Issue: Group III Written Notice with termination (falsifying a State document); Hearing Date: November 13, 2001; Decision Date: November 19, 2001; Agency: Virginia Commonwealth University; AHO: Carl Wilson Schmidt, Esquire; Case Number: 5323

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5323

Hearing Date: November 13, 2001
Decision Issued: November 19, 2001

PROCEDURAL HISTORY

On September 19, 2001, Grievant was issued a Group III Written Notice of disciplinary action with removal for misrepresenting her supervisor on two State applications for employment.[1] On September 19, 2001, Grievant timely filed a grievance to challenge the disciplinary action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On October 16, 2001, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 13, 2001, a hearing was held at the University's regional office.

APPEARANCES

Grievant
Grievant's Representative

[1] The Written Notice attaches copies of the two applications for which Grievant listed someone other than her actual supervisor. The notice does not specify the offense committed by Grievant. In addition, the notice was issued by an employee of the human resource department rather than by someone within Grievant's chain of command. Any defect in the notice is a matter that could have been addressed through a compliance ruling prior to hearing. Consequently, if a notice is defective, that defect would not provide a basis for the Hearing Officer to reverse the University's action.

Agency Party Designee
Legal Assistant Advocate
Three Division Directors
Three Office Services Supervisors
Medicaid Analyst
Personnel Analyst

ISSUE

Whether Grievant should receive a Group III Written Notice of disciplinary action with removal.

BURDEN OF PROOF

The burden of proof is on the University 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 Virginia Commonwealth University employed Grievant as a Office Service Specialist until her removal on September 19, 2001. She had been working for the Commonwealth for approximately 12 years. She began working for the University on June 25, 2000.

On September 6, 2001, the University notified Grievant that her position was being abolished effective October 5, 2001 "due to the redistribution of grant funds."[2] She was told to continue reporting to work until September 21, 2001 and after that date she would be placed on pre-layoff leave until October 5, 2001. A Human Resource Generalist was assigned to help Grievant find placement in another position within the University.

On September 11, 2001, Grievant presented her supervisor with a letter stating that she would be transferring to a position in another division within the University beginning on September 18, 2001. The HR Manager received a copy of the letter and became concerned as to whether the University supervisor who intended to hire

[2] University Exhibit 2; Grievant Exhibit 10.

Grievant had completed a reference check. All supervisors are required to contact references before hiring an employee. The HR Manager contacted the new supervisor and asked if the new supervisor had spoken with Grievant's references and supervisor. The new supervisor stated that Grievant's application for employment showed Ms. VB as Grievant's supervisor and that the new supervisor called Ms. VB but Ms. VB was not in the office. The new supervisor then spoke with Ms. TS who said she also supervised Grievant. Ms. TS gave Grievant a favorable reference.

Grievant submitted two State applications for employment to the University. One is referred to as a "layoff application" because it was completed and signed but not submitted for any specific position. As positions became available within the University, the application would be used to provide Grievant with priority hiring. Grievant submitted the second application for a specific position. Each application asks, "May we contact your present supervisor?" Grievant answered "yes" on each application. Both applications state above the signature line, "I agree and understand that any falsification of information herein, regardless of time of discovery, may cause forfeiture on my part to any employment in the service of the Commonwealth of Virginia." Grievant signed both applications.

CONCLUSIONS OF LAW

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force." P&PM § 1.60(V)(B). [3] Group II offenses "include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal." P&PM § 1.60(V)(B)(2). Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal." P&PM § 1.60(V)(B)(3).

"Falsifying any records, including, but not limited to, vouchers, reports, insurance claims, time records, leave records, or other official state documents" constitutes a Group III offense. P&PM § 1.60(V)(B)(3)(b).[4]

"Falsifying" is not defined by the P&PM, but the Hearing Officer interprets this provision to require proof of an intent to falsify by the employee in order for the falsification to rise to the level justifying termination. This interpretation is less rigorous but is consistent with the definition of "Falsify" found in Blacks Law Dictionary (6th Edition) as follows:

---

[3] The Department of Human Resource Management has issued its *Policies and Procedures Manual* (P&PM") setting forth Standards of Conduct for State employees.

[4] The Hearing Officer construes this language to include the circumstances where an employee creates a false document and then submits it to an agency where that document becomes a record of the agency.

