

Issues: Group II Written Notice (failure to follow instructions), Group III Written Notice (falsifying records), and Termination; Hearing Date: 06/27/16; Decision Issued: 06/29/16; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10810; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10810

Hearing Date: June 27, 2016

Decision Issued: June 29, 2016

PROCEDURAL HISTORY

On April 18, 2016, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow policy. On April 18, 2016, Grievant was issued a Group III Written Notice with removal for falsification of records.

On April 20, 2016, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On May 4, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 27, 2016, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency's Representative
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notices?
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 Senior Probation Officer at one of its facilities. No evidence of prior active disciplinary action was introduced during the hearing.

Probation officers are assigned offenders to monitor. The status of each offender is to be recorded in the Agency's electronic database, VACORIS. The Agency has a policy setting forth deadlines for probation officers to perform tasks related to offenders and make entries in the database to record those tasks.

The Probation Officer reported to Grievant. Grievant reported to the Supervisor. Grievant was responsible for reviewing the case files of the Probation Officer. The Supervisor was responsible for reviewing the offender case files assigned to Grievant as well as evaluating how well Grievant reviewed the case files of the Probation Officer.

Grievant was responsible for monitoring eight offenders. The Supervisor reviewed the offender case files assigned to Grievant. Of the five offender cases requiring action, Grievant did not take appropriate action. For example, Grievant was responsible for monitoring Offender B. Grievant made an entry in Officer B's file on August 1, 2014. Grievant received an order from a local Circuit Court authorizing termination of the case. Grievant made no entries in the Agency's database. Grievant was responsible for monitoring Offender R. Offender R was released from supervision on September 15, 2015. Grievant never opened properly the case for Offender R. The Agency presented other examples of Grievant's inaction.

Grievant supervised a Probation Officer. As part of his supervision he was to review the case files assigned to the Probation Officer, identify inaccuracies and/or omitted tasks, and write a review in the Agency's electronic database. For example, Grievant might give instructions to the Probation Officer to schedule a visit with an offender or close a case. By making entries in the VACORIS, Grievant represented that he had completed a review of a case file.

The Supervisor reviewed six of the Probation Officer's case files to determine how well Grievant had reviewed those cases. Grievant's comments were supposed to be specific to each case. Instead of reviewing each case and writing notes, Grievant wrote the following statement in each of the case files of the Probation Officer:

Since the last CR, case has been in waiver from 11/23/2015 through 2/24/2016. PO to contact offender, have them report, re-sign probation conditions and resume supervision. PO to conduct VCIN to assess offender's law abiding behavior. PO to develop and or review CP and address any risks or needs. PO to continue to monitor closely and impose any sanctions deemed appropriate.¹

When a case is in waiver status, it means the probation officer had authorization from a supervisor to refrain from taking any actions regarding an offender. On February 15, 2016, the Supervisor instructed Grievant to take the Probation Officer's cases out of waiver. Grievant did not comply with the instruction.

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."² 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."³ Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."⁴

Group II Written Notice

DOC Operating Procedure 920.2 governs Supervision of Offenders in the Community. This policy sets forth steps a probation officer must follow after being assigned an offender to supervise. The steps are to be recorded in the Agency's

¹ Agency Exhibit 1.

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

³ Virginia Department of Corrections Operating Procedure 135.1(V)(C).

⁴ Virginia Department of Corrections Operating Procedure 135.1(V)(D).

electronic database. Depending on the level of supervision, the probation officer must conduct an initial interview within one to ten workdays; make personal contact on a monthly basis, conduct an initial home visit within 30 days, complete follow up home or field visits on a monthly basis, and review whether an offender must have his or her finger prints taken.

“Failure to follow a supervisor’s instructions, perform assigned work, or otherwise comply with applicable established written policy” is a Group II offense.⁵ Of the five offenders assigned to Grievant requiring action, Grievant failed to take action as required by policy. Grievant was instructed by the Supervisor to remove the Probation Officer’s cases from waiver. Grievant failed to do so. Grievant failed to comply with a supervisor’s instructions. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

Group III Written Notice

"[F]alsification of records" is a Group III offense.⁶ Falsification is not defined by the 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:

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*.

Grievant made the same entry into the case files of the Probation Officer. He did so to give the impression he had reviewed the case files. He had not reviewed the case files. Had he reviewed the Probation Officer’s case files, he would have recognized numerous significant problems with how the Probation Officer had processed the cases.

The Agency has presented sufficient information to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, the Agency’s decision to remove Grievant must be upheld.

⁵ Virginia Department of Corrections Operating Procedure 135.1(V)(C)(2)(a).

⁶ See, Attachment A, DOC Operating Procedure 135.1.

Procedural Due Process

Grievant argued that the Agency denied him procedural due process as part of his removal. He claimed the Agency required him to return his weapon contrary to policy and removed him from the Agency's premises without informing him of the allegations against him.

Grievant's argument, if true, does not affect the outcome of this case. To the extent the Agency denied him procedural due process, the hearing process cures these defects. Prior to the hearing, Grievant was given information regarding the nature of the Agency's allegations against him, its witnesses regarding his behavior, and documents supporting the Agency's actions. Grievant had the opportunity to question the Agency's evidence and present any defenses of his choosing through his evidence.

Mitigation

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 Human Resource Management"⁷ 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. In light of this standard, 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 II Written Notice of disciplinary action is **upheld**. The Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is **upheld**.

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 believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management

⁷ *Va. Code § 2.2-3005.*

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

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR 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:

Office of Employment Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

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 provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative 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.⁸

[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

⁸ Agencies must request and receive prior approval from EDR before filing a notice of appeal.