

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

**DECISION OF HEARING OFFICER**

In re: Northern Virginia Community College (NVCC)

**Case Number: 11385**

Hearing Date: July 24, 2019

Decision Issued: October 5, 2019

**PROCEDURAL HISTORY**

**On May 24, 2019, Grievant was issued a Group III Written Notice of disciplinary action with termination for violating DHRM Policy 1.60; Virginia Community College Systems (VCCS) Code of Ethics/VCCS General Policies 3.14; Code of Ethics 3.14.2.5, and VCCS General Policies 3.14: Consensual and Familial Relationships 3.14.2 (Agency Ex. 1) Specifically “[Grievant] failed to disclose she knew ■, a candidate for the Evening Administrator position before the recruitment process began.” ■ was hired and supervised by Grievant. (Agency Ex. 4)**

On or around May 28, 2019, Grievant timely filed a grievance. (Grievance Form A) (Agency Ex. 2) Effective June 12, 2019, the Department of Human Resource Management (DHRM) assigned the matter to the undersigned Hearing Officer. On July 24, 2019, a hearing was held at NVCC Conference room.

**APPEARANCES**

Grievant pro se

Agency Advocate

Three witnesses for the Agency

Three witnesses for the Grievant

## **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 1, 11, or 111 offense)?
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 20 exhibits numerically tabbed. Grievant did not object to any of the agency's exhibits. Grievant submitted a three-ring binder containing 12 exhibits numerically tabbed. The Agency withdrew its initial objection to certain exhibits during the prehearing process. Therefore, Grievant's exhibits were admitted without objection

## **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. 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)

## FINDINGS OF FACT

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

At the time Grievant was discharged, she held the position of Director of Campus Operations at one of NVCC's campuses. At the time Grievant received the disciplinary action that is the subject of this hearing, she had approximately 7 years of state service to NVCC. Grievant had no prior disciplinary actions and good performance evaluations.

The Director of Campus Operations is a key position and part of the Provost's Leadership Team. Trust, reliance, and good judgment are significant attributes for the position. (Testimony of ■■■ Acting Provost and Grievant's Direct Supervisor)

Specifically, as Director of Campus Operations, Grievant had responsibility to manage and oversee all non-academic areas of the campus for the Provost/Chief Academic Officer including, but not limited to campus wide budget management, emergency preparedness, campus space utilization/event management, campus facilities planning and special projects management; management and supervision of Provost Office Personnel.<sup>1</sup>

Grievant's supervisor, ■■■(hereinafter ■■■ or Acting Provost) is an experienced administrator. She has been employed by NVCC since 2003, became the Interim Dean in 2014 and the Interim Provost in 2016. She supervised Grievant for approximately 3 years. Up until the events unfolded that gave rise to Grievant's discharge and this grievance, ■■■ trusted Grievant. She testified favorably as to Grievant's job performance.

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<sup>1</sup> See Agency Exhibit 12 for a complete list of Grievant's duties and responsibilities.

The Hearing Officer observed no reticence or animosity by [REDACTED] toward Grievant.

[REDACTED] was the Evening Operations Administrator in Campus Operations. He began working at NVCC on July 10, 2017. He was a full-time classified employee. Grievant was his supervisor. The Evening Operations Administrator serves as administrative officer for the campus during assigned hours and on weekends. In the position, [REDACTED] supervised and coordinated the work activities of academic and classified staff to ensure instructional support and facilities function effectively.

Three days after he began working at NVCC under Grievant's supervision, [REDACTED] (and his son) began living in Grievant's house as her tenant.<sup>2</sup>

In the spring of 2017, NVCC was seeking to fill the Evening Operations Administrator position in Campus Operations. Grievant was scheduled to play an integral role in interviewing and selecting a candidate for the position.

On or about March 27, 2017, NVCC received a hotline complaint alleging that Grievant had compromised the integrity of the hiring process by "providing [REDACTED] with a ... interview questions and rehearsing his responses... with him" (Agency Ex. 9) (Testimony of [REDACTED])

On April 3, 2017, Grievant's spouse called the agency and admitted he was the sender of the anonymous complaint. He alleged that Grievant and [REDACTED] are in an intimate personal relationship for over a year. He claimed to have overheard a telephone conversation between Grievant and [REDACTED] in which Grievant was coaching on the hiring questions to expect. (Agency Ex. 9)

[REDACTED] became aware of the hotline complaint on or around April 19, 2018. [REDACTED] did not have any uneasiness at that time in continuing Grievant's involvement in the hiring process because Grievant had assured her that she did not know [REDACTED] and she trusted her employees. (Testimony of [REDACTED])

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<sup>2</sup> How long he lived there is hotly disputed. [REDACTED] contends he lived at Grievant's residence for approximately one year, had access to the entire house and moved on July 16, 2018. Grievant contends that [REDACTED] lived at her residence for approximately three months and moved prior to the winter holiday break in 2017. What is undisputed is that he was her tenant.

