.

Grievant has the burden of raising and establishing any affirmative defenses to the discipline and any evidence of mitigating circumstances related to the discipline. (GPM § 5.9). She alleged that she was fired in retaliation for blowing the whistle on her first line supervisor for disclosing the classroom passcode in an email.

The Supreme Court has defined retaliation as an intentional act in response to a protected activity. *Jackson v. Birmingham Board of Education*, 544 U.S. 167, 173-74 (2005). Citing *Jackson*, the court in *Gutierrez* underscored the intentional nature of a retaliation complaint: "Retaliation is, by definition, an intentional act. It is a form of discrimination because the complainant is being subjected to differential treatment" *Gutierrez v. Wash. Dep't of Soc. & Health Servs.*, 2005 WL 2346956, at 5.

To make out a prima facie case of retaliation under the burden shifting framework, Grievant must show (1) that she engaged in protected activity; (2) GMU acted adversely by terminating her employment; and (3) the protected activity was casually connected to Grievant's termination. GMU has acknowledged, for purposes of argument, that Grievant has satisfied (1) and (2). GMU argues forcefully that the evidence does not show a causal connection between Grievant's complaint and her discharge. The Hearing Officer agrees.

Grievant has not offered any direct evidence establishing a causal link. There were no statements or testimony by any of the agency officials involved in the disciplinary decision that even establish by a preponderance of the evidence that they were motivated by retaliatory animus toward Grievant. Indeed, the witnesses all testified that they bore no ill will, anger, resentment towards

Grievant. The witnesses all testified that Grievant was correct to report the issue so that any IT security concerns could be addressed by changing the password.

There is no evidence to prove or even suggest that her supervisor or anyone else was so upset that they would retaliate against her.

Moreover, the evidence adduced at the hearing demonstrated that the Director of the School of Art, and not Grievant's first level supervisor who she reported, had a reason to fire her.

A significant part of Grievant's case was either far-fetched or not relevant. She argued that the decision by the Employee Relations Specialist to call GMUPD to assist was evidence of retaliation because it was not standard procedure. Likewise, she argues that the police officer did not follow GMU's standard practice when she administered the breathalyzer was not standard practice. That argument fails because she never established that their actions deviated from GMU's policies. Moreover, the evidence demonstrated that neither the Employee Relations Specialist nor the police officer were aware of Grievant's protected activity.

She also included exhibits that have no bearing on the case. And tried to argue about drug and alcohol testing procedures that apply to CDL holders and workers in GNU's bio-hazard labs.

Assuming, arguendo that Grievant presented some evidence of a causal link between her complaint and her termination, GMU has provided a legitimate non-retaliatory reason for discharging Grievant. The legitimacy of GMU's reason is amply supported by the evidence. The Director who took the action to fire Grievant testified that she did so because of safety concerns and the recent reminder that "alcohol is not permitted on campus". (Agency Ex.8)

There were no mitigating circumstances justifying a reduction or removal of the disciplinary action.

The Hearing Officer is not a super personnel officer. The Hearing Officer cannot change an agency's disciplinary action simply because he disagrees with it.

In hearings contesting formal discipline, if the hearing officer finds that (1) the employee engaged in the behavior described in the Written Notice, (11) the behavior constituted misconduct, and (11) the agency's discipline was consistent with law and policy, the agency's discipline must be upheld and may not be mitigated unless under the record evidence, the agency's discipline exceeds the limits of reasonableness."(GPM at § 5.9).

The Standards of Conduct Policy provides for the reduction of discipline if there are mitigating circumstances, such as conditions that compel a reduction to promote the interests of consistence, equity and objectivity, or based on an employee's otherwise satisfactory work performance. (Grievant's ex. 734)

Grievant had approximately 5 years of service to GMU when was fired. There is no record of Grievant's level of performance in the exhibits. Moreover, the agency had put Grievant and other team members on notice that alcohol was not permitted on campus. And Grievant never availed herself of the opportunity for alcohol treatment. And there is no indication that the agency singled out Grievant for termination because she belonged to some disadvantaged class of GMU employees. Therefore, there is no basis for mitigation.

DECISION

The disciplinary action of the Agency is upheld and Grievant's claim for relief is denied.

APPEAL RIGHTS

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

Please address your request to:

Office of Employment Dispute Resolution (EDR)

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.

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.⁶



Neil A.G. McPhie
Hearing Officer

2/24/2025

⁶ [See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation or call EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].