

Issue: Group III Written Notice with Termination (providing false information); Hearing Date: 05/04/10; Decision Issued: 05/05/10; Agency: DBHDS; AHO: Frank G. Aschmann, Esq.; Case No. 9318; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION

DIVISION OF HEARINGS
DECISION OF HEARING OFFICER

In the matter of: Case No. 9318

Hearing Date: May 4, 2010
Decision Issued: May 5, 2010

PROCEDURAL ISSUE

No procedural issues raised.

APPEARANCES

Grievant
Three Grievant Witnesses
Two Shared Witnesses
Agency Presenter
Agency Recorder Operator

ISSUE

Did the Grievant violate Agency policy by providing false information about his outside employment such as to warrant the issuance of a Group III Written Notice and termination of employment as disciplinary action by the Agency?

FINDINGS OF FACT

The Agency employed the Grievant in a supervisory position as a Team Leader. The Agency operates facilities which provide services twenty-four hours a day. As a Team Leader the Grievant was responsible for overseeing three shifts which provide coverage for each day. The Team Leader is not expected to work twenty four hours per day but is expected to be available when issues arise on any of the three shifts. Outside employment must be approved by the Agency to avoid interference with job duties.

The Agency uses a variety of forms to track services which are provided in its facilities. Checks are performed on the various documents to maintain quality control. Errors and inaccurate information are at times found on the documents. Intentionally falsifying these forms would be a policy violation. Discipline for a policy violation in regard to filling out these forms falsely would be considered on a case by case basis. The Grievant issued a Group II Written Notice to a subordinate on one occasion when the staff member reported completing a program on a form when it had not been done.

The Grievant's supervisor noticed a decline in the work performance of the Grievant and suspected the Grievant had outside employment. The Grievant's supervisor asked the Grievant if he had outside employment in May 2009. The Grievant denied having any outside employment. The Grievant did not request Agency approval of any outside employment in 2009. On May 2, 2009, the Grievant signed an Agency form which stated he had no outside employment. On January 14, 2010, the Grievant's supervisor and the Human Resources Director confronted the Grievant about outside employment. The Grievant denied any outside employment initially but later admitted that he had outside employment since 2008. In the Grievant's, January 23, 2010, response to the Group III Written Notice issued in this matter he admitted lying about outside employment and did so because he thought approval of his outside employment would be denied. The Grievant filed an Agency form notifying the Agency of outside employment and requesting approval on January 14, 2010. The Agency did not respond to this notice. The Agency requested the Grievant sign a release so that more information about his outside employment could be obtained from the employer. The Grievant complied with this request.

On May 21, 2009, the Grievant was issued a Notice of Improvement Needed/Substandard Performance. On July 20, 2009, the Grievant was issued a Group I Written Notice for unsatisfactory work performance for failing to follow through on the May 21, 2009 notice. On July 22, 2009, the Grievant was issued a Group II Written Notice for a safety violation and suspended for five days. On October 25, 2009, the Grievant was issued a "below contributor" rating on an annual performance evaluation. On January 25, 2010, the Grievant was issued a Group III Written Notice for providing false information about outside employment and was terminated from employment with the Agency. This personnel action is the subject of this case.

APPLICABLE LAW AND OPINION

The General assembly enacted the Virginia Personnel Act, Code of Virginia §2.2-2900 et seq., establishing the procedures and policies applicable to employment with the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. Murray v. Stokes, 237 Va. 653 (1989).

Code of Virginia §2.2-3000 et seq. sets forth the Commonwealth's grievance procedure. State employees are covered by this procedure unless otherwise exempt. Code of Virginia §2.2-3001A. In disciplinary actions, the Agency must show by a preponderance of the evidence that the disciplinary action was warranted and appropriate under the circumstances. Department of Employment Dispute Resolution Grievance Procedure Manual, §5.8 (2).

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Code of Virginia §2.2-1201, the Department of Human Resource Management promulgated Standards of Conduct Policy number 1.60. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards of Conduct serve to

establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action. The Agency uses these Standards of Conduct and has cited Chapter 14, Group III Offenses, (2), falsifying any records, including, but not limited to, vouchers, reports, insurance claims, time records, leave records or other official State and agency documents. A Group III offense usually warrants suspension of up to thirty workdays or employment termination for a first occurrence. The Standards of Conduct allow the consideration of mitigating circumstances to reduce the sanctions normally imposed in the interests of fairness and objectivity or a long service record of satisfactory performance.

The Agency has a specific policy which governs employee conduct in regard to outside employment. Departmental Instruction 503(HRM)03 sets forth specific procedures employees must follow to have outside employment and remain with the Agency. The Agency has this policy for the legitimate business purpose of preventing conflicts of interest and maintaining the quality of its services. Section 503-5 of the policy prohibits outside employment without prior written approval. Section 503-6 of the policy requires employees to file an Agency Form 119 to request approval of outside employment. Approval is not automatic and is evaluated by a supervisor. The evaluating supervisor is required to review the request within five workdays but may request additional information. The Agency's current procedure is to request an update to Form 119 annually at the time of the employee's Employee Work Profile or when the employee becomes aware of a change in his outside employment.