On or about April 20, 2017 Human Resources (HR) informed Grievant, in writing that “further disciplinary action may be initiated” if it was determined that she knew ■ before he was interviewed and hired. (Agency Ex. 9)

Grievant told the HR Employee Relations Analyst, that the complaint was a fabrication by her husband with she was involved in a domestic relations dispute. (Agency Ex. 9)

■ began to feel uneasiness regarding ■ involvement in the hiring process, when on August 27, 2017 a second complaint was received from an alleged candidate claiming to have been unfairly eliminated from consideration to the position. (Agency Ex. 9) (Grievant Ex. 3) (Testimony of ■)

The second complaint was assumed to be a hoax probably perpetrated by Grievant’s spouse and was not considered in Grievant’s termination. (Testimony of ■)

### **The Interview and Hiring Process.**

Applicants for the position were screened and interviewed by a committee and the top three, including ■ were recommended for a second interview.

On April 24, 2017 ■ and Grievant interviewed two in state candidates. On May 1, 2017, ■ and Grievant interviewed ■, the only out of state candidate.

■ wrote the interview questions with input from Grievant. (Agency Exs. 8,9)

■ was selected because he had the most experience in budgeting, which Grievant identified as her as her top priority for the position.

■ began working for the college on July 17, 2017.

■ believed that because ■ was coming from out of state, it seemed unlikely that Grievant would know him. (Agency Ex. 8) (Testimony of ■)

■ view changed when she saw the evidence gathered by the Title 1X investigation and by HR.

## **Workplace Arguments:**

On or around September 21, 2018, Grievant and ■ were heard by other employees arguing loudly in the office during work hours. (Agency Ex. 8) The argument was so loud and disruptive that ■ pushed open the door to Campus Operations and told Grievant and ■ “you all need to cut that shit out” (Testimony of ■). He also sent Grievant a text message “Hey [Grievant], you and ■ have got to get things under control. There are too many people passing by and hearing you all loud and clear through the door. It’s not a good look for you all” (Grievant Ex. 9).

The Hearing Officer observed no animosity or reticence by ■ towards Grievant.

■ investigated the cause of the disruption and was told by a student worker in Campus Operations that she is forced to leave the office when Grievant and ■ argue usually about personal things and ■ told her the “whole history” which was awkward. (Agency Ex. 8) ■ did not follow up and determine, what the student worker meant by the “history.”

The student worker also told ■ faculty have asked her if Grievant and ■ are a “thing”; that a named employee in IT heard Grievant and ■ arguing so loudly in the breezeway that the architects eating lunch in the cafeteria may have heard it. (Id)

The student worker noted that this was her last semester and she felt bad for the new student workers starting in the office (Id)<sup>3</sup>

■ and Grievant blame each other for perpetrating the arguments, and much testimony at the grievance hearing was directed to this point.

Based on the totality of the evidence, the Hearing Officer finds that ■ and Grievant mutually engaged in unprofessional, argumentative discourse of a

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<sup>3</sup> The student worker did not testify at the hearing. The Hearing Officer is of the view that her testimony as a fact witness to the relationship between Grievant and ■ would have benefitted the hearing. Nevertheless, her hearsay statements have been considered and given the necessary weight considering the evidence as a whole and the fact that no witness or document indicated that her statement was false.

personal nature, with one another, in the workplace that disrupted the work environment.<sup>4</sup>

On October 1, 2018 the Deputy Title 1X Coordinator informed ■ that ■ had filed a Title1X complaint against Grievant claiming sexual harassment-hostile work environment. (Agency Ex. 8)

Pursuant to policy, the complaint was investigated, and a 21-page Investigative Fact-Finding Report was issued on or around December 13, 2018. (Grievant Ex. 4)

On March 11, 2019 the Title 1X Coordinator issued a carefully analyzed and comprehensive decision, concluding that ■ had proved he and Grievant had engaged in an intimate relationship before he was hired and during his employment at NVCC but failed to prove sexual harassment. (Agency Ex. 7)

On March 11, 2019, Title 1X turned the investigation over to HR for consideration of HR policy violations. Upon receiving the report, HR conducted a fact-finding review. The summary of these findings was submitted to ■ on April 11, 2019 for further consideration of disciplinary action. (Agency Ex. 16)

