

DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 11927

Hearing Date: March 10, 2023
Decision Issued: March 13, 2023

PROCEDURAL HISTORY

On September 1, 2022, the Grievant was issued a Group III Written Notice.¹ On October 3, 2022, the Grievant timely filed a grievance challenging the Agency's actions.² On February 10, 2023, the grievance was assigned to this Hearing Officer. A hearing was held on March 10, 2023.

APPEARANCES

Agency Counsel
Agency Representative
Grievant
Witnesses

ISSUES

Did Grievant, in filing her report, regarding an incident that occurred on January 18, 2022, violate OP 135.1(XIV)(B)(2) by "*Falsifying any records either by creating a false record, altering a record to make it false, or omitting key information, willfully or by acts of gross negligence, including but not limited to all electronic and paper work and administrative related documents generated in the regular and ordinary course of business...*"³

AUTHORITY OF HEARING OFFICER

Code Section 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code Section 2.2-3005.1 provides that the Hearing Officer may order appropriate remedies including alteration of the Agency's disciplinary action. By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of

¹ Agency Exhibit 1, Tab 1, Page 1

² Agency Exhibit 1, Tab 7, Page 67

³ Agency Exhibit 1, Tab 1, Page 1 and Tab p, Page 114

state government.⁴ Implicit in the Hearing Officer's statutory authority is the ability to independently determine whether the employee's alleged conduct, if otherwise properly before the Hearing Officer, justified termination. The Court of Appeals of Virginia in *Tatum v. VA Dept of Agriculture & Consumer Servs.*, 41VA. App. 110, 123, 582 S.E. 2d 452, 458 (2003) held in part as follows:

While the Hearing Officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy...the Hearing Officer reviews the facts de novo...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action. Thus, the Hearing Officer may decide as to the appropriate sanction, independent of the Agency's decision.

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 proof for establishing any affirmative defenses to discipline such as retaliation, discrimination, hostile work environment and others, and any evidence of mitigating circumstances related to discipline. A preponderance of the evidence is sometimes characterized as requiring that facts to be established more probably than not occurred, or that they were more likely than not to have happened.⁵ However, proof must go beyond conjecture.⁶ In other words, there must be more than a possibility or a mere speculation.⁷

FINDINGS OF FACT

After reviewing the evidence presented, I make the following findings of fact:

The Agency provided me with a notebook containing tabs 1 through 9 and a CD-R video disk. The Grievant had no objections to the contents of Agency's notebook or the CD-R disk. They were accepted as Agency Exhibit 1. The Grievant emailed me 2 videos which I was unable to open. The Grievant stated that they were the same two videos contained in the CD-R which was a part of Agency Exhibit One. The Grievant agreed to rely on the videos that were a part of Agency's exhibit. While the CD-R apparently contained an audio file, neither the Agency nor the Grievant asked that I listen to it or played it at the hearing.

Virginia Department of Corrections Operating Procedure 135.1(XIV)(B)(2) states in part that "*Falsifying any record either by creating a false record... or **omitting key information**, willfully or by acts of gross negligence including, but not limited to electronic and paper work and administrative related documents generated in the regular and ordinary course of business, such as ... official state documents*" is a Group III offense.⁹ (Emphasis

⁴ See Va. Code § 2.2-3004(B)

⁵ *Ross Laboratories v. Barbour*, 13 Va. App. 373, 377, 412 S.E. 2d 205, 208 1991

⁶ *Southall, Adm'r v. Reams, Inc.*, 198 Va. 545, 95 S.E. 2d 145 (1956)

⁷ *Humphries v. N.N.S.B., Etc., Co.*, 183 Va. 466, 32 S.E. 2d 689 (1945)

⁷ Agency Exhibit 1, Tab A, Page 1

⁸ Agency Exhibit 1, Tab A, Page 2

⁹ Agency Exhibit 1, Tab 9, Page 114

added) This Operating Procedure defines falsification to include acts of commission (creating a false record), as well as acts of omission (omitting key information).

On January 18, 2022, Grievant created and filed an Internal Incident Report (IIR) regarding an altercation between an inmate (AB) and a corrections officer (XY). The IIR stated in part as follows “...*AB came into the day room... upon exiting he was irate and began you yell at XY... **AB began walking towards XY in a threatening manner** and they began to push each other. They both exited out of the Northside rear door on the ground.*”¹⁰ (Emphasis added)

After XY wrote an institutional charge against AB, the Special Investigations Unit (SIU) was asked to investigate this matter. Accordingly, an investigator (ISIU) was assigned, and he testified as an Agency witness. During the course of this investigation, it was determined that there were two videos of this incident. The CD-R, a part of Agency Exhibit 1, contains both. One is the north entry view and the other is the north control view. ISIU prepared and filed an Incident Report. (IR)¹¹ The IR stated in part “*a review of the surveillance video, from 2 different angles, show that XY and AB walked towards one another and came within a few feet of each other. XY, without warning or any overt or sudden move of a physical threat made against him, used both hands to shove/push AB in the chest area away from him, and with such force, that AB came off of his feet and landed on the floor with his back hitting against two metal seats/stools bolted down to the floor.*”¹²

The IR also stated in part “...*after being pushed to the ground, AB quickly returned to his feet, rushed towards XY (in retaliation) and took a swing at him... after taking a swing at XY, AB turns and runs out the open door to the outside yard with XY in close and immediate foot chase behind him.*”¹³

As was reported in the IR, ISIU testified there appeared to be no overt action by AB that was a threat to XY. Indeed, the video clearly shows that there was a table between the 2 of them and XY moved from one end of the table to the other in order to place himself in a position to shove AB. ISIU testified that AB addressed some colorful language towards XY but made no physical threat toward XY.

