



COMMONWEALTH OF VIRGINIA

Department Of Human Resource Management

Office of Employment Dispute Resolution

DECISION OF HEARING OFFICER

In re:

Case number: 12167

Hearing Date: October 23, 2024

Decision Issued: December 2, 2024

PROCEDURAL HISTORY

On July 17, 2024, Grievant was issued a Group III Written Notice of disciplinary action with termination for falsifying records.¹

On August 15, 2024, Grievant timely filed a grievance to challenge the University's action. The matter advanced to hearing. On August 26, 2024, the Office of Employment Dispute Resolution assigned this matter to the Hearing Officer. A pre-hearing conference was held on September 3, 2024, and the hearing date and time were agreed to by the parties. The University agreed to provide an interpreter to be available for the hearing as requested by the Grievant. On October 23, 2024, a hearing was held at a University facility in Charlottesville, Virginia. The Grievant did not appear for the hearing. Prior to commencing the hearing, the Hearing Officer called the telephone number provided by Grievant and received no answer. The hearing proceeded as scheduled without the Grievant's participation.

APPEARANCES

University Legal Advocate
University Party Designee
Witnesses

¹ University Ex. at 17-20.

ISSUES

1. Whether Grievant engaged in the behavior described in the Group III Written Notice of disciplinary action?
2. Whether the behavior constituted misconduct?
3. Whether the University'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 University 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:

Prior to his dismissal, Grievant was a Senior Trade Utility Worker in the University's Housing Maintenance Department. Grievant's job duties often required that he work alone in student housing and "student spaces." Grievant's job duties also required that he perform work that was not readily viewed (e.g. behind a wall).²

On March 5, 2024, Grievant did not report to work. Grievant's wife contacted Grievant's supervisor to advise him that Grievant would not be reporting to work that day.

On March 7, 2024, Grievant returned to work after being absent for two days. Grievant informed his supervisor that he had been hospitalized for respiratory issues that he had experienced as a result of work he had performed on an air handler in a University building while at work on March 4, 2024.³

Based on the information Grievant provided about the cause of his hospitalization, Grievant's supervisor advised Grievant to complete an accident report in the University's on-line system for reporting work-related injuries or illnesses.

² Hearing Recording at 1:24:31-1:25:32.

³ Hearing Recording at 1:04:19-1:05:25, and Agency Ex. at 23-28.

OHS Manager oversees the University Facilities' occupational health and safety compliance and reporting. On March 7, 2024, OHS Manager was notified that Grievant had experienced a work-related injury or illness that had caused him to be hospitalized. OHS Manager went to the housing maintenance offices to see and speak with Grievant. OHS Manager asked Grievant if he was "okay" and also about the nature of his hospitalization. Grievant told OHS Manager that he had experienced respiratory issues related to work he had performed at the University. OHS Manager testified that she initially spoke with Grievant in Spanish to confirm that he was comfortable completing the accident report in English. Grievant indicated that he understood and did not need assistance completing the report.⁴

Grievant had submitted accident reports on prior occasions in order to report work-related injuries and to utilize the workers' compensation benefit.⁵

Grievant submitted an accident report dated March 7, 2024, through the University's electronic reporting system. In the section of the report titled "Information about Time/Place of Injury," Grievant reported the "Exact Date" of the injury as "3/4/2024" and the "Exact Location" where the injury occurred as "[University building] attic air handler." Grievant identified the "Time of Injury" as "7:00 PM."⁶ Grievant identified [a co-worker] as a witness to the injury. In the section of the report titled "Information about Nature and Cause of Accident," Grievant identified the "Exact Machine, tool or object causing injury:" as "Air Handler." Grievant reported the "Nature of Injury..." as "Hard to Breathe." In a section for Grievant to list all injured body parts, Grievant wrote "Respiratory Problem." Grievant noted that safety equipment/Personal Protective Equipment" had been used and indicated the equipment was a "face mask." Under the part of the form requesting information to "Explain in full detail how the incident or injury occurred. Describe the sequence of events; specify object or exposure which directly produced the incident or injury," Grievant wrote "[The] task was to clean [inside and outside] the air [h]andler." Grievant indicated that first aid was administered at UVA Hospital and that he lost two days from work. Grievant noted that he returned to work on "3/7/2024". Grievant electronically signed the form on 3/7/2024.⁷

The form that Grievant completed to report the accident identified the document as "Accident Report for Workers' Compensation." The form notified an employee completing the report that the form would be automatically sent to the employee's supervisor and then after the supervisor completed their portion of the form, the form would be automatically sent to OHS Manager. The University's occupational health and safety office would forward the accident information to the University's workers compensation coordinator in the University's office of human resources.⁸ The form

⁴ Hearing Recording at 15:00-19:00, 46:46-50:03.

