

Issue: Group III Written Notice with termination (falsifying records); Hearing Date: 09/09/04; Decision Issued: 09/28/04; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 849



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 849

Hearing Date: September 9, 2004
Decision Issued: September 28, 2004

PROCEDURAL HISTORY

On June 16, 2004, Grievant was issued a Group III Written Notice of disciplinary action with removal for, "Falsifying any records, by omission." On June 17, 2004, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On August 18, 2004, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 9, 2004, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Advocate
Witnesses

ISSUE

Whether Grievant should receive a Group III Written Notice of disciplinary action with removal for falsifying 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 Department of Corrections employed Grievant as a Corrections Officer Senior until her removal effective June 22, 2004. She began working for the Agency in 2003. Part of Grievant’s responsibilities included standing and walking for prolonged periods of time.

Prior to hiring Grievant, the Agency evaluated her application for employment and also assessed her physical fitness for duty. Grievant was required to disclose her medical condition and was examined and interviewed by the Agency’s physician.

On April 23, 2003, Grievant signed a form entitled “INSTITUTIONAL SERVICES – MEDICAL RECORD.” This form is a tool used by the Agency and its medical staff to determine whether offers of employment should be made. One section of the form is entitled “Family History” and requires the applicant to indicate the family members affected by: Mental Illness, Epilepsy, Cancer (Type), Diabetes, Tuberculosis, Heart Disease, Hypertension, and Arthritis. Grievant completed this section by entering “no” or identifying the family member experiencing the listed items.

A second section of the form is entitled “Personal History” and requires the applicant to check “yes” or “no” as to whether certain items are applicable to Grievant. These items include: Hematology, Cardiovascular, Hypertension, Diabetes, Neurology, Epilepsy, Respiratory, Tuberculosis, Gastro intestine, Endocrine, Auto-immune/Connective tissue, Arthritis, Malignancy, Hepatitis, Urology, Venereal Disease, Drugs, Alcohol, Orthopedic/back, Operations, Injuries, Allergies, Psychiatric TX, Pregnancies, Miscarriages, and Other.

A third section of the form is entitled “Personal History Remarks.” In order to supplement the second section, Grievant wrote in this section that she had experienced

migraine headaches, asthma, and operations on her right middle finger and left wrist and abdomen.

After completing the form, Grievant met with the Agency's Physician. The Physician took Grievant's vital signs, measured her height and weight, evaluated her vision, among other tests. He reviewed Grievant's Medical Record form¹ and asked any relevant questions. The Physician had the authority to recommend to the Agency that they not hire Grievant, but he did not exercise that authority based on the information Grievant provided and his examination of Grievant.

On June 3, 2004, Grievant's doctor² sent the Agency a letter stating:

This is a ... female who has recently had at the very least a severe post phlebitic symptoms related to deep blood clots that she incurred in 1998 and the year 2000. This will always be a problem for her if she stands a prolonged amount of hours.³

Agency managers were surprised to learn that Grievant had deep blood clots in prior years. When Grievant took her physical in April 2003, she did not disclose on the Medical Record form or discuss with the Physician any incidents of phlebitis. Having a history of phlebitis can reveal a compromise of vein circulation thereby resulting in pain and swelling and affect an employee's ability to work.

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." Department of Corrections Procedure Manual "(DOCPM)" § 5-10.15. 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." DOCPM § 5-10.16. Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal." DOCPM § 5-10.17.

Group III offenses include "falsifying any records, including but are not limited to, vouchers, reports, insurance claims, time records, leave records, or other official state documents." DOCPM § 5-10.17(B)(2). "Falsifying" is not defined by DOCPM § 5-

¹ Grievant did not ask the Physician any questions about how to fill out the form.

² Grievant objected to the introduction of her doctor's letter because she had not asked the doctor to provide the detail about her medical history. The Hearing Officer overruled Grievant's objection because the Agency was not at fault in obtaining the document. Grievant's physician determined what information was to be contained in the letter and provided the letter to the Agency.

³ Agency Exhibit 5.

10.17(B)(2), 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. ***

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 Grievant submitted her Medical Record to the Agency, it became a record of the Agency. If Grievant intended to falsify the application for employment, then she would have engaged in behavior rising to the level of a Group III offense.

Grievant knew or should have known that the Agency expected her to fully disclose her medical condition and history. The Medical Records form addresses detailed and comprehensive aspects of an applicant’s health. Grievant was expected to provide information relating to eight categories of her family history. She was expected to provide information relating to 26 categories of her personal health. Grievant’s blood clots fell within the category of “Cardiovascular.” If she was not sure in what category her condition fell, she should have checked the “Other” category and then explained her medical experience in the “Personal History Remarks” section. Grievant wrote in that section that she had asthma, migraine headaches, and several operations but she failed to mention blood clots. Grievant had experienced serious incidences of bloods clots in 1998 and 2000 such that she could not have overlooked them as being insignificant.

By omitting information Grievant knew or should have known that the Agency expected her to disclose, Grievant falsified her Medical Record. Because Grievant did not fully disclose her medical history, the Agency was unable to fully evaluate Grievant’s fitness for duty. The Agency has presented sufficient evidence to support its issuance of a Group III Written Notice with removal.

Grievant argues that the signature sentence at the bottom of the form acknowledges she is expected to disclose only current medical problems.⁴ Since her blood clots occurred several years ago and were not active when she signed the form, Grievant asserts she was not obligated to disclose them. Grievant’s argument fails because other portions of the form refer to Grievant’s medical history. Grievant’s comments addressed operations occurring in prior years. She also referred to past

⁴ The form states, “My signature below certifies that I have disclosed all known medical problems/conditions which affect me at this time.”

pregnancies. None of those conditions affected her on April 23, 2003 when she signed the form. The Hearing Officer cannot conclude that the signature sentence affected how Grievant disclosed her medical history.

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 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. Please address your request to:

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

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. Please address your request to:

Director
Department of Employment Dispute Resolution
830 East Main St. STE 400
Richmond, VA 23219

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.⁵

[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

⁵ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.