

Issue: Group III Written Notice (falsification of State document); Hearing Date: 07/20/11; Decision Issued: 08/01/11; Agency: VDOT; AHO: Ternon Galloway Lee, Esq.; Case No. 9636; Outcome: No Relief – Agency Upheld.

DECISION OF HEARING OFFICER

In the matter of

Case Number: 9636

Hearing Date: July 20, 2011

Decision Issued: August 1, 2011

SUMMARY OF DECISION

The Agency had found Grievant violated DHRM Standards of Conduct Policy Number 1.60 when he submitted an application for promotion by failing to list all of his convictions. The Agency then issued Grievant a Group III Written Notice for falsifying records. The Hearing Officer upholds the Agency's discipline.

PROCEDURAL HISTORY

On March 10, 2011, Grievant was issued a Group III Written Notice of disciplinary action for falsifying records.

On March 16, 2011, the Grievant timely filed a grievance to challenge the disciplinary action. The Grievant was dissatisfied with the Third Resolution Step's outcome and requested a hearing. On June 27, 2011, the Department of Employment Dispute Resolution ("EDR") assigned this appeal to the Hearing Officer. The Hearing Officer held a pre-hearing conference ("PHC") on July 6, 2011, and subsequently issued a scheduling order

The Hearing Officer scheduled the hearing for July 20, 2011, the first date available between the parties and the Hearing Officer. During the hearing, the Hearing Officer admitted the Hearing Officer's exhibits one through five, Grievant's exhibit one through eight, and Agency exhibits one through 8.¹

At the hearing both parties were given the opportunity to make opening and closing statements, to call witnesses and to cross-examine witnesses called by the other party.

During the proceeding, attorney RL represented Grievant, LC represented the Agency.

APPEARANCES

¹ Included in the Hearing Officer's exhibits is the scheduling order mentioned here. Also, Grievant's exhibit 6 initially contained only page six of EDR decision in case 8793. The Agency objected to admitting only part of that decision. Grievant then offered to admit the entire decision, without objection from the Agency. Thus, Grievant's exhibit 6 is the entire decision.

Advocate for Agency
Agency Representative
Witnesses for the Agency (3 witnesses)
Grievant's Advocate
Grievant
Witnesses for the Grievant (6 including Grievant)

ISSUE

Was the Group III Written Notice with termination warranted and appropriate under the circumstances?

BURDEN OF PROOF

In disciplinary actions, 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 all the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

1. Grievant has been employed by the Virginia Department of Transportation ("VDOT") or "Agency" for nineteen years. (Testimony of Grievant).

A. February 2, 1992; February 15, 2005; and July 22, 2010 Applications

2. Grievant submitted his first application for employment with the Agency on February 9, 1992 ("February 9, 1992 application"). Grievant was asked the following "conviction question" on the this application:

Have you ever been convicted of a law violation(s) including moving traffic violations but excluding offenses committed before your eighteenth birthday which were finally adjudicated in a Juvenile Court or under a youth offender law?
___ Yes ___ No. If yes, list all and explain _____.

To this question, Grievant responded "No."
(A Exh. 5/4).

3. Grievant submitted an application on February 15, 2005 ("February 15, 2005

application”). Grievant was asked the following “conviction question” on this application:

Have you ever been convicted*² for any violations of law, including moving traffic violations?

Grievant responded “yes.” He further answered by describing the charge as “**reckless driving;**” noting the dates of the charge and conviction as “**12/18/97, and 7/2/98,**” respectively; and identifying “**Yorktown, Va.**” as the locale of the offense. (A Exh. 5/7).

4. Grievant electronically submitted to the Agency an employment application (“application”) for a promotion. Grievant signed a hard copy of the application on July 22, 2010 (“July 22, 2010 application”). (A Exh 5/15; Testimony of KM).

5. The July 22, 2010 application contains the following conviction question:

Have you ever been convicted for any violations of law, including moving traffic violations?

Grievant responded “Yes” to this question. (A Exh. 5/14; G Exh. 1).

6. Following the conviction question on the application is the Criminal History section. First this section contains the words “Description of the Offense.” Next, space is provided to describe any convictions. In this space, Grievant responded “**Reckless Driving.**” Second, in the Criminal History section of the application appear the words “Statute/Ordinance if known.” Grievant responded “**Reckless Driving/resulting in accident.**” After that appear the words “Date of Charge.” To this inquiry, Grievant responded “**1996.**” Next, the section requests the “Date of Conviction.” Grievant did not provide a date. Then, Grievant is asked for the “County, City, State of conviction.” To which Grievant responded “**Yorktown, Virginia.**” (A Exh. 5/14; G Exh. 1).

