

Issue: Group III Written Notice with Termination (falsifying documents); Hearing Date: 02/21/17; Decision Issued: 03/06/17; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10914; 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: 10914

Hearing Date: February 21, 2017
Decision Issued: March 6, 2017

PROCEDURAL HISTORY

On October 11, 2016, Grievant was issued a Group III Written Notice of disciplinary action with removal for falsification of records.

On November 7, 2016, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On November 28, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 21, 2017, a hearing was held at the Agency's 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?

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 Probation and Parole Officer at one of its locations. He began working at that Location in 2013. No evidence of prior active disciplinary action was introduced during the hearing.

VACORIS is the Agency's electronic database used to record employee activity related to each offender. Grievant accessed the VACORIS to enter information about tasks he performed relating to offenders.

The Virginia Criminal Information Network (VCIN) is a database maintained by the Virginia State Police. It shows the dates criminal charges were filed against individuals. The Agency's Office has a computer terminal in Grievant's Location specifically for accessing information in the VCIN. Each probation officer in Grievant's office, including Grievant, had a unique identification and password to log into the VCIN and check offender records. The VCIN system records the dates a user accesses the VCIN database.

In May and November of each year and when recommending termination of offender supervision, Grievant was obligated to access the VCIN to determine whether there were pending charges against the offender. Once Grievant determined if any pending charges existed against an offender, Grievant was obligated to access the Agency's VACORIS system and make an entry indicating whether the offender had new charges against him or her.

Grievant's case load included Offender J and Offender G. Offender J was charged with possession of cocaine on October 21, 2015. This information would have appeared in the VCIN database. On November 24, 2015, Grievant accessed VACORIS and entered that a records check for Offender J through VCIN was "all negative at this time."

On August 25, 2016, Grievant submitted a request that supervision be terminated for Offender G. Offender G had a pending charge for Unlawful Use. Grievant wrote that a "records check conducted on today's date shows no new felony or misdemeanor arrests or convictions."¹

Grievant accessed VACORIS and wrote that on May 3, 2016 he conducted a records check of Offender G through VCIN and that it was "all negative at this time."

On August 29, 2016, the Agency asked the VIRGINIA STATE POLICE for VCIN searches relating to Offender J and Offender G. The VIRGINIA STATE POLICE reviewed its VCIN database and informed the Agency:

The search was conducted for the dates of November 24, 2015 and May 3, 2016. There was no record of inquiry on the above dates listed.²

The Agency randomly selected 20 of Grievant's approximately 90 case files. On September 9, 2016, the Agency asked the Virginia State Police to conduct a VCIN search to determine if criminal background checks were conducted from the Agency's VCIN terminal on the 20 offenders including Offender G. The Virginia State Police reported that only two of the 20 cases showed criminal records checks were completed. One of the 18 cases without a background check was searched using an incorrect name.

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."³ 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

¹ Agency Exhibit 4.

² Agency Exhibit 4.

³ Virginia Department of Corrections Operating Procedure 135.1(VI)(B).

warrant removal.”⁴ Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”⁵

Group III offenses include:

Falsifying any records, willfully or by acts of gross negligence including, but not limited to all electronic and paper work and administrative related documents generated in the regular and ordinary course of business, such as count sheets, vouchers, reports, insurance claims, time records, leave records, or other official state documents.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*.

The Agency has established that Grievant falsified VACORIS by reporting that he had conducted VCIN searches when he had not conducted such searches. The Agency established this through a pattern of behavior. Grievant knew or should have known that his entries into VACORIS regarding conducting VCIN searches were false. The Agency has presented sufficient evidence 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, Grievant’s removal must be upheld.

Grievant argued that he conducted a VCIN records check and had 7 days to enter his findings into VACORIS. He may have made the records check on a date other than the date recorded in VACORIS. When the VIRGINIA STATE POLICE searched its records they searched for a date requested by the Agency instead of the date he actually conducted the VCIN search.

⁴ Virginia Department of Corrections Operating Procedure 135.1(VI)(C).

⁵ Virginia Department of Corrections Operating Procedure 135.1(VI)(D).

⁶ Virginia Department of Corrections Operating Procedure 135.1(V)(D)(2)(b).

This argument is not persuasive. At least seven of the searches conducted by the Virginia State Police showed dates more than seven days prior to the date Grievant reported he completed VCIN searches. For example, the Virginia State Police searched for dates between November 24, 2015 and May 19, 2016 regarding Offender M. Grievant entered into VACORIS that he conducted a VCIN records check on May 19, 2016 and that the result was “negative.” If Grievant had conducted a VCIN search as he claimed, the Virginia State Police search would have disclosed that fact.

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 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 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

⁷ Va. Code § 2.2-3005.

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.