After carefully reviewing the overwhelming documentation amassed by the Title 1X proceeding and the subsequent HR fact finding, ■ concluded that Grievant had lied to her and to HR when she claimed that she did not know ■ until the interview.<sup>5</sup> (Testimony of ■)

■ lost trust in Grievant to be a responsible member of her team. (Testimony of ■)

■ made her decision to issue a Group III disciplinary action with termination based on the Title 1X evidence and the additional evidence gathered by the agency after the Title 1X process concluded. Either evidentiary collection is

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<sup>4</sup> The Title 1X Coordinator reached the same conclusion. (Agency Ex. 7)

<sup>5</sup> See Agency Ex. 10 for Title 1X documents and Agency Ex. 18 for the HR fact-finding documents.

enough to support the issuance of the Group iii disciplinary action with termination.

The Hearing Officer finds that the position held by Grievant is a key leadership position that requires a high level of trust and good judgment that Grievant had not demonstrated; that Grievant's actions disrupted the workplace and put the college at risk for harassment and hiring claims.

The Hearing Officer also finds that Grievant's actions demonstrate a lack of professional integrity, and violation of the Code of Ethics, and the familial relationship policy between supervisors and subordinates.

### **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.

The Department of Human Resource Management (DHRM) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees. Policy 1.60. (Agency Ex. 1; Grievant Exhibit 13) “The purpose of the policy is to set 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.” A legitimate goal of the policy is to “enable agencies to fairly and effectively discipline and/or terminate employees... where the misconduct and/or unacceptable performance is of such a serious nature that a first offense warrants termination.” Id.

Under the Policy, unacceptable behavior is divided into three types of offenses, according to their severity. Group III offenses “include acts of misconduct of a more serious nature that significantly impact agency operations.

### **APPLICABLE POLICIES**

The Agency took the disciplinary action in this case pursuant to the Commonwealth’s Standards of Conduct, Policy 1.60 effective April 16, 2008, revised June 1, 2011 (Agency Ex. 13); the VCCS General Policies 3.14 (Code of Ethics 3.14.2.5, and Consensual and Familial Relationships 3.14.2) (Agency Ex. 14)

### **Grievant Engaged in the conduct described in the Written Notice**

The evidence in Agency Exhibits 10 and 16 clearly prove that ■ and Grievant engaged in an amorous relationship before and after he was hired to work as her subordinate. For example, numerous photos are date stamped

before ■ was hired. The photos depict the couple at commercial off-campus venues smiling into the camera. Grievant admits that the photos are of herself and ■ but argues that the photos were edited, and the date stamp changed.

The agency submits that after speaking with multiple representatives in the creative media department of at Apple, the agency was advised that it is impossible to alter dates and times that photos were taken with an iPhone;<sup>6</sup> and that the iPhones are manufactured so that when the photos are taken, they are automatically date stamped in real time, and the photos cannot be manipulated. (Agency Ex. 16)

Grievant submitted an exhibit, in this case, (and in the Title 1X proceeding, that purports to assert that iPhone date stamps can be manipulated with the right technology and skill. (Grievant Ex. 5) Her argument fails because she never demonstrated to the Hearing Officer how the change could be accomplished, and never proved that ■ had the technical skill and equipment to change the date stamp as the article suggested.

Additional documents support the conclusion. For example, there is a copy of a FedEx receipt dated December 19, 2016 from Grievant to ■, packaging envelopes that contain both ■ and Grievant's name, screen shots of documents authored by Grievant and saved in ■ electronic folder in 2016. (Agency Ex. 10) Also, a screen shot of Grievant's Face Book entries clearly indicate that Grievant was communicating with ■ in 2015 and 2016 long before he was interviewed and hired by NVCC. (Agency Ex. 16). Although Grievant disputes the authenticity of these documents, they appear authentic and unaltered to the Hearing Officer.<sup>7</sup>

The photos and documents clearly demonstrate that Grievant lied to her supervisor, ■ and to HR when she was asked whether she knew ■ before she interviewed him before he was hired and replied that she did not.

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<sup>6</sup> The evidence is uncontroverted that the photos were taken and stored on ■ iPhone.

<sup>7</sup> The Title 1X Coordinator reached the same conclusion.

The evidentiary record demonstrates that ■ and Grievant engaged in a consensual amorous relationship during ■ employment. ■ contends the romantic relationship ended after he moved from Grievant's residence on July 16, 2018. Grievant denies that they engaged in a romantic relationship and claims that ■ moved from her residence prior to the winter holiday break in 2017. Two documents are particularly compelling concerning the private and intimate nature of their relationship: 1) Grievant's journal entries and 2) Facebook Messenger chat between Grievant and a third party. Both documents mention and discuss ■ and his relationship to Grievant as more than professional in nature. Although Grievant raises several objections of unauthorized access by ■ to these and other private documents, The Hearing Officer concludes (as did the Title 1X Coordinator) that unauthorized access though arguably inappropriate, does not negate the content contained within the documents and , consequently, the consideration afforded for purposes of this hearing.

