

Issue: Group III Written Notice with Termination (falsification of employment application); Hearing Date: June 13, 2002; Decision Date: June 17, 2002; Agency: Virginia Polytechnic Institute and State University; AHO: David J. Latham, Esquire; Case Number: 5454



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5454

Hearing Date:	June 13, 2002
Decision Issued:	June 17, 2002

APPEARANCES

Grievant
Associate Director of Human Resources
Attorney for Agency
One witness for Agency

ISSUES

Did the grievant's conduct warrant disciplinary action under the Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

FINDINGS OF FACT

The grievant filed a timely appeal from a Group III Written Notice issued for falsification of an employment application.¹ As part of the disciplinary action, the grievant was discharged from employment on March 22, 2002.² Following failure to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.

Virginia Polytechnic Institute and State University (Virginia Tech) (hereinafter referred to as "agency") has employed grievant as a food operations assistant (baker) since August 2000. Initially, grievant was hired as a temporary employee but was subsequently hired as a full-time classified employee on October 25, 2000.

When he applied for the classified position, grievant completed a standard state Application for Employment form, which he signed on August 21, 2000. The form includes the following question in the miscellaneous section:

Have you ever been convicted for any violation(s) of law, including moving traffic violations? If YES, please provide the following: Description of offense; Statute or ordinance (if known); Date of Charge; Date of Conviction; County, City and State of Conviction.

Grievant checked YES and listed the following:

Description of offense: No inspection sticker
Date of charge: 9-98 & 12-98
City of Conviction: Christiansburg, VA³

Just below the above information, grievant signed and dated the following Certification:

I hereby certify that all entries on both sides and attachments are true and complete, and I agree and understand that any falsification of information herein, regardless of time of discovery, may cause forfeiture on my part of any employment in the service of the Commonwealth of Virginia. I understand that all information on this application is subject to verification and I consent to criminal history background checks. ...⁴

The agency does not routinely perform criminal history checks on employees in grievant's job classification. However, criminal record checks are

¹ Exhibit 1. *Grievance Form A*, filed March 26, 2002.

² Exhibit 4. Written Notice, issued March 22, 2002.

³ Exhibit 2. DPT Form 10-012, Application for Employment, signed by grievant August 21, 2000.

⁴ Exhibit 2. *Ibid.*

performed at any time when the agency has cause for concern about an employee's background.

In early 2002, the Associate Director of Human Resources, whose areas of responsibility include Residential and Dining Facilities, began to hear concerns from grievant's coworkers regarding his past, and their own safety. The grievant had told some coworkers about portions of his past history, which included criminal activity. The Associate Director decided that it would be prudent to request a criminal history records check. On March 18, 2002, he requested the agency's police chief to obtain a background check on grievant. Through its computer system, the agency police department has the capability to request a criminal history records check from the National Crime Information Center (NCIC). The police department requested a report on the grievant on March 19, 2002 and almost instantaneously received a printout by teletype.⁵

The NCIC report lists three convictions: Assault – August 1989; Brandishing a Firearm – January 1990; and, Brandishing a Firearm – October 1990. The report also lists eight other charges that were dismissed (6), nolle prossed (1), or disposition not received (1). The police department verbally notified the Associate Director that grievant had an extensive criminal record. The matter was then reviewed and evaluated by agency counsel and the Human Resources Department. Because grievant had failed to list these three convictions on his application form, it was concluded that grievant had falsified an official state document. On March 22, 2002, he was given a Group III Written Notice and removed from employment.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. Murray v. Stokes, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . .

⁵ Exhibit 6. NCIC report on grievant, March 19, 2002.

