

Issue: Group III Written Notice with Termination (falsifying a State document); Hearing Date: 10/19/10; Decision Issued: 10/20/10; Agency: DOE; AHO: Carl Wilson Schmidt, Esq.; Case No. 9424; Outcome: No Relief – Agency Upheld;
Administrative Review: AHO Reconsideration Request received 11/04/10; Outcome pending; Administrative Review: EDR Ruling Request received 11/04/10; Outcome pending; Administrative Review: DHRM Ruling Request received 11/04/10; Outcome pending.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9424

Hearing Date: October 19, 2010
Decision Issued: October 20, 2010

PROCEDURAL HISTORY

On June 29, 2010, Grievant was issued a Group III Written Notice of disciplinary action with removal for falsification of his State employment application.

On July 30, 2010, 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 September 21, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 19, 2010, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency Counsel
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 Education employed Grievant as an Accountant until his removal effective June 29, 2010. He had been employed by the Agency since 1998. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

On April 30, 1998, Grievant submitted a State Application for Employment for the position of Fiscal Technician Senior with the Agency. Grievant wrote in the information necessary to complete the application. This information included his name and address, education, experience, miscellaneous items, and certification. In the upper left corner on the first page of the application, there appeared space on the preprinted form for the applicant to write the "Position number". Grievant wrote the position number of the Fiscal Technician Senior position. There also appeared a space for the applicant to write "Number of attachments". Grievant left the space blank.

Under the miscellaneous items portion of the application, the following question is posed:

Have you ever been convicted of any violation(s) of law, including moving traffic violations or juvenile convictions committed after your fourteenth birthday? YES NO. If YES, please provide the following:
 Description of offense: _____ Statute or ordinance (if known): _____ Date of Charge: _____

_____ Date of conviction: _____ County,
city and state of conviction: _____

For additional convictions use plain paper -- include all information listed above.

Grievant wrote a check mark in the blank space next to the word "YES". He wrote "Trespassing" in the blank space following "Description of offense". He wrote "12 - 93" in the blank space following "Date of Charge". He wrote the name of a location in Virginia in the blank space following "County, city and state of conviction".

The Agency did not conduct a background check to verify the information provided by Grievant. The Agency's customary hiring practices did not include conducting background checks on applicants selected for employment.

On March 5, 2010, the Agency learned the Grievant had been arrested and charged with a misdemeanor. The Human Resource Coordinator met with Grievant. Grievant indicated that the matter was all a mistake and that the matter was scheduled for trial. The Agency began an investigation.

On May 18, 2010, the Agency retrieved Grievant's State application from his personnel file and noted that Grievant had written that he had been convicted of trespassing. On May 25, 2010, the charges against Grievant were withdrawn from prosecution. The Investigator spoke with law enforcement officers involved in the case and became concerned that there was "more to the story." The Investigator contacted the Agency's legal counsel and learned for the first time that Grievant had prior convictions.

On June 7, 2010, the Human Resource Analyst and the Investigator met with Grievant to inform him that he had falsified his April 1998 applicant for employment. Grievant was provided a copy of his application. Grievant agreed to and signed an authorization form enabling the Agency to receive his criminal history background from the Virginia State Police.

The Virginia Criminal Record provided by the Virginia State Police showed that Grievant was found guilty on March 6, 1987 of a misdemeanor for solicitation, found guilty on March 27, 1991 for a misdemeanor solicitation for a lewd act, and found guilty on October 6, 1993 of a misdemeanor for solicitation. Grievant's Virginia Criminal Record did not show a conviction for trespassing.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal

disciplinary action.”¹ Group II offenses “include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action.” Group III offenses “include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.”

Although the Agency did not submit a copy of the Standards of Conduct in effect in 1998, the Application for Employment specifically states the consequences of submitting false information as part of the hiring process. The CERTIFICATION section of the application states, in part:

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 the discovery, may cause forfeiture on my part to any employment in the service of the Commonwealth of Virginia.

Grievant signed and dated the application directly below the certification.

Blacks Law Dictionary (6th Edition) defines "Falsify" 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. ***

New Webster's Dictionary and Thesaurus 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*.

Grievant falsified his April 1998 State Application for Employment. He read the portion of the application asking if he had been convicted of any violations of law and asking for the details of those convictions. Instead of entering information regarding his three misdemeanor convictions, Grievant omitted the information from his application. The application Grievant submitted to the Agency falsely described his criminal history because it omitted reference to all of his criminal convictions. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice of disciplinary action for falsification of a State Application for Employment. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

Grievant argued that he had attached a sheet of paper to his application for employment that listed in detail his three convictions. The evidence presented does not support this assertion for several reasons. First, Grievant did not write in the upper left-hand corner of the application that there were any attachments to his application.

¹ The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

Second, Grievant did not write "see attachment" or similar words anywhere else on the application for employment. Third, when the Agency hired employees in 1998, its customary business practice was to take the new employee's application for employment and place it in the employee's personnel file. No testimony or documents were presented to show that an attachment to Grievant's application for employment was placed in Grievant's personnel file in 1998 or was a part of this file when the Agency took disciplinary action against him.²

Grievant argued that when he submitted his application, the person who received it told him only to reference matters for which he had been charged and not matters for which he had been convicted. No evidence was presented to support this allegation. The State Application for Employment clearly requested information regarding convictions. To the extent Grievant disregarded the terms of the application, he did so at his own risk.

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..."³ 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 argued that he significantly changed his life following those criminal convictions and that he has never hid from his past. Although Grievant's decision to change his life is of great significance and is admirable, it does not constitute a mitigating circumstance under the Rules for Conducting Grievance Hearings. 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**.

² Grievant also alleged that the Agency had discriminated against him but he did not present any evidence to support the allegation as part of the hearing.

³ *Va. Code § 2.2-3005.*

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
600 East Main St. STE 301
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.⁴

⁴ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

[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