

Issues: Group III Written Notice with Termination (falsifying records); Hearing Date: 07/06/07; Decision Issued: 07/25/07; Agency: DJJ; AHO: Carl Wilson Schmidt, Esq.; Case No. 8620; Outcome: No Relief – Agency Upheld in Full; **Administrative Review**: HO Reconsideration Request received 08/09/07; Reconsideration Decision issued 08/30/07; Outcome: Original Decision Affirmed; **Administrative Review**: EDR Ruling Request received 08/09/07; Outcome pending; **Administrative Review**: DHRM Ruling Request received 08/09/07; Outcome pending.



***COMMONWEALTH of VIRGINIA***  
***Department of Employment Dispute Resolution***

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8620**

Hearing Date: July 6, 2007  
Decision Issued: July 25, 2007

**PROCEDURAL HISTORY**

On March 14, 2007, Grievant was issued a Group III Written Notice of disciplinary action with removal effective March 13, 2007 for falsifying State records. On April 12, 2007, 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 he requested a hearing. On May 22, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 6, 2007, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Grievant's Representative  
Agency Party Designee  
Agency Advocate  
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 Juvenile Justice employed Grievant as a Probation Officer at one of its Facilities. The purpose of his position was:

Ensure the protection of the public by assisting the courts in holding juveniles accountable for their actions and offering them the opportunity to reform. This includes providing supervision of those youths on probation or parole in the community. Provide counseling, diversion and intervention services to these youth. The probation officer provides reports and other materials to the court and to other community agencies.<sup>1</sup>

He had been employed by the Agency for approximately 11 years until his removal effective March 13, 2007. His work performance had been satisfactory to the Agency. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

Probation officers are obligated by Agency policy to meet face-to-face with juveniles under their supervision and with the juvenile's family or guardian at least once

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<sup>1</sup> Agency Exhibit 4.

every 90 days. They are also obligated to maintain monthly contact with the family or guardian of a juvenile to provide identified services and support consistent with the Parole Supervision and Family and Involvement Plan.

The Agency maintains a Juvenile Tracking System to record and monitor the services provided to juveniles and their families. Probation officers are responsible for entering information into the Juvenile Tracking System.

Grievant wrote in the Juvenile Tracking System that he had a face-to-face meeting with Juvenile K's father on August 4, 2006. Grievant wrote:

PO met with [Father] and informed him that I am the new parole officer for [Juvenile K] and any concerns they have they can address with me. [Father] stated that he and his wife visit [Juvenile K] at least once a month. When [Juvenile K] is released they planned for him to live with them. Supervision plans reviewed and understood with parent.

Juvenile K's Father did not meet with Grievant. The Father had not met with Juvenile K in jail.

Grievant wrote in the Juvenile Tracking System that he had a face-to-face meeting with Juvenile K's Mother on September 14, 2006. Grievant wrote:

PO met with [Mother] who stated that [Juvenile K] call[s] home every week and he is progressing well thus far. [Mother] stated that when [Juvenile K] is released they planned for him to live with them. Supervision plans reviewed and understood with parent.

Grievant did not meet with the Mother on September 14, 2006. Juvenile K was only allowed one telephone call per month. He did not call his parents weekly as Grievant wrote.

Grievant wrote in the Juvenile Tracking System that he had a face-to-face meeting with Juvenile K's Mother on November 7, 2006. Grievant wrote:

PO talk[ed] with [Mother], she informed this officer that she is disappointed that [Juvenile K] was not released on this review date. I informed [Mother] that [Juvenile K] had very serious charges and that [is] why he was not released[.] Family involvement plans reviewed and understood with [Mother].

The Mother did not meet with Grievant on November 7, 2006 and did not make the statements Grievant wrote in the Juvenile Tracking System.

Grievant wrote in the Juvenile Tracking System that he had a face-to-face meeting with Juvenile K's Mother on December 6, 2006. Grievant wrote:

PO met with [Juvenile K's Mother], she informed this officer that everything is progressing well in the home and she plans for [Juvenile K] to return home to live with her upon his release. Family involvement plans reviewed and understood with [Juvenile K's Mother].

Grievant did not meet with Juvenile K's Mother on December 6, 2006. Indeed, Juvenile K's Mother informed Grievant's Supervisor that she had never met Grievant.

### 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."<sup>2</sup> 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."<sup>3</sup> Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."<sup>4</sup>

"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).<sup>5</sup> "Falsifying" is not defined by DHRM § 1.60(V)(B)(3)(b), 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 (6<sup>th</sup> 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*.

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<sup>2</sup> Virginia Department of Corrections Operating Procedure 135.1(X)(A).

<sup>3</sup> Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

<sup>4</sup> Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

<sup>5</sup> 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.