To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.⁶

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the Code of Virginia, the Department of Personnel and Training⁷ promulgated Standards of Conduct Policy No. 1.60 effective September 16, 1993. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action. Section V.B.3 of the Commonwealth of Virginia's *Department of Personnel and Training Manual* Standards of Conduct Policy No. 1.60 provides that Group III offenses include acts and behavior of such a serious nature that a first occurrence normally warrants removal from employment. One example of a Group III offense is falsifying any records or official state documents.⁸ The agency has incorporated the same policy in its Classified Employee Handbook.⁹

The agency based its disciplinary action on the fact that grievant's application falsely stated that he had been convicted of only one violation of law, and that falsification of an official state document is a Group III offense. Black's Law Dictionary provides the following definition of "falsify:"

To counterfeit or forge; to make something false; to give a false appearance to anything. ... The word "falsify" may be used to convey two distinct meanings – either that of being intentionally or knowingly untrue, made with intent to defraud, or mistakenly and accidentally untrue.¹⁰

The agency has demonstrated that grievant did falsify an official state document when he failed to list on his application for employment all of the

⁶ § 5.8 Department of Employment Dispute Resolution, *Grievance Procedure Manual*.

⁷ Now known as the Department of Human Resource Management (DHRM).

⁸ Exhibit 12. Section V.B.1.e, DHRM Policy 1.60, *Standards of Conduct*, September 16, 1993.

⁹ Exhibit 5. Section F.6.c, Classified Employee Handbook, *Standards of Conduct and Performance*.

¹⁰ Washer v. Bank of American Nat. Trust & Savings Ass'n, 21 Cal 2d 822, 136 P 2d 297, 301.

offenses of which he had been convicted. Such an offense normally results in removal from employment.

Grievant contends that he did not list the 1989 and 1990 convictions because he had gone to a local court clerk who told him that they had no record of any convictions for the grievant prior to 1996. Therefore, grievant assumed that he did not have to report convictions for years prior to 1996 on his application form. Grievant's reasoning is incorrect because the application form asks whether grievant had "ever been convicted." The use of the word "ever" in the question makes it abundantly clear that the grievant was required to provide information about all convictions, regardless of when they occurred.

Grievant avers that he had forgotten about these convictions. In each of the three cases, grievant testified that he was jailed, tried, found guilty and sentenced to time served while awaiting trial. Based on grievant's demeanor, his ability to express himself orally during the hearing, and his recollection of other facts, it is simply not credible that he could have forgotten three separate confinements, trials and convictions that took place over the period of nearly one and a half years. Moreover, grievant has unintentionally corroborated that he did remember these convictions when he stated on his grievance form, "I know of no other convictions *on record*. As to the best of my knowledge **all other convictions** were deleted." (Italics and emphasis added)

Grievant objects to the fact that the Associate Director did not have in hand a copy of his criminal record on the day he was discharged. This is a red herring. The fact is that the agency police department had the criminal record in hand when grievant's employment was terminated. It is not necessary that everyone else associated with the decision to discharge grievant also have a copy of the criminal history record in their own hands at the time of discharge. The Associate Director and others reasonably relied on the accuracy of the verbal report from the police department that grievant had an extensive criminal record. Furthermore, grievant has not demonstrated that that reliance was misplaced. The actual written report supports the verbal report given to the Associate Director by the police department.

Grievant also argues that the Virginia Employment Commission (VEC) initially found him qualified for unemployment compensation benefits.¹¹ However, the deputy made her initial determination based solely on information provided by the grievant; a hearing has not yet been conducted. The agency has filed an appeal so that a VEC appeals examiner may conduct a formal hearing.¹² In any case, this hearing officer is not bound by the determination of another agency. The decision in this case must be made based solely on the evidence presented during the hearing conducted by this hearing officer.

¹¹ Exhibit 7. Virginia Employment Commission *Notice of Deputy's Determination*.

¹² Exhibit 8. Letter of appeal filed to VEC by agency.

DECISION

The disciplinary action of the agency is affirmed.

The Group III Written Notice for falsification of an application for employment and grievant's discharge from employment on March 22, 2002 are hereby AFFIRMED. The disciplinary action shall remain active pursuant to the guidelines in Section F.4.A of the Standards of Conduct.

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 three 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.

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.

David J. Latham, Esq.
Hearing Officer