ISIU interviewed the Grievant on March 15, 2022.¹⁴ During the course of this interview, Grievant viewed the 2 videos on the CD-R contained in Agency exhibits. When asked if she heard AB make any verbal threat to XY, she responded that she could not remember.¹⁵ She stated “*XY only put his arms out when AB came close to him.*”¹⁶ During the interview, Grievant admits that she saw AB on the floor. She did not recall seeing AB take a swing at XY. She acknowledged that she saw both AB and XY down on the ground outside, but refused to go further in describing their relative positions to one another.¹⁷

The Grievant, after having the opportunity to review the videos, did not ask to revise her written statement.

Finally, I heard from the Superintendent who issued the Group III Written Notice. He testified that normally the result for falsification under Operating Procedure 135.1(XIV)(B)(2) would be termination. However, because of Grievant’s work performance and the fact that she had never had a disciplinary issue, he deemed mitigation to be warranted and there was no punishment beyond the issuance of the Written Notice.

¹⁰ Agency Exhibit 1, Tab 5, Page 34

¹¹ Agency Exhibit 1, Tab 4, Pages 7-32

¹² Agency Exhibit 1, Tab 4, Page 9

¹³ Agency Exhibit 1, Tab 4, Page 10

¹⁴ Agency Exhibit 1, Tab 4, Page 17

¹⁵ Agency Exhibit 1, Tab 4, Page 18

¹⁶ Agency Exhibit 1, Tab 4, Page 18

¹⁷ Agency Exhibit 1, Tab 4, Pages 18-19

Grievant did not testify and called no witnesses.

After hearing testimony from ISIU and after repeated viewings of the videos, it is clear that Grievant omitted key information from her report, an act of omission. In addition, some of what she reported is clearly in error, an act of commission. She reports that AB approached XY in a threatening manner. Based on the visual evidence contained in the CD-R, this is not true. She fails to report that XY violently pushes AB to the floor. She does not report that AB, upon getting up, took a swing at XY. She simply says that both men exited on the ground. From the video, it is reasonable that she saw XY on top of AB and at least the start of the subsequent pummeling that XY gave to AB. None of this was reported. Because of the clientele of this Agency, it is important that reports such as the IIR be completely factually accurate and be complete as to all interactions between Agency staff and the clientele, particularly violent interactions. Here, Grievant was wrong in some allegations in her IIR and left out many facts that should have been a part of the IIR.

MITIGATION

Va. Code § 2.2-3005(C)(6), authorizes and grants Hearing Officers the power and duty to receive and consider evidence in mitigation or aggravation of any offense charges by an Agency in accordance with rules established by EDR. The Rules for Conducting Grievance Hearings (“Rules”), provide that a Hearing Officer is not a super personnel officer. Therefore, in providing any remedy, the Hearing Officer should give the appropriate level of deference to actions by the Agency management that are found to be consistent with law and policy. Specifically, in disciplinary grievances, if the Hearing Officer finds that (1) the employee engaged in the behavior described in the Written Notice; (2) the behavior constituted misconduct; and (3) the Agency’s discipline was consistent with law and policy, then the Agency’s discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.

Hearing Officers are authorized to make findings of fact as to the material issues of the case and to determine the grievance based on the material issues and the grounds and the records for those findings. The Hearing Officer reviews the facts *de novo* to determine whether the cited actions constitute misconduct and whether there were mitigating circumstances to justify a reduction or removal of the disciplinary action, or aggravating circumstances to justify the disciplinary action. The Hearing Officer has the authority to determine whether the Agency has established by a preponderance of the evidence that the action taken was both warranted and appropriate under all the facts and circumstances.

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, (3) the disciplinary action was free of improper motive, (4) the length of time that the Grievant has been employed by the Agency, and (5) whether or not the Grievant has been a valued employee during the time of his/her employment at the Agency.

As the offense in this matter justified a Group III Notice and termination and as the Agency mitigated such that there was no punishment beyond the issuance of the Group III Written Notice, I find no reason to further mitigate this matter.

DECISION

For the reason stated herein, I find the Agency has borne its burden of proof in this matter and that the issuance of the Group III Written Notice was proper.

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

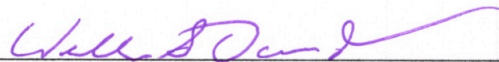
or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

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.^[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].



William S. Davidson, Hearing Officer

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