On at least four occasions Grievant wrote that he held face-to-face meetings with the parents of Juvenile K. Grievant had never met Juvenile K's parents. Grievant knew or should have known that he was writing false information into the Juvenile Tracking System. The Juvenile Tracking System maintains official State records. Grievant falsified official State records thereby justifying the issuance of a Group III Written Notice.<sup>6</sup> Removal from employment is authorized upon the issuance of a Group III Written Notice. Accordingly, Grievant's removal must be upheld.

### Mitigation

*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 Employment Dispute Resolution...."<sup>7</sup> 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 contends the disciplinary action should be mitigated because the Agency failed to consider whether there were mitigating circumstances justifying a reduction in disciplinary action.<sup>8</sup> This argument fails. Although agencies should consider whether employees have mitigating circumstances justifying the reduction of disciplinary action, an agency's failure to do so is not a basis to reverse or reduced disciplinary action.

Grievant contends the disciplinary action should be mitigated because of his length of service and otherwise satisfactory work performance. He adds that the Agency failed to provide him with adequate resources to enable him to perform his job. Because of this failure, he experienced additional pressure to complete his work assignments. These arguments fail. Under the *Rules for Conducting Grievance*

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<sup>6</sup> The Agency presented evidence of several other cases in which Grievant falsified entries in the Juvenile Tracking System. It is not necessary to discuss that evidence since the evidence presented with respect to Juvenile K is sufficient to support the Agency's allegation of falsification of State records.

<sup>7</sup> *Va. Code § 2.2-3005.*

<sup>8</sup> The Agency argued it considered Grievant's length of service and satisfactory work performance and concluded a basis to mitigate the disciplinary action did not exist. Grievant argued the Agency did not consider mitigating circumstances because it did not complete section IV of the Written Notice which would have contained a discussion of the mitigating circumstances considered.

*Hearings*, an employee's length of service and satisfactory work performance, standing alone, are not sufficient to mitigate disciplinary action. The additional pressure Grievant felt explains his motivation to falsify records, but it does not excuse it. In light of the standard set forth in the *Rules*, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

#### Date of Removal

The Agency issued the Written Notice on March 14, 2007 with a removal date prior to the date of issuance, namely March 13, 2007. Disciplinary action is prospective in nature. The Standards of Conduct do not authorize retroactive discipline. Accordingly, Grievant must be paid through March 13, 2007.

### **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**. The Agency is directed to provide the Grievant with **back pay** for one day, March 13, 2007 with credit for leave and seniority that the employee did not otherwise accrue.

### **APPEAL RIGHTS**

You may file an administrative review request within **15 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 14<sup>th</sup> St., 12<sup>th</sup> 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 15 calendar days of the date the decision was issued. You must give a copy of all of your appeals to the other party and to the EDR Director. The hearing officer's **decision becomes final** when the 15-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.<sup>9</sup>

[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].

*S/Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>9</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.



**COMMONWEALTH of VIRGINIA**  
**Department of Employment Dispute Resolution**

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case No: 8620-R**

Reconsideration Decision Issued: August 30, 2007

**RECONSIDERATION DECISION**

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. “[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis ...” to grant the request.

Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the hearing ended. However, the fact that a party discovered the evidence after the hearing does not necessarily make it “newly discovered.” Rather, the party must show that:

- (1) the evidence is newly discovered since the date of the Hearing Decision;
- (2) due diligence on the part of the party seeking reconsideration to discover the new evidence has been exercised;
- (3) the evidence is not merely cumulative or impeaching;
- (4) the evidence is material; and
- (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the Hearing Decision to be amended.

Grievant contends he has discovered new evidence that would show that the Agency has been unfair in its disciplinary process of certain employees. There is no basis to grant Grievant’s request based on new evidence. Grievant has not shown that he exercised due diligence to obtain the evidence prior to the hearing. In addition, the evidence the Grievant seeks to present would not likely produce a new outcome if the case were retried. Losing a case file is not the same as falsifying official State records. Willfully or negligently damaging or defacing State property is not the same as falsifying state documents. An employee who is permitted to resign in lieu of termination relates

to how the Agency treated an individual following the filing of a grievance and not with respect to the act of issuing disciplinary action.

Grievant does not cite any error of law.

Grievant argues the Agency violated the grievance procedure, submitted perjured testimony, provided false documentation, used disciplinary action against him for conduct that was not in the Department's policy and procedures, and engaged in double jeopardy by giving him a verbal warning and written discipline for the same incident. These arguments were either made or could have been made during the hearing. None of these arguments were supported by the evidence.

Grievant's request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. For this reason, Grievant's request for reconsideration is **denied**.

### **APPEAL RIGHTS**

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

1. The 15 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 DHRM, 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.

*S/Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer