

Issues: Group III Written Notice with demotion and transfer (falsifying official State documents), and 10% pay reduction; Hearing Date: 06/16/08; Decision Issued: 07/21/08; Agency: VSP; AHO: Carl Wilson Schmidt, Esq.; Case No. 8777, 8860; Outcome: No Relief – Agency Upheld in Full; **Administrative Review: EDR Admin Review request received 08/04/08; EDR Ruling #2009-2093 issued 08/22/08; Outcome: Hearing decision affirmed.**



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8777 / 8860**

Hearing Date: June 16, 2008  
Decision Issued: July 21, 2008

**PROCEDURAL HISTORY**

On November 16, 2007, Grievant was issued a Group III Written Notice of disciplinary action with a demotion, disciplinary transfer, and a 10% disciplinary pay reduction for falsifying official State documents. After his transfer, Grievant no longer performed the duties of a Task Force Coordinator and, thus, his Special Rate of pay for that assignment ended.

Grievant timely filed a grievance to challenge the Agency's action and another grievance to challenge the additional ten percent pay reduction. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On April 23, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 16, 2008, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Grievant's Counsel  
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?
5. Whether the Agency misapplied policy?

### **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 State Police employed Grievant as a Special Agent until his demotion to a Senior Trooper with transfer to another jurisdiction effective November 25, 2007. Grievant received a disciplinary pay reduction in the amount 10% of his base salary. Prior to the facts giving rise to this disciplinary action, Grievant's work performance was satisfactory to the Agency. Grievant has been employed by the Agency for approximately 22 years. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

On July 26, 2006, Grievant was notified that he was temporarily assigned to be a Task Force Coordinator. He received a memorandum from the Major stating:

Effective August 10, 2006, you are relieved of your present duties and assignment, and temporarily assigned to the [Location] Drug Task Force. Your official State Policy title will remain the same (Special Agent); and Task Force Coordinator will be your working title. Additionally, you will be required to sign the attached "Acceptance of Task Force Coordinator

Position" document that outlines duties and responsibilities of the Task Force Coordinator position assigned to this Unit.<sup>1</sup>

The Acceptance of Task Force Coordinator Position document stated, in part:

While assigned to this position, I will receive a special rate over and above my current salary based on the State's Promotional Policy. Upon reassignment to my permanent title/rank and position, the special rate of pay will be terminated.

As a result of becoming a Task Force Coordinator, Grievant received a Special Rate pay increase equaling 10% of his base salary.

On August 27, 2007, Grievant submitted a Work/Leave Activity Report showing that he worked 23 hours of overtime for the week ending August 25, 2007. Grievant actually had only worked 10 hours of overtime for that period.

On August 28, 2007, the Lieutenant contacted Grievant by telephone and advised him that his Work/Leave Activity Report contained errors in the amount of money he had claimed for meals. The Lieutenant also advised Grievant to review the entire form to ensure that there were no additional errors. On August 28, 2007, Grievant submitted another Work/Leave Activity Report for the week ending August 25, 2007. On the second form, he again claimed 23 hours of overtime but he had changed the meal amounts claimed.

On September 4, 2007, Grievant submitted a Work/Leave Activity Report for the week ending September 1, 2007. He claimed 17 hours of overtime even though he had only worked 10 hours of overtime for that period.

The Work/Leave Activity Report forms submitted by Grievant contained a statement:

REQUIRED OVERTIME CERTIFICATION: I certify I worked overtime as indicated for which overtime leave, overtime pay, compensatory time is requested.

On September 6, 2007, Grievant called the Captain and said he wanted to meet with the Agency Investigator because "he had messed up ... and wanted to talk to [the Agency Investigator] about it." Later that day, Grievant met with the Agency Investigator. The Agency Investigator presented Grievant with two allegations as follows:

Allegation 1: during the week ending August 25, 2007 you falsified an official state document (SP-106) by claiming overtime pay for work-hours

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<sup>1</sup> Agency Exhibit 14.

that you do not work. This conduct undermines the effectiveness and efficiency of the Department's activities. These actions impair the Department's reputation as well as the reputation of its employees.

Allegation 2: during the week ending September 1, 2007 you falsified an official state document (SP-106) by claiming overtime pay for work-hours you did not work. This conduct undermines the effectiveness and efficiency of the Department's activities. These actions impair the Department's reputation as well as the reputation of its employees.