7. Grievant signed a copy of the above referenced applications on February 9, 1992; February 15, 2005; and July 22, 2010, respectively. Each signed application contained a certification or agreement statement immediately above the signature. In pertinent part this provision reads as follows:

I hereby certify that all entries on both sides and all 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 to any employment in the service of the Commonwealth³ of Virginia.

² The asterisk after the word “convicted” directed the applicant to a statement following the conviction question that clarified what juvenile convictions must be included when answering the question.

³ The Hearing Officer notes that on the February 9, 1992 application in lieu of “Commonwealth” the word “State” appears.

Grievant also electronically certified that all his entries were true and complete when he initially submitted the July 22, 2010 application. (Testimony of KM; A Exh. 5).

B. Criminal History

8. By letter dated August 18, 2010, the Agency offered Grievant the position applied for when he submitted the July 22, 2010 application. The employment was contingent upon his passing a finger print criminal background check. Grievant accepted the offer and began his employment in the new position on August 25, 2010. (A Exh. 6/5; Testimony of KM).

9. For applicants who become finalists or are offered contingent employment, the Agency conducts a criminal history background check under its policy DPM 1.25 known as the Fingerprint Based Criminal History Record Check. The Agency implemented this policy on January 1, 2009. The criminal check once performed compares its reported results of identified convictions with those disclosed by the applicant on his/her application. If all criminal convictions are not disclosed on the employment application, the nondisclosure is considered falsification. (Testimony of KM; A Exh. 3; G Exh. 5)).

10. Grievant's criminal history background check ("criminal history report") revealed Grievant was convicted of shoplifting (concealment) on August 14, 1978. (A Exh. 8/1). Further the criminal history report showed that the local police fingerprinted Grievant at the time he was charged with this offense. Grievant did not list this conviction on his July 22, 2010 application. (A Exhs. 5/14 and 8/1; Testimony of Grievant).

11. Because Grievant's response on his application regarding his criminal history did not correlate with Grievant's criminal history report obtained by the Agency, the Agency determined Grievant's application was not true and complete and therefore falsified. The Agency contemplated disciplining Grievant. It then took steps to provide Grievant due process prior to taking any disciplinary action. (Testimony of KM; A Exh. 4; G Exh. 5).

12. Then the Agency issued Grievant a Group III Written Notice on March 10, 2011. The Agency described the nature of the offense in the Written Notice as follows:

Group III Written Notice: for **"falsifying records"** in compliance with DHRM Standard of Conduct Policy 1.60. You submitted a state application for a Promotion. The agency reviewed your criminal history record. Your application stated you had one conviction; however, you failed to list your convictions for violation(s) of law. You concealed a criminal conviction from your state application for promotion.

(A Exh. 1).

C. Other

13. Grievant took a polygraph test on June 13, 2011. The main issue during the testing was whether or not Grievant was truthful when he denied that he had intentionally falsified information on his VDOT promotion application. Based on results of this testing, the polygraph examiner opined that Grievant indicated no deception. (G Exh. 8; Testimony of AC).

14. Character witnesses for Grievant testified that he is honest and trustworthy. Testimonies of LJ, CT, PH, JW).

15. Falsifying records is a Group III offense under the Standards of Conduct, Policy 1.60. (A Exh. 2).

16. Management did not partner with Grievant to help him understand the importance of disclosing all convictions on his application as discussed by SP during an executive staff meeting on January 18, 2010. (Testimony of Grievant; G Exh. 5/2).

DETERMINATIONS AND OPINION

The General Assembly enacted the *Virginia Personnel Act, VA. Code §§2.2-2900 et seq.*, establishing the procedures and policies applicable to employment within 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/her 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, 656 (1989).

Va. Code § 2.2-3000 (A) sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints... To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. *Grievance Procedure Manual*, § 5.8.

To establish procedures on Standards of Conduct and Performances for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the *Code of Virginia*, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 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 serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance.

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.” 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.”⁴

Agency management issued Grievant a Group III Written Notice on March 10, 2011, for falsifying records. The Hearing Officer examines the evidence to determine if the Agency has met its burden.

