

Issues: Group III Written Notice with termination (falsification of records); Hearing Date: 10/22/07; Decision Issued: 10/23/07; Agency: VDH; AHO: Carl Wilson Schmidt, Esq.; Case No. 8718; Outcome: No Relief, Agency Upheld In Full.



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8718**

Hearing Date: October 22, 2007  
Decision Issued: October 23, 2007

**PROCEDURAL HISTORY**

On June 28, 2007, Grievant was issued a Group III Written Notice of disciplinary action with removal for falsification of records. On July 25, 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 she requested a hearing. On September 20, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 22, 2007, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Agency Party Designee  
Agency Representative  
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 Virginia Department of Health employed Grievant as Office Services Specialist at one of its Facilities. She began working for the Agency in January 2006 until her removal effective June 28, 2007. The purpose of her position was:

Supports the environmental program by performing administrative tasks requiring interpretation and judgment in applying policies, procedures, permit or certificate requirements. Applies EH guidelines to answer citizen inquiries. Accepts sewage disposal & well permit applications after verifying compliance with regulations. Schedules site visit, determines fee, writes receipt, coding to applicable fund. Coordinates animal bite investigation activities between EHS staff, local Animal Control Officers, law enforcement officers, Animal Wardens. Informs owners of quarantine procedures. Compiles historical data on well and septic tank installations for construction, researching applicants' property and adjoining properties using files of tax map information and property records at local jurisdiction.<sup>1</sup>

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<sup>1</sup> Agency Exhibit 2.

Grievant's work performance had been satisfactory to the Agency. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

On December 7, 2005, Grievant submitted an application for employment with the Agency. Item 12(j) of the application asks:

Have you ever been convicted for any violation(s) of law, including moving traffic violations. \_\_\_ Yes \_\_\_ No. If YES, please provide the following:

Description of offense:

Statute or ordinance (if known):      Date of Charge:      Date of Conviction

County, City, State of conviction:

Grievant checked "Yes". After "Description of offense" Grievant wrote, "Misdemeanor / Reckless Driving 10/04 11/04 [Locality], VA"

Grievant did not write anything in the blank following "Statute or ordinance (if known)". After "Date of Charge", Grievant wrote "10/97". Grievant did not write anything in the blank following "Date of Conviction".

After "County, City, State of Conviction", Grievant wrote [Locality] VA".

Grievant signed and dated the application for employment. Immediately above her signature appears item 14. This item states:

CERTIFICATION-- Each Application Requires Current Date and Original Signature

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. I also consent that you may contact references, former employers and educational institutions attended regarding this application. I further authorize the Commonwealth to rely upon and use, as it sees fit, any information received from such contacts. Information contained in this application may be disseminated to other agencies, nongovernmental organizations or systems on a need-to-know basis for good cause shown as determined by the agency head or designee.<sup>2</sup>

Grievant's application for employment was reviewed by the Agency and Grievant was granted an interview. The Supervisor participated in the review and decision making process for Grievant's position. Based on her application for employment, Grievant was selected for the position and began working in January 2006.

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<sup>2</sup> Agency Exhibit 3.

The Agency began a background investigation on February 8, 2006 and finalized that investigation on April 24, 2007. The investigation revealed that Grievant was convicted of:

1. Reckless Driving in the local General District Court on September 23, 2004.
2. Petit Larceny (Misdemeanor) with a 12 month sentence of which 12 months was suspended in the local General District Court. The offense date was October 29, 1999.
3. Petit Larceny (Misdemeanor) with a 12 month sentence of which 12 months was suspended in the local General District Court. The offense date was October 31, 1999.

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

“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.<sup>4</sup> 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 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 (6<sup>th</sup> Edition) as follows:

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<sup>3</sup> The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

<sup>4</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.

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. 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.

The Agency has presented sufficient evidence to show that Grievant knew or should have known that she had omitted material and relevant information from her application of employment. The Agency has shown that this omission is sufficient to establish an intent to falsify. Grievant wrote the word "Misdemeanor" and the Date of Charge as October 1997. She did not list a Date of Conviction for that misdemeanor. Grievant did not describe the misdemeanor as Petit Larceny. This led the Agency to believe that the word "Misdemeanor" referred to the charge of "Reckless Driving" which appeared on the same line.<sup>5</sup> Although she had been convicted of two misdemeanors for Petit Larceny, Grievant only disclosed one of them.

Grievant argues that she completed the application for employment based on her best recollection. The Certification appearing above the signature line of the application informed Grievant of the Agency's expectation that the information she provided was to be "true and complete". A standard of "true and complete", is a higher standard than merely relying upon one's best recollection. Grievant should have taken the necessary steps to ensure that the information she provided on the application for employment was true and complete.

*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>6</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

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<sup>5</sup> Reckless Driving is a misdemeanor under Virginia law. See, *Va. Code § 46.2-868*.

<sup>6</sup> *Va. Code § 2.2-3005*.

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 of her satisfactory work performance, the Agency's delay in completing the background check, and she is a different person today in terms of values than she was in 1999. Grievant worked for the Agency for approximately one and one half years. Although her work performance was satisfactory to the Agency, her length of employment is insufficient to establish a mitigating circumstance. The Agency's delay in completing the background check is due to the level of the investigator's workload. No evidence was presented that Grievant was materially prejudiced by the delay. After 1999, Grievant earned an undergraduate degree. She worked during the day and then attended school at night to earn a master's degree. Grievant has made a dramatic improvement in her life. Although Grievant's personal achievements are worthy of admiration, they are not mitigating circumstances. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

### **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 **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>7</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>7</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.