

**IN THE COMMONWEALTH OF VIRGINIA, DEPARTMENT OF HUMAN
RESOURCE MANAGEMENT, OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

IN RE: CASE NO.: 11861

DECISION OF HEARING OFFICER

I. INTRODUCTION

This case involves the resolution of a grievance arising from the issuance of a Group III Written Notice by the Virginia Department of Labor and Industry (hereafter “the agency”). The grievant was terminated from his employment with the agency as a result of the formal disciplinary action. For the reasons hereafter stated, I uphold the issuance of the written notice and the termination from employment.

II. PROCEDURAL BACKGROUND

The agency issued the grievant a Group III Written Notice and terminated him from employment on or about May 12, 2022. The Written Notice itself is undated but shows a termination of May 12. The grievance proceeded with the filing of the Form B by the grievant on May 31. As a disciplinary action, the matter was automatically qualified for a hearing. I was appointed as hearing officer effective July 12. A prehearing conference call was held on _____ . By the agreement of all parties, the matter was scheduled for hearing for September 20, 2022.

Prior to the hearing the grievant requested from the agency certain documents. Objections were raised as to some of the documents. I issued my ruling requiring disclosure of some, but not all, of the documents on _____. The grievant has not claimed that the agency failed to comply with my ruling. Orders for the appearance of both agency and non-agency employees

were issued at the request of the agency.

I conducted the hearing at the agency facility on September 20. The hearing lasted approximately five hours, including recesses. The agency was represented by counsel. A designated representative for the agency was present throughout the hearing. The agency presented six witnesses, including one by telephone. The grievant was called as an adverse witness by the agency. Prior to the hearing in accordance with the prehearing order issued by me the agency proffered twenty-one printed exhibits and a USB thumb drive with additional materials. No objection was raised to the admissibility to any of these documents and all were accordingly accepted into the record.

The grievant represented himself throughout these proceedings. He participated fully in the hearing by cross examining the agency witnesses and by making a closing statement.

III. FINDINGS OF FACT

The grievant, at the time of his termination, had been an employee of the agency for approximately twenty-nine years. He was nearing his retirement age. His work record was mostly satisfactory. He had no active formal disciplinary actions issued against him prior to the one resulting in his termination.

SITE NO. 1:

On October 5, 2021 the grievant had the duty of performing a safety inspection of a facility operated by a small, rural county school system. This was a planned inspection. The worksite to be inspected had twelve employees.

As part of his post-inspection report, the grievant an employee interview statement from a mechanic. The statement is reflected upon a standard form used by the agency, apparently promulgated in 2013. The grievant included on the form the address of the facility rather than the

personal address of the employee. He also failed to note a contact telephone number for the employee. He failed to have the employee sign the statement confirming the accuracy of the information contained therein. The form contains printed lines for the signature of the person being interviewed and his printed name. Neither line was completed on this statement.

A Supervisor interview statement was also submitted by the grievant as part of his report of this inspection. As with the employee interview statement, the address shown is that of the facility and not a personal address of the interviewee. No telephone number was shown for the Supervisor. It, was also unsigned despite there being a printed line for the signature of the person being interviewed. The grievant found no safety violations for this facility. The Grievance Report reflects his spending two hours, fifteen minutes during his walk around and inspection.

In April 2022 the agency conducted a follow-up inspection of this facility. (Exhibits 13 and 14). A different Inspector was assigned for this task. She found multiple minor safety violations, including one that was clearly in existence at the time of the October 2021 inspection by the grievant. This Inspector found that none of the violations warranted the imposition of a penalty.

This second Inspector, found that no employee by the name shown on the employee interview statement submitted by the grievant had ever existed as an employee at the site. The Supervisor whose statement was submitted in the initial report indicated that he was not interviewed by the grievant, showing certain documents required to be shown by an investigator according to the agencies Field Operations Manual or asked some of the questions to which he had purported provided answers. When he testified by phone at the hearing in September, the Supervisor was less certain as to what information he had provided to the grievant.

SITE NO. 2:

The grievant was assigned to perform a planned full inspection of a large manufacturing facility. The grievant was somewhat familiar with this facility having investigated an accidental injury there in a prior year. He submitted a post-investigation report reflecting his having been at the facility on March 15 and March 16. He purported being on-site a total of eleven hours.