I. Analysis of Issue before the Hearing Officer

A. Did the employee engage in the behavior described in the Written Notice and did the behavior constitute misconduct?

1. Did the Grievant engage in the behavior - falsification of records - described in the Written Notice?

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 follows:

to alter with intent to defraud, to falsify accounts, to misrepresent, to falsify an issue, to pervert, to falsify the course of justice.

⁴ The Department of Human Resource Management (DHRM) has issued its Policies and Procedures Manual setting forth Standards of Conduct for state employees.

Grievant argues that his shoplifting conviction happened over 31 years ago and he did not remember it when he completed his July 22, 2010 application. The evidence shows police fingerprinted Grievant on July 31, 1978, when he was charged with this offense. Further, the evidence shows being fingerprinted was not normal for Grievant and his experiencing the entire situation and resulting conviction humiliated him. Grievant, in fact, describes the event during his testimony as “a bad ordeal.” Considering the above, the Hearing Officer finds that even with the passage of decades, Grievant’s claim of loss recollection is incredible.

Having made this finding, the Hearing Officer is also cognizant of the polygraph examiner’s opinion that Grievant was truthful when he stated he did not intentionally omit his criminal conviction from his VDOT promotion application. The Hearing Officer notes that the evidence shows a polygraph examination is used to help determine the truth and the examiner’s conclusion is not absolute.

In the instant case, the Hearing Officer does not find the polygraph examiner’s opinion controlling for the reasons noted above and here. First, the Hearing Officer had the opportunity to observe Grievant’s demeanor when he testified and hear his responses. Particularly during cross examination, Grievant was evasive and hesitant to respond.

Second, the Hearing Officer notes inconsistency in Grievant’s testimony. The evidence shows that the “conviction question” on the application directed Grievant to disclose “any violations of law, including moving traffic violations.” Grievant failed to

disclose as noted above, his shoplifting conviction. In addition, Grievant did not disclose two moving traffic violations. A comparison of his testimony during direct examination and cross examination shows inconsistent responses regarding why he also did not reveal the traffic convictions on his July 22, 2010 application. On direct examination Grievant testified that he did not disclose two convictions of moving violations on his promotion application because they were not as egregious as his reckless driving conviction and he did not have them in mind when he completed the application. On cross examination, Grievant testified that he did not disclose those traffic convictions because he was employed by a transportation agency and those convictions were not as egregious as the reckless driving one that he reported on his application. In effect, Grievant stated he did not think those two convictions were important. Yet Grievant acknowledged that the application requested all convictions and he signed the application certifying that his responses were true and complete.⁵

What’s more, when Grievant testified regarding disclosure of his criminal conviction, he stated that he did not reveal the 1978 conviction on his February 9, 1992 employment application either because it had occurred when he was 20 years of age and he forgot it. The evidence shows 13.5 years had elapsed since the criminal conviction and Grievant submitting his initial application to the Agency on February 9, 1992. Grievant

⁵ The Hearing Officer does note the evidence shows at Grievant’s interview, he did provide a copy of his driving record disclosing the traffic violations he did not list on his application.

acknowledged that relatively speaking about the same amount of time had passed from his 1998 reckless driving conviction and Grievant submitting his July 22, 2010 promotion application. Yet Grievant revealed the reckless driving conviction on his July 22, 2010 application over a decade after it occurred, but he failed to disclose his criminal conviction on his February 9, 1992 application which had also occurred over a decade before the February 9, 1992 application. Grievant claims to have remembered the reckless driving conviction when he submitted his July 22, 2010 application but not the criminal conviction when he completed the February 9, 1992 application. The Hearing Officer finds that relatively speaking nearly the same amount of time had passed between the 1978 criminal conviction and Grievant submitting his initial employment application on February 9, 1992, and the 1998 reckless driving conviction and Grievant submitting his July 22, 2010 application. And further, both convictions were egregious/a bad ordeal. Thus, the Hearing Officer finds Grievant's testimony conflicting that he remembered the reckless driving conviction but not the shoplifting conviction.

Considering the above, the Hearing Officer finds Grievant had not forgotten his criminal conviction when he submitted his promotion application and his non-disclosure was a misrepresentation.

