

Issues: Group III Written Notice with demotion and pay reduction (falsification of documents); Hearing Date: 12/03/07; Decision Issued: 12/04/07; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 8741; Outcome: Full Relief;
Administrative Review: HO Reconsideration Request received 12/18/07;
Reconsideration Decision issued 12/28/07; Outcome: Original decision affirmed.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8741

Hearing Date: December 3, 2007
Decision Issued: December 4, 2007

PROCEDURAL HISTORY

On August 6, 2007, Grievant was issued a Group III Written Notice of disciplinary action with demotion and disciplinary pay reduction for falsifying a medical certificate. On August 17, 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 October 24, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 3, 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 Corrections employed Grievant as a Corrections Sergeant until his demotion to a Corrections Officer effective August 10, 2007. As part of the demotion, Grievant received a disciplinary pay reduction in the amount of 5%. Grievant began working for the Agency approximately 18 years ago. Grievant has prior active disciplinary action consisting of a Group I issued October 6, 2005 for unsatisfactory job performance.

On June 1, 2007, Grievant's Wife drove Grievant to a medical appointment because he was unable to drive himself. Grievant and his Wife spoke with the Doctor. The Doctor indicated that he wished to see Grievant for a follow-up visit on June 8, 2007. Grievant and his Wife left the examination room. Grievant's Son picked up Grievant at the Doctor's office and drove him home. Grievant had taken medication that made him lethargic. Grievant's Wife walked to the Doctor's Secretary's office and told the Secretary what the Doctor had said. The Secretary wrote a note entitled, "Certificate to return to work or school". The note stated, "[Grievant] has been under my care from 6/1/07 to ----- and is able to return to work/school on 6/9/07." The note also said, "To Be Seen By Dr." It was dated June 1, 2007 and signed by the Secretary on behalf of the Doctor. The Secretary gave the note to the Wife and kept a copy for the Doctor's files. The Wife complained to the Secretary that the note was not what the Doctor said to her. The Secretary did not change the note.

The Wife ran some errands and approximately one hour later returned home. She took the Doctor's note and placed tape over the date "6/9/07." As a result, the note

read "is able to return to work/school on _____". After the phrase, "To Be Seen By Dr.", the Wife wrote "6/8/07."

The Wife took the revised note and faxed it to the Facility from her home fax machine. She indicated that the fax was from Grievant. She did not list her own name on the fax.

An Agency supervisor asked the Personnel Practices Supervisor when Grievant would be returning to work. The Personnel Practices Supervisor looked through Grievant's file and found the note sent by Grievant's Wife. She believed it was unusual for a doctor to have failed to write a return to work date on a note. She called the Doctor's office and spoke with the Secretary. The Secretary said that the note the Personnel Practices Supervisor had obtained from Grievant was not the note she gave to Grievant. The Secretary faxed the Personnel Practices Supervisor a copy of the original note the Secretary had written. The Agency compared the two documents and concluded Grievant had falsified the Doctor's note. The Agency initiated disciplinary action against 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."¹ 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."² Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."³

"[F]alsifying any records, including but not limited to vouchers, reports, insurance claims, time records, leave records, or other official state documents" is a Group III offense.⁴ "Falsifying" is not defined by the DOC Standards of Conduct, 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:

¹ Virginia Department of Corrections Operating Procedure 135.1(X)(A).

² Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

³ Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

⁴ Virginia Department of Corrections Operating Procedure 135.1(XII)(B)(2).

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*.

The Agency has presented sufficient evidence to show that Grievant's Wife falsified the doctor's note. She altered the note with the intent to modify the information contained in the note as drafted by the Secretary as the Doctor's designee. The Agency, however, has not presented sufficient evidence to show that Grievant falsified the Doctor's note. No evidence has been presented to show that Grievant drafted the note or the fax that was sent to the Facility. No evidence has been presented to show the Grievant knew or should have known that his Wife had modified the note. The evidence, as presented, shows that Grievant did not know that his Wife had modified the Doctor's note at the time she faxed it to the Facility. Accordingly, the Group III Written Notice cannot be sustained.

A question arises regarding whether the actions of the Wife can be deemed to be the actions of Grievant. No argument or evidence has been presented to show that the actions of the Wife should be deemed as a matter of law or policy to be the actions of Grievant. Absent notice to the contrary, employees are responsible under the Standards of Conduct only for their own actions and not for the actions of others.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with demotion and disciplinary salary action is **rescinded**. The Agency is ordered to reinstate Grievant to Grievant's former position, or if occupied, to an objectively similar position. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of demotion and 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 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 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.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].

S/Carl Wilson Schmidt

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.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8741-R

Reconsideration Decision Issued: December 28, 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.

The Agency seeks reconsideration because Grievant's statement of July 17, 2007 reveals that he knew that his wife was falsifying the doctor's note.⁶ Grievant wrote in his statement, "I [Grievant] had my wife [fax] the note up to work and that was it." In addition, Grievant wrote, "So in short, I [Grievant] nor [Grievant's wife] falsify anything because, it was just a mistake on my Doctor secretary" these statements, however, did not reveal that Grievant knew or should have known that his wife had altered the Doctor's note. It is not in dispute that Grievant expected his wife to be responsible for sending the Doctor's note to the Facility. What has not been established, however, is that Grievant knew or should have known that his wife had *altered* the note prior to faxing it to the Agency. Grievant did not testify during the hearing. His written statement does not resolve what he knew about his wife's action of altering the Doctor's note.

The Agency seeks reconsideration of the Original Hearing Decision because, "the Agency cannot be expected to make accurate staffing requirements when an employee provides falsified information on a return to work date. Nor can the Agency hold third parties responsible for providing accurate information on behalf of employees." The Agency sites as its authority Hearing Decision Case Number 5585.

⁶ Grievant did not testify during the hearing.

The facts of Hearing Decision Case Number 5585 are materially different from the facts of this case.⁷ In Hearing Decision Case Number 5585, the Hearing Officer found:

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.

In case 5585, the employee delegated all functions of completing the application for employment to another person. The employee signed the application for employment certifying that the information contained therein was correct. He had the opportunity to have the application read to him. In the case under current appeal, Grievant only delegated responsibility for sending the Doctor's note to the Agency. He did not know nor would it have been reasonable for him to have expected that his wife would alter the Doctor's note prior to sending it to the Agency. Grievant did not have an opportunity to review the Doctor's note prior to it being sent to the Agency because he was affected adversely by his illness when the note was faxed.

The request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. For this reason, the 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

⁷ In addition, Hearing Decisions do not serve as administrator precedent.

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

Carl Wilson Schmidt, Esq.
Hearing Officer