⁵ See University Ex. at 115-128 and Hearing Recording at 1:36:03-1:37:40.

⁶ Hearing Recording at 20:14-20:55. OHS Manager testified that Grievant initially incorrectly indicated on the form that he had reported the accident on 3/5/2024, but later corrected the date. OHS Manager also testified that it was unusual that Grievant reported the time of injury as 7:00 pm since that was after his working hours and after he had completed work, he had indicated was the cause of his respiratory issues.

⁷ University Ex. at 23-25, Hearing Recording at 20:14-21:43, 22:47-23:20.

⁸ University Ex. at 23-28.

required that the individual completing the form be identified and stated in bold, capitalized letters that **"FALSIFICATION OF INFORMATION IS A SERIOUS MISCONDUCT, WHICH MAY RESULT IN DISCHARGE."**⁹

After Grievant had completed and submitted the accident report, Grievant's supervisor received Grievant's report and completed a section of the accident report form. The supervisor was required to "Give accident causes and comment fully." The supervisor wrote:

[Grievant] and [co-worker] were cleaning an Air Handler Unit in the attic of [University building] the work day before [Grievant] went to the hospital (Monday 3/4). I received a call 3/5 from [Grievant's] wife letting me know he would not be at work. 3/6 I reached out to [Grievant] by phone call/text and did not receive a response. 3/7 [Grievant] came to work at scheduled time, 8am, and told me about what had been going on. He said – 3/4 he went to the hospital via ambulance because of respiratory issues and remained in the hospital until 3/6. They had to clear his lungs and gave him antibiotic. Then he said he was cleared to leave 3/6 with no restrictions, thus returning 3/7. This process for cleaning the air handler is as follows – change filters, brush coils, clean coils with water and evaporator cleaner (nu-calogen evaporator cleaner) if needed, vacuum unit, wipe inside and out to clean any other dirt. With this unit they did need to use evaporator cleaner to clean the coil and Tilex to wipe down the case. [Grievant] did go home at lunch to get a new set of clothes due to them being soiled. I spoke with [Grievant] and [co-worker] 3/4 and they said it was dirty but nothing out of the scope.¹⁰

Grievant's supervisor also was required to provide information regarding "What action is necessary to prevent reoccurrence of this type of accident." Grievant's supervisor wrote: "To prevent this from reoccurring it may be best practice to use a hepa vac, which was not used in this incident. Ensure anyone with preexisting health conditions are fit tested for respirator, if needed."¹¹

Grievant's supervisor also completed his portion of the report on March 7, 2024.

Workplace safety laws and regulations require that certain work-related injuries or illnesses that result in hospitalization be reported to the state Occupational Safety and Health program (VOSH) within 24 hours. Based on the information provided by Grievant, that he had been hospitalized due to a work-related injury or illness, OHS Manager reported the information provided by Grievant in his accident report to VOSH on March 7, 2024.¹²

On March 11, 2024, VOSH responded to OHS Manager's report of Grievant's workplace injury and hospitalization with the following information and directives:

⁹ University Ex. at 23-25, Hearing Recording at 21:43-22:14.

¹⁰ University Ex. at 272, Hearing Recording at 23:18-23:59.

¹¹ University Ex. at 272, Hearing Recording at 23:18-23:59.

¹² Hearing Recording at 23:57-25:47, University Ex. at 29-35.

As we discussed, there are some important steps you should be taking to ensure the safety and health of your workers and avoid the need for a Virginia Occupational Safety and Health (VOSH) inspection.

In most cases, a serious injury indicates the presence of workplace hazards that threaten the health and safety of other workers. VOSH is very concerned that additional employees at your worksite are at risk of being injured. As we discussed, it is in everyone's interest that you conduct a thorough investigation to determine the reasons for the work-related incident, to identify hazards related to the incident and to implement corrective actions.

Please complete the following by March 18, 2024:

- Conduct an incident investigation. (See Non-Mandatory Investigative Tool – Attachment A)
- Provide OSHA with written, signed documentation of findings from the investigation.
- Provide OSHA with written, signed abatement certification documenting action taken to correct hazards related to the incident.
- Document findings and send corrective actions to: [Regional Health Director].
- Post a copy of this letter in a conspicuous place where all affected employees will have notice or near the location where the incident occurred.
- Fax or email a copy of the signed Certificate of Posting (Attachment B) to [Regional Health Director.]

