Issue: Group III Written Notice with Termination (falsifying records); Hearing Date: 05/20/19; Decision Issued: 06/10/19; Agency: VEC; AHO: Carl Wilson Schmidt, Esq.; Case No. 11334; Outcome: No Relief – Agency Upheld.

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11334

Hearing Date: May 20, 2019
Decision Issued: June 10, 2019

PROCEDURAL HISTORY

On February 20, 2019, Grievant was issued a Group III Written Notice of disciplinary action with removal for falsifying records.

On February 26, 2019, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On March 11, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 20, 2019, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Counsel
Witnesses

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:

The Virginia Employment Commission employed Grievant as a Hearing & Legal Services Officer I at one of its locations. Her position was also known as a Deputy. She had been employed by the Agency for approximately nine years. Grievant had prior active disciplinary action. On May 2, 2016, Grievant received a Group III Written Notice for falsifying records. She was suspended for 30 workdays.

The purpose of Grievant's position was:

> As a certified Hearings Officer, render monetary and non-monetary determinations concerning claimant's eligibility or qualification for unemployment benefits based on findings of fact from claimants and employers an application of law and regulations. Review assigned cases and case documentation; respond to inquiries; schedule required hearings promptly; conduct fact-finding interviews with claimants and employers; document statements and hearing progress; and prepare and release monetary and non-monetary determinations concerning claimant's eligibility or qualifications for UI benefits. Ensure all related actions comply with applicable laws and regulations, including the Department of Labor (DOL) standards related to first pay timeliness and quality. As assigned,

provide training to new staffing review proposed determinations for final release.[1]

Eligibility for unemployment benefits requires that an individual conduct an active search for work as directed by the Agency. If the claimant does not meet this requirement, the claimant is ineligible for benefits during the period the individual failed to actively search for work.

On February 11, 2019, the Manager received an email from a manager in the quality assurance unit of the Agency. The quality assurance manager indicated an employer alleged Grievant attributed statements to the employer that were not actually made by the employer. The Manager began a review of Grievant's work performance. The Manager reviewed a spreadsheet containing hearing officers' decisions and noticed that Grievant had a high number of non-separation decisions. These decisions typically addressed the issue of whether the claimant was available to work or had conducted a work search. Grievant had written 79 non-separation decisions. The hearing officer with the next highest number of non-separation decisions had 42 non-separation decisions.

The Manager randomly selected a number of Grievant's cases with decisions issued between January 15, 2019 and February 11, 2019. The Manager reviewed the B3 forms completed by Grievant for each case. The Manager could not find any B3 forms where Grievant reported the claimant as having made job contacts. This seemed unusual to the Manager. The Manager contacted 14 claimants and received responses from eight of them. The Manager found problems with eight of Grievant's claimant decisions leading her to believe Grievant had falsified records. Among the eight were claimed filed by Claimant R, Claimant Bi, and Claimant E whose claims were addressed in more detail during the hearing.[2]

On January 15, 2019, Grievant issued a denial of Claimant R's case based on a 63 issue (failure to make job contacts) for the time frame of December 23, 2018 through January 12, 2019. Grievant wrote a Memo #004 stating "63 issue: [BWE 12/29 – BWE 01/12] [claimant] made no job contacts." Grievant wrote on the B3 in VUIS[3] that Claimant R said, "I got this letter and I thought I had to wait."

[1] Agency Exhibit 3.

[2] The Agency presented determinations written by Grievant as evidence to support the disciplinary action against Grievant. These documents are admissible in this hearing. Code of Virginia § 60.2-623 appears to intend that VEC decisions cannot be used, either by a claimant or VEC, in other proceedings in which the claimant is involved. For example, an employee cannot present a VEC decision awarding her unemployment benefits in a grievance hearing for the purpose of proving that she did not engage in work-related misconduct (or other similar arguments). In this case, the documents are not offered for that purpose, but rather as evidence that Grievant engaged in misconduct in her position as a VEC hearing officer. It does not appear that the legislature intended to limit the Agency's ability to manage personnel matters of this nature by limiting its ability to provide documents in support of its decision to discipline an employee for misconduct relating to the performance of her duties as a VEC hearing officer.

[3] VUIS is the Agency's database.

On February 12, 2019, Claimant R sent an email to the Manager stating:

> During the fact-finding interview the officer did not ask me about my job contacts for the weeks listed in your email nor did she ask if I was able and available to work. The interview centered around the facts concerning my layoff. I did ask why I wasn't able to enter my job contacts on the website prior to the scheduled interview and she said she would have [to] unlock my account. When I entered the weeks after the interview, I looked for a way to enter the previous weeks but was unable. Yes I did maintain my records from the weeks listed above.[4]

Claimant R provided work search evidence in his email response for the weeks in question.

On February 6, 2019, Grievant issued a denial of Claimant Bi's claim based on a 63 issue (failed to make job contacts) for the timeframe of January 20, 2019 through February 2, 2019. Grievant wrote Memo #007 stating "63 issue BWE 1/26 – 2/2 [claimant] made no job contacts." Grievant wrote on the B3 in VUIS that Claimant Bi told Grievant, "I had no idea I had to keep doing them."

On February 11, 2019, the Manager spoke with Claimant Bi. Claimant Bi said Grievant advised her she was not up-to-date with her weekly filing. Claimant Bi said Grievant did ask if the claimant was able and available to work but did not ask the claimant about any job contacts that were made or to give any company names. Claimant Bi said she never told Grievant she did not make any job contacts.

On January 17, 2019, Grievant issued a denial of Claimant E's case based on a 63 issue (failed to make job contacts) for the time frame of December 23, 2018 through January 12, 2019. Grievant wrote Memo #002 stating "63 issue: BWE: 12/29 - BWE 1/12 [claimant] made no job contacts." Grievant wrote on the B3 in VUIS that Claimant E said, "I was trying to wait for the outcome of this before doing them."

On February 11, 2019, the Manager sent Claimant E an email asking, "During the fact finding interview, did the hearing officer ask you for your weekly claim information …. Were you asked if you were able and available to work during those weeks, whether or not you refused any offers of work during those weeks, etc.?"

Claimant E replied, "Yes she did ask me those questions. Yes I was available to work and I didn't refuse any offers (none were presented.).

The Manager also asked in the email, "During the fact finding interview did the hearing officer ask you to provide the names of any companies you contacted for work …" If yes, what was your response? "

[4] Agency Exhibit 1.

Claimant E replied, "Yes she did ask me and I said yes I had done my work search for that period of time and I told her I had trouble getting them online to the website and she said that's because I was "locked out" she said she would fix it and I could try in the coming day."[5]

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."[6] 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."

"[F]alsification of records" is a Group III offense.[7] An agency may establish falsification of records by showing that an employee knew or should have known what he or she was writing was false. In this case, Grievant wrote that Claimant R made no job contacts when in fact Claimant R had job contacts and could have provided them to Grievant. Grievant wrote that Claimant Bi did not make job contacts even though Grievant failed to ask Claimant Bi if Claimant Bi made any job contacts. Grievant wrote that Claimant E made no job contacts even though Claimant E told Grievant Claimant E made job contacts. The Agency has presented evidence of a pattern of behavior by Grievant showing the creation of false records. That pattern of behavior is sufficient to show that Grievant knew or should have known that she was falsely writing that claimants had not made job contacts. The Agency's evidence is sufficient to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

Grievant denied falsifying any records. She testified she "could not recall one case from another" and she was obligated to complete cases in 48 hours. The Agency has presented a pattern of behavior sufficient to show Grievant knew or should have known she was writing false information about several claimants.

Grievant argued she was not told about the allegation against her until February 19, 2019 when she was presented with the notice of intent to take disciplinary action. This argument is unpersuasive because the Agency is not obligated to notify an employee of its investigation and may wait to inform the employee of the allegations against the employee after the investigation.

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[5] Agency Exhibit 1.

[6] The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

[7] See, Attachment A, DHRM Policy 1.60.

Grievant argued that the Manager did not like her and showed favoritism towards other deputies. Grievant testified she heard the Manager say she "couldn't stand" Grievant. Grievant argued she returned to work on February 20, 2019 and was treated poorly by the Agency as she had to wait from 8:45 a.m. until 3:30 p.m. to have her disciplinary action addressed. She asserted that the Agency treated her unprofessionally by allowing other employees to see her packing her belongings and taking them out to her vehicle in the rain. Grievant argued she was not allowed to review documents prior to the grievance hearing.

The Hearing Officer can assume for the sake of argument that Grievant's assertions about how the Agency treated her are true. The truthfulness of Grievant's assertions would not affect the outcome of this hearing. The Manager did not begin an investigation against Grievant because the Manager did not like Grievant. The Manager only began an investigation after being contacted by another manager who raised questions about Grievant's work performance. The Agency's poor treatment of Grievant as she departed the Facility would not form a basis for reversing the disciplinary action. To the extent the Agency failed to allow Grievant to review documents prior to the filing of her grievance, the hearing process allowed her to have access to all of the Agency's documents at least four workdays before the hearing. The hearing process cured any defect in procedural due process created by the Agency.

Va. 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 …."[8] 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.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is **upheld**.

APPEAL RIGHTS

[8] Va. Code § 2.2-3005.

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].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

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