The Hearing Officer is mindful of Grievant's argument that he is honest and would not behave fraudulently. She notes Grievant presented several witnesses, to include, Agency employees to attest to his character. CT, a minister, testified that he has known Grievant "all his life" and Grievant "treats everyone right and is respectful." Similarly, VDOT co-worker, PH, and supervisors - LJ and JW, testified that they have known Grievant for years and he is honest, a hard worker, and dedicated to his job. At least one character witness testified that "he would trust Grievant with his life." The Hearing Officer also notes that while presented as an Agency witness, Grievant's supervisor, SH, testified that G was an honest and trustworthy employee and he believed G forgot the conviction when he completed the promotion application. However, considering the totality of the evidence, the Hearing Officer finds Grievant engaged in the conduct cited in the Written Notice.

2. Was the behavior misconduct?

The Agency's Policy Number 1.60 lists falsification of records as a Group III offense. The Hearing Officer has found that Grievant did falsify his application by intentionally failing to disclose his criminal conviction. Thus, Grievant's conduct constitutes misconduct.

B. Was the Agency's Discipline consistent with law and policy?

The Agency implemented DPM 1.25 on January 1, 2009. It requires all finalists for an employment position for which they have applied to undergo a criminal history background check. Grievant submitted a promotion application and signed it on July 22, 2010. He was offered and accepted the promotion contingent upon a criminal history background check. Grievant's criminal history background check disclosed a criminal

conviction Grievant failed to list on his application. The Hearing Officer did not give credence to Grievant's claim that he forgot the conviction and therefore did not list it. Thus, she found Grievant's conduct was a misrepresentation and established falsification.

As noted previously, Standards of Conduct 1.60 classifies misconduct under three categories, Group I Offenses, Group II Offenses, and Group III Offenses. The most severe misconduct is classified as a Group III offense. Falsification of records is such an offense. The evidence therefore shows the Agency's issuance of a Group III Written Notice for the offense was consistent with policy.

III. Mitigation

Under statute, hearing officers have the power and duty to “[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Employment Dispute Resolution.”⁶ EDR's *Rules for Conducting Grievance Hearings* provides that “a hearing officer is not a ‘super-personnel officer’” therefore, “in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy.”⁷ More specifically, the *Rules* provide that in disciplinary grievances, if the hearing officer finds that:

- (i) the employee engaged in the behavior described in the Written Notice,
- (ii) the behavior constituted misconduct, and
- (iii) the agency's discipline was consistent with law and Policy, the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.⁸

Thus the issue of mitigation is only reached by a hearing officer if he or she first makes the three findings listed above. Further, if those findings are made, a hearing officer must uphold the discipline if it is within the limits of reasonableness.

The Hearing Officer has found the Grievant engaged in the behavior described in the Written Notice, that behavior constituted misconduct, and the Agency's discipline was consistent with law and policy.

The Hearing Officer does not find the Agency's discipline unreasonable. She notes that while issuance of a Group III Written Notice normally warrants termination under Standards of Conduct, Policy 1.60, the Agency took no other disciplinary action

⁶ Va. Code Section 2.2-3005 (c)(6)

⁷ *Rules for Conducting Grievance Hearings* VI(A)

⁸ *Rules for Conducting Grievance Hearing* VI(B)12

against Grievant upon issuing the notice. Further, the evidence shows the Agency mitigated Grievant's discipline due to his work history and his acknowledgement of one conviction on his application. Moreover, the Hearing Officer notes the evidence shows Grievant can apply for other positions with the Agency.

The Hearing Officer has considered all the evidence, to include, but not limited to testimony from Grievant's character witnesses, the polygraph examination, the polygraph examiners credentials, and Grievant's testimony that management did not partner with him and explain the importance of disclosing all convictions. She also considered all Grievant's arguments. Having given careful thought to all the evidence and arguments, the Hearing Officer finds the Agency's action reasonable and upholds the discipline issued.

DECISION

For the reasons stated herein, the Hearing Officer upholds the Agency's discipline.

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 review 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. Request 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 that the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decisions so that it complied with the grievance procedure. Requests should be sent to the EDR Director, Main Street Centre, 600 East Main, Suite 301, Richmond, VA 23219 or faxed to (804)786-0111.

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 final decisions, a party may appeal on the ground that the determination is contradictory 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 Directory before filing a notice of appeal.

ENTERED this 1st day of August, 2011

_____/s/_____
Ternon Galloway Lee, Hearing Officer

cc: Agency Advocate
Agency Representative
Grievant
EDR's Hearings Program Director