> Falsify. To counterfeit or forge; to make something false; to give a false appearance to anything. To make false by mutilation, alteration, or addition; to tamper with, as to falsify a record or document. ***

The Hearing Officer's interpretation is also consistent with the New Webster's Dictionary and Thesaurus which defines "falsify" as:

> to alter with intent to defraud, *to falsify accounts* || to misrepresent, *to falsify an issue* || to pervert, *to falsify the course of justice.*

Once an application for employment is submitted to a State agency, it becomes a record of that agency. Grievant knew the identity of her supervisor and knew that the persons she wrote as her supervisors were friends who would favorably describe her work performance. At the time she submitted the applications, her intent was to misrepresent the identify of her supervisor. She knew the University would rely on her misrepresentation because she answered "yes" to the question of whether the prospective employer could contact her supervisor. The University has met its burden of proof to show that Grievant falsified a State record.

Corrective action may be reduced based on mitigating circumstances. Mitigating circumstances include: (1) conditions related to an offense that justify a reduction of corrective action in the interest of fairness and objectivity, and (2) consideration of an employee's long service with a history of otherwise satisfactory work performance.[5]

Grievant contends her actions were justified because she was working in an unprofessional and unfriendly workplace where managers were hostile to employees.[6] She presented testimony of co-workers in her division who had been yelled at by supervisors without any action being taken to redress employee complaints. She also presented evidence that the division had a high turnover rate in non-supervisory positions. Grievant argues that if she had correctly listed the name of her supervisor, her supervisor would have given her a poor reference in order to defeat her attempt at further employment. She felt she had to misrepresent the identify of her employer as a method of survival.

---

[5] P&PM § 1.60(VII)(C)(1).

[6] Once Grievant informed the University that she had obtain other employment, the University removed her access to confidential patient records and physically moved her to another room on the same floor. Grievant testified she was not given any work to do once she was moved and that other departing staff had not been sequestered. She contends the University mistreated her. The University argues it followed a reasonable process to secure its confidential patient records by removing an employee who may have some motive to harm the University for abolishing her position. The Hearing Officer concludes that Grievant's removal from access to confidential information is not relevant to whether her discipline was appropriate. Grievant was moved after she had already falsified the employment applications and before the University discovered the falsification. Consequently, there is no connection between the poor treatment Grievant alleges and the disciplinary action.

The evidence presented is not sufficient for the Hearing Officer to conclude that the University would have intentionally misrepresented Grievant's employment performance in order to defeat her employment opportunities. Grievant testified that when she informed her supervisor that her position was being abolished, her supervisor was "almost in tears" because of the improper treatment given to a valuable employee. The evidence also showed that Grievant's work performance had much improved at the time her position was being abolished. Grievant's evidence suggesting an unprofessional and unfriendly work environment did not include any such actions by Grievant's supervisor towards her. Based on this evidence it is likely Grievant's supervisor would have given her a favorable reference. Even if the Hearing Officer assumes for the sake of argument that Grievant's supervisor would have intentionally misrepresented her work performance, Grievant could have checked the "no" box and instructed prospective employers not to contact her supervisor. Grievant has not established any mitigating circumstances that would justify reduction in the University's discipline.

State agencies are prohibited from retaliating against employees who have participated in protected activities. Retaliation is defined by the *Grievance Procedure Manual* as "Actions taken by management or condoned by management because an employee exercises a right protected by law or reported a violation of law to a proper authority (e.g. 'whistleblowing')."

When Grievant wrote the Governor regarding improprieties she believed were occurring within her division, she was engaging in a protected activity for which the University may not take retaliatory action. Grievant has not established that the disciplinary action against her was taken because she corresponded with the Governor. Indeed, the disciplinary investigation was initiated by a human resource employee for whom Grievant expressed gratitude and appreciation for the assistance provided by that human resource employee. The University's disciplinary action was based solely on Grievant's behavior.

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 **upheld**.

APPEAL RIGHTS

As Sections 7.1 through 7.3 of the Grievance Procedure Manual set forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review – This decision is subject to four types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.
2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy.
3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure.
4. In grievances arising out of the Department of Mental Health, Mental Retardation and Substance Abuse Services which challenge allegations of patient abuse, **a challenge that a hearing decision is inconsistent with law** may be made to the Director of EDR. The party challenging the hearing decision must cite to the specific error of law in the hearing decision. The Director's authority is limited to ordering the hearing officer to revise the decision so that it is consistent with law.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **10 calendar** days of the **date of the original hearing decision.** (Note: the 10-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 10 days; the day following the issuance of the decision is the first of the 10 days). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 10 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or HRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

____

Carl Wilson Schmidt, Esq.
Hearing Officer