...
If we do not receive the investigation results, abatement verification and certificate of posting by March 18, 2024, your worksite may be considered for an on-site inspection. The goal of your incident investigation should be to identify both the immediate and the underlying causes of the incident. To assist you in conducting an effective investigation, I have attached a guide you can use in identifying the root causes of the incident and taking the necessary steps to ensure your employees are protected from future injuries. ...¹³

OHS Manager interviewed Grievant, Grievant's supervisor, and Grievant's co-worker to gather information regarding the events and circumstances that led to the work-related injury or illness Grievant had reported. OHS Manager interviewed Grievant on March 11, 2024. OHS Manager testified that Grievant described to her that he had been hospitalized due to respiratory issues he experienced when he returned home after work and he described those issues as related to the work he performed on the air handler while at work earlier that day.¹⁴

¹³ University Ex. at 41-46 and Hearing Recording at 29:57-31:00.

¹⁴ Hearing Recording at 25:40-29:35, 46:46-48:37, and University Ex. at 36-40.

On March 12, 2024, Housing Zoning Manager certified that he had posted the letter the University received from VOSH “in a conspicuous place, where all affected employees will have notice or near such location where the incident occurred” and that he had provided a copy of the letter to Grievant.¹⁵

On March 13, 2024, OHS Manager met with Grievant, his supervisor, and his co-worker to discuss whether there were corrective actions that could be taken in order to avoid the work-related injury or illness that Grievant had reported he had experienced. OHS Manager testified that during the meeting Grievant again described the injury for which he had been hospitalized as respiratory in nature and related to his work with the air handler in a University building.¹⁶

OHS Manager and her staff investigated the incident that led to Grievant’s reported work-related injury or illness and developed the Incident Report and additional information requested by VOSH.

OHS Manager timely submitted the Incident Report to VOSH on March 18, 2024. The Incident Report and attachments are comprised of more than 40 pages. The report includes information about: the location of the incident (whether in a confined space), whether employees had been trained and the training they had received, kind of personal protective equipment used, condition of the equipment Grievant had been working on, type of tools used, chemicals used and safety data sheets for those chemicals, symptoms Grievant had reported he experienced and when those symptoms arose, determinations about the root cause of the reported incident, and any necessary corrective actions that had been identified.¹⁷

OHS Manager estimated that it took approximately 40 hours to investigate and prepare the Incident Report. In addition to interviewing Grievant, his supervisor, and his co-worker, OHS Manager described that the investigation and preparation of the report required that she and/or members of her team visit the site where Grievant reported he had been working and inspect the equipment, as well as research the materials used by Grievant and his co-worker and the safety data sheets for those materials to try to identify what may have caused or contributed to the illness or injury Grievant described. OHS Manager also described reviewing Grievant’s, and other employees’ training records related to safety and equipment use to determine whether there were gaps in the training they had received that may have contributed to the work-related injury or illness that Grievant had reported.¹⁸

On March 18, 2024, Grievant’s wife called Housing Zone Manager. Grievant’s wife told Housing Zone Manager that on March 4, 2024, Grievant had been hospitalized due to a mental health crisis and not as a result of a work-related injury or illness. Housing Zone Manager tried to speak with Grievant that same day in order to confirm with Grievant

¹⁵ University Ex. at 87.

¹⁶ Hearing Recording at 46:46-50:03 and see University Ex. at 47.

¹⁷ University Ex. at 48-89, Hearing Recording at 25:40-46:01.

¹⁸ Hearing Recording at 25:40-46:01.

that Grievant's hospitalization was not work-related, but Grievant had left work early that day and Grievant's supervisor was unable to reach Grievant by phone.¹⁹

On March 19, 2024, after Grievant reported for work, Housing Zone Manager and Grievant's supervisor met with Grievant. Grievant confirmed at that time that on March 4, 2024, he had been hospitalized due to a mental health crisis and not due to a work-related respiratory issue.²⁰

On April 1, 2024, Housing Zone Manager and Grievant's supervisor met with Grievant to discuss the false accident report Grievant had submitted on March 7, 2024, and to advise Grievant that he may be subject to disciplinary action. Housing Zone Manager testified that when Grievant was questioned about the motive for his false report, Grievant indicated that he was embarrassed about being hospitalized due to mental health.²¹

On June 28, 2024, Grievant submitted a request to the University for reasonable accommodation. The information provided by Grievant described his impairment as "generalized anxiety disorder."²²

On July 17, 2024, Grievant was issued a Group III Written Notice of disciplinary action with termination for falsifying records.²³

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." 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."²⁴

Whether Grievant engaged in the behavior and whether the behavior constituted misconduct

Based on the unrefuted testimony of Housing Zone Manager, when Grievant returned to work on March 7, 2024, following his two-day absence, there was no reason for Grievant to need to come up with any alternative story for his hospitalization because Grievant was not required to provide the University with any specific information about his hospitalization unless the hospitalization was due to a work-related injury.²⁵ Grievant had been absent from work for two days and was able to provide a note from a doctor

¹⁹ Hearing Recording at 1:05:20-1:06:36.