As part of his report he submitted two employee interview statements and two supervisor employment statements. None of the four statements contained contact information for the individuals such as address or telephone number. Three of the four statements were unsigned by an employee. The fourth statement appears to have been signed by the grievant on both the lines for his own signature and that of the employee. The grievant reported no safety violations at this site during this inspection.

Approximately one month later a follow-up inspection of this site was conducted by other Inspectors. The follow-up inspection over fifty violations classified as serious (Exhibit 21). The agency assessed penalties of \$352,540.00 for the combination of forty-four of the serious violations. The other investigators spoke with three of the four employees for whom the grievant had submitted statements as part of his report. Each of those three denied having been fully interviewed by the grievant. The Supervisor whose statement appears as Exhibit 9, page 21, denied that it was his signature appearing on the form. The fourth employee for whom a statement was provided could not be reinterviewed.

GENERAL CONCERNS:

The grievant had a recent history of the less than diligent in the performance of his duties. Exhibit 18 contains statistics showing that he ranked consistently at the bottom of employees in the district on meeting certain key timelines. The grievant had also been counseled by his

Supervisor with regard to the lack of complete or appropriate documentation including employee interview statements.

IV. ANALYSIS

The Written Notice cites the grievant in two primary areas: Significant neglect of duties and unethical conduct. The agency has largely proven its allegations of neglect. The grievant clearly failed to interview employees and supervisors as required by the agency procedures. He failed to properly interview employees at both Site 1 and Site 2. He argues that this is due to the lack of proper training in this regard by the agency. Other than this bare assertion by the grievant, there is no evidence in the record to support the allegation. It is relied by the fact that the statements submitted are on a standard form for which little, if any, training should be required. I do not accept his argument that he was unclear as to what constituted a “interview” of an employee; his many years of experience provided him with ample notice of what was required.

I also find that he neglected his duties by failing to properly conduct the inspections. As to Site 1, I can only find that his failing to notice inspection dates on fire extinguishers existed on the date of his inspection. Because the inspection occurred approximately six months later, I do not find that the other violations would have necessarily been found by the grievant during a proper inspection.

The situation to Site 2 very different. In that instance, the re-inspection occurred approximately one month later found tens of serious violations, as well as minor violations. I cannot comprehend that all of these violations arose in the one month between his initial inspection and the follow-up.

The grievant was also cited for unethical conduct. I also find this charge to be well-proven. His filing an employee interview statement for a non-existent employee at Site 1 would be ample

support for the allegation. His submitting statements for interviews that did not take place (at both Site 1 and Site 2) was also clearly unethical. The evidence regarding the extent to which he overstated the time spent at Site 2 is less clear cut. Because of the other violations, I do not find it necessary to rely on those time records to support the agencies actions.

The agency chose to combine all of its allegations against the grievant into a single Group III Written Notice. This step is appropriate and allowable. Group III Written Notices are for those offenses serious enough that a first violation would justify termination. Not all of the individual misdeeds by the grievant would properly be classified as a Group III. The submission of false interview statements by themselves, however, would rise to that level. Whether looking at those events solely or in combination with the other evidence, the actions taken by the agency clearly justify the issuance of a Group III Written Notice.

The agency employees testified that they considered the long, mostly satisfactory, work history of the grievant in litigation. The grievant provided no other evidence that would serve to mitigate the level of offense. I find that no reason has been shown to mitigate the level of punishment. The general recent work performance of the grievant could well be viewed as aggravating factors.

The grievant filed a claim with the agency around the time of his termination alleging age discrimination. That claim was investigated by the agency and found to be without merit. At the hearing the grievant presented no evidence supporting the claim of discrimination. Accordingly, I do not find that the decision by the agency is inconsistent with law or policy.

V. DECISION

For these reasons, I hereby uphold the issuance of the Group III Written Notice and the termination of the grievant from employment with the agency.

APPEAL RIGHTS

You may file an administrative review request within 15 calendar days from the date the decision was issued, if any of the following apply:

1. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. 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 may request more than one type of review. Your request must be in writing and must be received by the reviewer within 15 calendar days of the date the decision was issued. You must provide a copy of all of your appeals to the other party, EDR, 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.

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.

[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].

ORDERED this ____ day of October, 2022.

/s/Thomas P. Walk

Thomas P. Walk, Hearing Officer