

Issue: Group III Written Notice with Termination (falsifying records); Hearing Date: 07/13/17; Decision Issued: 07/14/17; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 11020; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11020

Hearing Date: July 13, 2017

Decision Issued: July 14, 2017

PROCEDURAL HISTORY

On April 13, 2017, Grievant was issued a Group III Written Notice of disciplinary action with removal for falsifying records.

On April 20, 2017, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On May 8, 2017, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On July 13, 2017, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
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. 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 Department of Corrections employed Grievant as a Food Service Assistant Director at one of its facilities. Grievant had prior active disciplinary action. On November 3, 2016, she received a Group I Written Notice for unsatisfactory work performance.

Grievant was responsible for conducting weekly inspections of the work center kitchen and then completing a form to record whether the items she observed were satisfactory or unsatisfactory. The report was used to monitor whether food was contaminated, staff were handling food properly, and equipment was operated safely. By completing an inspection form, Grievant represented to Facility managers that she had inspected and evaluated the kitchen.

Grievant completed inspection reports on February 23, 2017, March 3, 2017 and March 11, 2017. She did not inspect the kitchen on those dates. She later admitted to writing the reports without having conducted the inspections.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three groups, according to the severity of the behavior. Group I offenses "include types of behavior less severe in nature, but [which] require correction in the interest of maintaining a productive and well-managed

work force.”¹ Group II offenses “include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal.”² Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”³

Group III offenses include:

Falsifying any records, 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, such as count sheet, vouchers, reports, insurance claims, time records, leave records, or other official state documents.⁴

Grievant falsified three kitchen inspection reports because she completed the inspection forms describing inspections without having conducted inspections. The Agency has presented sufficient evidence 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.

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”⁵ 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.

Grievant argued that the disciplinary action was too harsh. Two Agency managers at the Facility testified that they recommended Grievant receive a Group III Written Notice but not be removed from employment. The Agency’s regional manager overruled their preference and required Grievant’s removal because her action was

¹ Virginia Department of Corrections Operating Procedure 135.1(VI)(B).

² Virginia Department of Corrections Operating Procedure 135.1(VI)(C).

³ Virginia Department of Corrections Operating Procedure 135.1(VI)(D).

⁴ Virginia Department of Corrections Operating Procedure 135.1(VI)(D)(2)(b).

⁵ Va. Code § 2.2-3005.

intentional and she had prior disciplinary action. The fact that a regional manager has overruled facility managers to increase disciplinary action is an important consideration, but it is not a mitigating circumstance. The Agency decided to issue a Group III Written Notice with removal and the Agency presented sufficient facts to support issuance of the disciplinary action.

Grievant argued that other employees falsified records but were not removed from employment. Grievant did not present sufficient evidence to show the details of these instances. The Facility Warden testified that he was unaware of the other employees. The Hearing Officer cannot conclude that Grievant was singled out for disciplinary action. In light of the standard set forth in the Rules, 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

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 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 EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

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