²⁰ Hearing Recording at 1:06:36-1:06:55.

²¹ Hearing Recording at 1:13:33-1:15:32, Agency Ex. at 90-96 and see Agency Ex. at 7-10.

²² University Ex. at 11-14.

²³ University Ex. at 17-20.

²⁴ See Ex. at 129-142 (University Standards of Conduct).

²⁵ Hearing Recording at 1:33:04-1:33:13, 1:46:40-1:51:37.

confirming that he had been treated during those dates and was able to return to work on March 7, 2024.²⁶ Even if Grievant felt embarrassed by the nature of his hospitalization, there was no need for Grievant to provide any further explanation to the University and there certainly was no need for Grievant to provide a false story to the University.

Yet, on March 7, 2024, Grievant submitted an accident report stating that he had experienced a work-related injury. Grievant stated in the report that the nature of the injury was “hard to breathe” and “respiratory problem,” for which he had received treatment at a hospital. Grievant stated in the report that the place where the injury had occurred was the “[University building] attic air handler,” and that the exact machine or tool that caused the injury was the “air handler.” The unrefuted evidence showed that the information reported by Grievant was false. Grievant had not experienced an illness or injury while at work and Grievant had not been injured by or experienced illness due to the air handler. Grievant had not sought treatment or been hospitalized due to a respiratory problem from an incident that was related to his work or his workplace.

In addition to submitting false information in the accident report he submitted on March 7, 2024, Grievant continued to provide false information to University personnel as they worked to investigate the work-related circumstances that may have contributed to or caused Grievant’s reported work-related injury or illness. The unrefuted, credible testimony of OHS Manager was that on three separate occasions, March 7, 2024, March 11, 2024, and March 13, 2024, Grievant verbally described to her the illness or injury that caused him to be hospitalized as respiratory in nature and related to his work with the air handler at the workplace on March 4, 2024.²⁷

When Grievant falsely reported to the University that he had experienced a work-related injury or illness, Grievant engaged in misconduct.

Whether the University’s discipline was consistent with law and policy

Group III level offenses generally include acts of misconduct, violations of policy, or performance that is of a most serious nature. This level is appropriate for offenses that, for example, endanger others in the workplace, constitute illegal or unethical conduct; indicate significant neglect of duty; result in disruption of the workplace; or other serious violations of policies, procedures, or laws.²⁸

Grievant chose to provide false and misleading information to the University. The nature and purpose of Grievant’s conduct was to deceive. Deception undermines and significantly impacts University operations. In this case, Grievant’s deception caused the University to unnecessarily report a workplace injury to the state agency that oversees workplace safety. Grievant’s deception also caused the University to have to post in a conspicuous space a notification that a work-related injury or illness had been reported on a University worksite and was under investigation. Finally, Grievant’s deception

²⁶ Agency Ex. at 79, Hearing Recording at 1:46:40-1:51:37.

²⁷ Hearing Recording at 46:46-48:37.

²⁸ See University Ex. at 135.

caused the University to unnecessarily expend significant staff time and resources to investigate the incident that Grievant falsely claimed caused him injury or illness.

The information provided by Grievant on the Grievance Form A indicated that if Grievant had participated in the hearing, he may have asserted that he suffers from generalized anxiety disorder and post-traumatic stress disorder (PTSD) and/or that he takes medications that may have impacted his behavior.²⁹ Any assertion regarding a claim of disability impacting Grievant's behavior would necessarily be fact and case specific. Grievant did not participate in the hearing and has not offered any evidence to support an assertion that anxiety disorder, PTSD, or medications caused him to engage in the behavior described in the Written Notice. Further, the Americans with Disabilities Act requires employers to provide reasonable accommodations for an employee's disability, but it does not broadly shield employees from disciplinary action for their own misconduct.

The information provided by Grievant on the Grievance Form A indicated that if Grievant had participated in the hearing he may have argued that the Agency's discipline of him was discriminatory or retaliatory in nature. Grievant did not present evidence to support such an allegation. The preponderance of the evidence showed that the University took disciplinary action because it believed Grievant engaged in behavior justifying disciplinary action.

The University's issuance of a Group III Written Notice of disciplinary action to Grievant was consistent with law and policy. Upon the issuance of a Group III Written Notice an agency may terminate an employee's employment.

Mitigation

Virginia 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...."³⁰ 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.

²⁹ University Ex. at 7-15.

³⁰ Va. Code § 2.2-3005.

DECISION

For the reasons stated herein, the University's issuance to Grievant of Group III Written Notice of disciplinary action 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.

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.³¹

Angela Jenkins

Angela Jenkins, Esq.
Hearing Officer

³¹ 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.