The Grievant raises a technical issue, which is that the Group III Written Notice states the offense date is 1-14-10 and he argues this is incorrect, the offense date being when he submitted the form in May 2009. Thus the Agency's issuance of the notice is untimely. The Grievant's position is without merit. The form denying outside employment was what was on file as the Grievant's outside employment status until January 14, 2010 when he admitted lying to his superiors and filed the form 119. The Grievant perpetrated his deception from the time he obtained outside employment until January 14, 2010. Thus his offense was ongoing into January 14, 2010, until he file his form 119, the date used in the notice as the offense date. The Grievant was issued the written notice on January 25, 2010 in a timely manner.

The Grievant raises another technical issue which is that the Agency did not give or deny approval of his form 119 request for outside employment filed on January 14, 2010. The Grievant argues this is a violation of policy which would have given him corrective action before the written notice was issued. The Grievant's position is without merit. The Agency policy requires that the request be reviewed within five workdays. The request was reviewed immediately and the Agency asked for a release to get further information from the employer. The Agency policy provides for this course of action. The Agency considered the information it had including information received from the employer, and made the decision to terminate the employment of the Grievant making approval of outside employment a moot issue. Furthermore, even if the Agency had violated policy by not timely responding to the Grievant after January 14, 2010, it would be irrelevant to his violation which occurred on January 14, 2010 prior to the filing of the form 119. The written notice was issued within a reasonable time after the violation was verified.

The Grievant does not contest that he lied to his supervisor about his outside employment and acknowledges that the form he filled out in May 2009 stating he had no outside employment is a falsified document. The Grievant's contention is that the sanction is too harsh and his actions do not warrant employment termination. Intentionally falsifying an official state document is a Group III offense which normally justifies employment termination for a first offense. The Agency's evidence establishes the offense occurred with certainty meeting its burden of proof for a preponderance of the evidence. The burden is on the Grievant to show that there are mitigating circumstances which demonstrate the personnel action is inappropriately harsh.

The Grievant argues that there are many important documents in the Agency which are filled out falsely and never has it resulted in employment termination which creates a culture that it is permitted. Therefore, it is too harsh to treat the Grievant differently and terminate his employment for a similar offense. The Grievant presented evidence of several types of Agency documents which had errors. Medicine, physical therapy and occupational therapy reports were all cited as having errors, however, the evidence did not show that for any of these reports there was an intentional falsification of the documents. The documents simply contained errors which were noticed at some point in the review process. The Grievant cited one example of a document which was intentionally falsified, a program report, in which a staff member wrote in the report that the program had been performed when it was impossible to do so because the materials to do the program were not available. The Grievant was the supervisor in this instance and recommended a Group II Written Notice. The Grievant did not provide details of why the Group II level was decided upon or if there were any mitigating factors in the decision. This vague single incident does not provide sufficient evidence to show there was a culture in which falsifying documents was acceptable or that some sort of de facto policy had been established. Every offense must be considered individually and the circumstances evaluated for the appropriate level of discipline. This argument by the Grievant provides no mitigation to the circumstances of his offense.

The Agency considered the issue of mitigation in reaching its decision to terminate the employment of the Grievant. The Agency reviewed the circumstances and the work history of the Grievant and found aggravating circumstances not mitigating circumstances. The Grievant's work performance had declined in the time period he held outside employment which was documented and brought to his attention for correction which never came. The Grievant had two active written notices in his personnel file. The Grievant perpetrated his deception over a long period of time and did not admit his offense until proof was forthcoming. The Grievant's willingness to be dishonest is inconsistent with a leadership position which he held.

The Standards of Conduct provide a system of progressive discipline in which past actions are relevant to the level of punishment for any given offense. In this case the Grievant was shown to have had a poor work record in the preceding year, failed to respond to attempts to improve his performance and perpetrated an offense at the highest level, Group III, over an extended period of time. The circumstances do not show any factor which mitigates the response of the Agency to this situation. Thus the Agency was justified in taking the personnel action to terminate the Grievant's employment.

DECISION

The disciplinary action of the Agency is affirmed.

APPEAL RIGHTS

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

ADMINISTRATIVE REVIEW: This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. A request to reconsider a decision or reopen a hearing is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.

2. A challenge that the hearing decision is inconsistent with state or agency policy is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, VA 23219 or faxed to (804) 371-7401.

3. A challenge that the hearing decision does not comply with grievance procedure is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the EDR Director, Main Street Centre, 600 East Main Street, Suite 301, Richmond, VA 23219 or faxed to (804) 786-0100.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within 15 calendar days of the date of the original hearing decision. (Note: the 15-day period, in which the appeal must occur, begins with the date of issuance of the decision, not receipt of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days). A copy of each appeal must be provided to the other party.

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 contrary 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.

Frank G. Aschmann
Hearing Officer