Grievant admitted to the allegations. As part of his written response to the Agency Investigator, Grievant wrote "My actions were not honorable and I am truly ashamed. Because of this I [had asked] to meet with [Captain] and a Supervisor and disclosed all wrongdoing prior to being called into the office."<sup>2</sup>

As a result of his demotion, Grievant received a 10% reduction in his base salary effective November 25, 2007. Following Grievant's transfer, he no longer performed the duties of a Task Force Coordinator in his new jurisdiction. The Agency stopped paying Grievant his additional Special Rate salary in the amount of 10%. The effect of Grievant's demotion and his removal of duties as a Task Force Coordinator was a 20% reduction in Grievant's salary.

### **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." General Order 19(12)(a). 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." General Order 19(13)(a). Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal." General Order 19(14)(a).

"Falsifying any records such as, but not limited to: vouchers, reports, insurance claims, time records, leave records, or other official state documents, or knowingly making a false official statement" is a Group III offense.<sup>3</sup> The Agency's Work/Leave Activity Report form is an official State document used by Agency employees to submit their requests for reimbursement of overtime. Grievant submitted a form for the week ending August 25, 2007 in which he claimed reimbursement for 13 hours more than he actually worked. Grievant submitted a form for the week ending September 1, 2007 in which he claimed reimbursement for 7 hours more than he actually worked. Grievant

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<sup>2</sup> Grievant was overpaid \$828.70 as a result of his false claim for overtime.

<sup>3</sup> General Order 19(14)(b)(5).

knew or should have known that the forms he was submitting or false. Accordingly, the Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for falsification of official State documents.

Upon the issuance of a Group III Written Notice, the Agency may remove an employee. Mitigating circumstances may justify the use of demotion, suspension for up to 30 days, and/or transfer as an alternative to removal.<sup>4</sup> Accordingly, Grievant's demotion and transfer must be upheld. A 10% disciplinary salary action as a result of the disciplinary demotion is consistent with DHRM policy.

Grievant argues that his disciplinary salary action should be reduced from 10% to 5%. Although DHRM policy provides a disciplinary salary action should be at least 5% it does not limit the maximum salary reduction. In this case, the Agency chose to reduce Grievant's salary by 10% because that percentage was consistent with how it treated most employees who were being demoted. There is no reason to believe Grievant was singled out by the Agency because he received a 10% disciplinary salary action.

Grievant argued that he was being demoted two positions because he held the position of Task Force Coordinator and was then demoted to Senior Trooper thereby bypassing the Special Agent position. This argument fails. Grievant did not hold the "position" of Task Force Coordinator. Serving as Task Force Coordinator was an "assignment" available to someone who held the position of Special Agent or Senior Special Agent.<sup>5</sup> A Task Force Coordinator was not a separate position. Grievant was demoted by one position in rank – from Special Agent to Senior Trooper.

Once Grievant was transferred to the new jurisdiction, he was no longer able to perform the duties of the Task Force Coordinator in his prior jurisdiction. Consequently, his Special Rate was rescinded. This resulted in an additional 10% salary reduction.

Grievant argues that he suffered a 20% salary reduction as part of the Group III Written Notice. This argument is untenable. The Group III Written Notice included discipline in the form of a demotion and a disciplinary salary reduction of 10%. Grievant's salary was further reduced by 10% not as part of a disciplinary transfer, but rather because he was no longer performing the duties of a Task Force Coordinator in his new jurisdiction. No evidence was presented showing that a Task Force Coordinator position was available in Grievant's new jurisdiction and that the Agency refused to place him in that position as a form of punishment. Grievant knew that his Special Rate was contingent upon him working a temporary assignment as a Task Force Coordinator in his former jurisdiction. Once that temporary assignment ended, Grievant's Special Rate also ended.

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<sup>4</sup> General Order 19(14)(c)(1).

<sup>5</sup> General Order 16(6)(a)(4).

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 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 Agency inconsistently applied disciplinary action thereby justifying mitigation of his disciplinary action. Grievant presented an example of another employee who had falsified official State documents but only received a Group II Written Notice. Based on the evidence presented, it is unclear what facts gave rise to the disciplinary action of that other employee. It is also not clear that the employee only received a Group II Written Notice. No credible evidence was presented to suggest that the Agency had singled out Grievant for unfair or improper treatment with respect to the disciplinary action given to him. There is no basis to further reduce Grievant’s disciplinary action. 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 demotion, transfer, and disciplinary pay action is **upheld**. Grievant’s request for relief with respect to his reduction of pay he earned while working as a Task Force Coordinator is **denied**.

## 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.

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<sup>6</sup> Va. Code § 2.2-3005.

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.