

Issue: Group III Written Notice with Termination (falsifying records); Hearing Date: 04/12/18; Decision Issued: 04/13/18; Agency: NSU; AHO: Carl Wilson Schmidt, Esq.; Case No. 11177; Outcome: Full Relief.



**COMMONWEALTH of VIRGINIA**  
*Department of Human Resource Management*

**OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 11177**

Hearing Date: April 12, 2018  
Decision Issued: April 13, 2018

**PROCEDURAL HISTORY**

On January 12, 2017, Grievant was issued a Group III Written Notice of disciplinary action with removal for falsifying records.

On February 12, 2018, Grievant timely filed a grievance to challenge the University's action. The matter proceeded to hearing. On March 5, 2018, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On April 12, 2018, a hearing was held at the University's office.

**APPEARANCES**

Grievant  
Grievant Representative  
University Representative

**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 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 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 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:

Norfolk State University employed Grievant as an Administrative and Office Specialist II. She began working for the University on November 10, 2010. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant was a full time classified employee with the University. Grievant also worked for the Part-Time Employer. She had been working for the Part-Time Employer for 14 years.

Grievant was laid off from work by the Part-Time Employer on May 8, 2017. Grievant filed an application for unemployment benefits with the Virginia Employment Commission on July 29, 2017. She completed the VEC Claim for Benefits form at her home computer and submitted it electronically to the VEC.

The University reviewed the VEC Claim for Benefits form completed by Grievant and concluded she falsified a record justifying the issuance of disciplinary action.

### **CONCLUSIONS OF POLICY**

The University alleged that Grievant falsified a record thereby justifying the issuance of a Group III Written Notice with removal. The VEC Claim for Benefits form is the document that the University alleged was falsified.

Va. Code § 60.2-623(B) provides:

Information furnished the Commission under the provisions of this chapter shall not be published or be open to public inspection, other than to public employees in the performance of their public duties. Neither such information, nor any determination or decision rendered under the provisions of § [60.2-619](#), [60.2-620](#) or [60.2-622](#), shall be used in any judicial or administrative proceeding other than one arising out of the provisions of this title; however, the Commission shall make its records about a claimant available to the Workers' Compensation Commission if it requests such records. The Commission may also, in its discretion, furnish copies of the transcript of hearings to any party.

Chapter 6 of Title 60.2 governs Benefits. Grievant submitted a VEC Claim for Benefits form pursuant to Chapter 6 of Title 60.2. Such information shall not be used in an administrative proceeding. A grievance hearing is an administrative proceeding. Thus, Va. Code § 60.2-623(B) renders Grievant's VEC Claim for Benefits inadmissible in this grievance hearing.

The University's claim for falsification rests entirely on its ability to present a falsified record. The VEC Claim for Benefits form completed by Grievant is not admissible and cannot be considered by the Hearing Officer. The University cannot establish that Grievant falsified a record because that record is not admissible in the grievance hearing. The University's Group III Written Notice must be reversed.

The University's concern regarding Grievant's behavior is understandable. The VEC assessed the University \$1,693.36 because Grievant was erroneously awarded unemployment compensation. The University does not have a remedy available under the Standards of Conduct.

## DECISION

For the reasons stated herein, the University's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is **rescinded**. The University is ordered to **reinstate** Grievant to Grievant's same position at the same facility prior to removal, or if the position is filled, to an equivalent position at the same facility. The University is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal and credit for leave and seniority that the employee did not otherwise accrue.

## 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 Equal Employment and Dispute Resolution  
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>[1]</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].

*/s/ Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>[1]</sup> Agencies must request and receive prior approval from EEDR before filing a notice of appeal.