

Issue: Group III Written Notice with termination (falsification of records); Hearing Date: 12/12/02; Decision Date: 12/26/02; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No.: 5585



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5585

Hearing Date: December 12, 2002
Decision Issued: December 26, 2002

PROCEDURAL HISTORY

On August 30, 2002, Grievant was issued a Group III Written Notice of disciplinary action with removal for "Falsification of Records."

On September 3, 2002, Grievant timely filed a grievance to challenge the disciplinary action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On November 21, 2002, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 12, 2002, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Advocate
Human Resource Officer
Assistant Operations Manager
Supervisor
Senior Trooper

ISSUE

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

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 Virginia Department of Transportation employed Grievant as a Senior Safety Service Patroller. The Agency employed him for approximately 24 years. He was a good and valuable employee who had been commended for his performance.¹ Grievant received a Group II Written Notice on April 4, 2002 for failure to report to work as scheduled without proper notice to his supervisor. Grievant received a Group II Written Notice on August 23, 2002 for failure to follow established written policy.

In 1993, Grievant's marriage of 16 years was dissolving. He and his wife had an altercation and the matter ended up in court.² Grievant was convicted of domestic assault.³ Grievant described the events in 1993 as follows:

When the charges were placed against me, I paid a \$40.00 fine and thought that was the end of it. I did not know that it would be on my record as a criminal conviction. I did not have a lawyer at the time and this was not explained to me.

On February 2, 2002, Grievant submitted an application for employment to the Agency for the position of Transportation Operations Manager. He checked "yes" to the question of "Have you ever been convicted for any violation(s) of law, including moving

¹ Grievant Exhibit 1.

² Grievant's former wife stated, "I believe [Grievant] was stressed as well as I was and he blotted out everything during that time in fear of losing his family." See, Grievant Exhibit 2.

³ Agency Exhibit 4.

traffic violations?” He described the offense as “Driving on suspended license” with a conviction date of July 20, 1998 in a Virginia county.

Grievant’s ability to read and write is limited. He asked another person to help him prepare his February 2, 2002 application for employment. That person simply copied the information contained in one of Grievant’s prior applications for employment. Grievant knew he was responsible for the information contained in the application when he signed his name to the application.

CONCLUSIONS OF POLICY

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.” DHRM § 1.60(V)(B).⁴ 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.” DHRM § 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.” DHRM § 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. DHRM § 1.60(V)(B)(3)(b).⁵ DHRM § 2.10 states:

Before an applicant is eligible for employment with the Commonwealth, several records must be reviewed or verified. This information is considered part of the application process and, as with information contained on the application form, if it is later discovered that an applicant falsified any information related to his or her employment, the employee may be terminated.

“Falsifying” is not defined by DHRM § 1.60(V)(B)(3)(b) or DHRM § 2.10, 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:

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. ***

⁴ The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

⁵ 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.

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. If Grievant intended to falsify the application for employment, then he would have engaged in behavior rising to the level of a Group III offense. The Hearing Officer finds that Grievant did not intend to falsify his application for employment for several reasons. First, Grievant did not understand his conviction to be of a criminal nature. Second, Grievant's understanding was confirmed when he passed a background check in 1999 which did not mention his 1993 conviction. Third, Grievant did not fill out and read the February 2, 2002 application for employment before he signed it. He did not realize the application contained an error regarding his criminal history.

Although Grievant did not intend to falsify his application for employment, his behavior rises to the level of disciplinary action. State agencies cannot make accurate hiring decisions when applicants fail to provide relevant information. Grievant knew that he was obligated to accurately complete his application for employment before submitting it. His failure to ensure the accuracy of his application amounts to the failure to follow established written policy. Grievant's failure to comply with the Agency's hiring requirements does not depend on whether he intended to disregard them. Thus, Grievant's behavior rises to the level of a Group II offense.

Group II Written Notices are cumulative. A second active Group II Written Notice normally should result in removal. DHRM § 1.60(VII)(D)(2)(b). Grievant received Group II Written Notices on April 4, 2002 and August 23, 2002. After reducing the disciplinary action subject to this appeal to a Group II Written Notice, Grievant has three active Group II Written Notices. Based on the accumulation of disciplinary action, the Agency's removal of Grievant must be upheld.

DECISION

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

APPEAL RIGHTS

You may file an administrative review request within **10 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy.
3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 10 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 10-calendar day period has expired, or when administrative requests for review have been decided.

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.⁶

[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].

Carl Wilson Schmidt, Esq.
Hearing Officer

⁶ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.