And there is more. Agency leave records establish that ■ and Grievant took time off from work at the same time on at least three different occasions: January 3, 2018-January 5, 2018; February 2, 2018, and August 23-August 24, 2018. ■ confirmed that on February 2, 2018, the two of them took time off to celebrate birthday at a local establishment. ■ birthday was confirmed in the HR system. (Agency Ex. 16)

Also, VCCS records show that ■ and Grievant had the same address and ■ voice message log indicated that on December 22, 2016, before he was interviewed and hired, Grievant shared her private cell phone number with ■.

### **The behavior constituted misconduct in violation of cited policies**

Grievant was fired for violating DHRM Standards of Conduct Policy 1.60, VCCS General Policies 3.14<sup>8</sup>, more specifically 3.14.2.5 VCCS Code of Ethics and 3.14.2 Consensual and Family Relationships.

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<sup>8</sup> The VCCS General Policies are found at Agency Ex. 14. The agency had submitted a partial copy of Policy 3.14. At the Hearing Officer's request, a complete copy was provided to the Hearing Officer and to Grievant and replaced the partial copy originally submitted. Grievant is knowledgeable of the Policy and vigorously defended the alleged policy violations throughout the grievance process and this hearing.

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 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" A legitimate goal of the policy is to "enable agencies to fairly and effectively discipline and/or terminate employees... where the misconduct and/or unacceptable performance is of such a serious nature that a first offense warrants termination."

The policy requires state employees to "perform assigned duties and responsibilities with the highest degree of public trust ... make work work-related decisions and/or take actions that are in the best interest of the agency... and comply with the letter and spirit of all state and agencies policies and procedures, the Conflict of Interest Act and the Commonwealth laws and regulations."  
(Agency Ex. 13)

According to the VCCS Code of Ethics "All employees have the duty to disclose to their supervisor or Chief Human Resources Officer any personal or professional relationship that has the potential of creating a conflict of interest or that could have a negative effect on college operations." (Policy 3.14.2.5)  
Grievant purposeful failure to disclose the relationship between her and ET clearly violated the provision.

Policy 3.14.2 prohibits consensual and family relationships where there is a power relationship between a supervisor and an employee or other potential conflicts of interest which have a negative impact on college operations. Power differential is defined as "Unequal positions such as instructor to student or supervisor to employee." The policy extends to "other employment relationships."

*Any employment relationship that could potentially create a conflict of interest is generally prohibited and is therefore governed by this policy (e.g. peer to peer, employee and vendor, etc.), as are any behaviors that are Inconsistent with Virginia's Conflict of Interest policies and regulations.*

*3.14.2.4*

Grievant clearly breached the cited provisions when she participated in the interview and selection process of her friend ■ and lied to her supervisor and HR that she first met him at the interview. Additionally, Grievant admitted during the internal grievance process that the landlord/tenant interactions with ■ were an “unintentional violation of policy 3.14.2.4.” (Agency Ex. 5)

**The Agency’s discipline was consistent with law and policy.**

Grievant argues that the discipline was not consistent with law because other VCCS employees had relationships with peers and subordinates and were not disciplined. Grievant has presented no evidence to support that argument. Indeed, she admitted at the grievance hearing that she had no evidence to support her claim.

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

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 (1) conditions that compel a reduction to promote the interests of fairness and objectivity, or based on an employee’s otherwise satisfactory work performance; or (2) an employee’s long service or otherwise satisfactory work performance.

Grievant had approximately 7 years of VCCS service when she was disciplined. Grievant was a contributing employee. Grievant had no prior disciplinary record. These factors were outweighed by several factors including, she held a supervisory position of trust, the violations were severe, the violations resulted in significant disruptions to the workplace, her willingness to lie to her supervisor and to HR that she met ■ for the first time at the interview, and her steadfast refusal to accept responsibility for her actions. Grievant’s demeanor and testimony did not demonstrate a willingness or ability to resume employment

at VCCS without disrupting the workplace. Moreover, the loss of trust engendered by her actions would, in the Hearing Officer's opinion, create an insurmountable bar to resuming employment at the college.

**DECISION**

The disciplinary action of the Agency is affirmed.

## 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 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto: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.<sup>9</sup>

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<sup>9</sup> [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].



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Neil A.G. McPhie  
Hearing Officer

10/5/19