

Issue: Group III Written Notice with Termination (theft of State property); Hearing Date: 06/10/13; Decision Issued: 06/17/13; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10064; 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: 10064

Hearing Date: June 10, 2013

Decision Issued: June 17, 2013

PROCEDURAL HISTORY

On February 21, 2013, Grievant was issued a Group III Written Notice of disciplinary action with removal for removing money from the employee fund and not using the money for its intended purposes.

On March 17, 2013, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On April 2, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The Hearing Officer found just cause to extend the time frame for issuing a decision in this grievance due to delays in the production of documents. On June 4, 2013, EDR issued Ruling 2013-3619 upholding the Hearing Officer's order to compel the production of documents. On June 10, 2013, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Advocate
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 an Officer Service Assistant at one of its Facilities. The purpose of her position was to, "ensure that all security policies pertaining to records management and audit requirements are effectively maintained. Maintain files in an efficient manner for easy retrieval."¹ She had been employed by the Agency for approximately 20 years prior to her removal effective February 21, 2013. No evidence of prior active disciplinary action was introduced during the hearing. Except for the facts giving rise to this disciplinary action, Grievant's work performance was satisfactory to the Agency.

The Facility maintained an Employee Fund. Grievant was President of the Fund and was obligated to spend Employee Fund money for the benefit of employees at the Facility. Grievant collected approximately \$585 from the sale of t-shirts and donuts. She did not deposit that money into the Employee Fund but rather used the money for her own purposes. When an employee complained about not receiving his shirt, the Agency made further inquiry and initiated an investigation.

¹ Agency Exhibit 3.

The Investigator worked as a Special Agent and had an office in a Building outside of the main administration building but within the Facility's perimeter fence. The size of the office was approximately ten by twelve feet. On January 24, 2013, the Investigator was dressed in a coat and tie, not in a uniform and not with his badge displayed. The Investigator asked the Assistant Investigator to join him during his interview because she was a female Special Agent and the Agency's practice was to have a female Special Agent present when a female employee was being questioned. The Assistant Investigator was not wearing a uniform or displaying a badge.

At the beginning of the meeting on January 24, 2013, the Investigator presented Grievant with a Statement of Miranda Rights advising her that:

1. You have the right to remain silent.
2. Anything you say can and will be used against you in a court of law.
3. You have the right to talk to a lawyer and have him present with you while you are being questioned.
4. If you cannot afford to hire a lawyer one will be appointed to represent you before any questioning if you wish.
5. You can decide at any time to exercise these rights and not answer any questions or make any statements.

Grievant signed the Statement waiving her rights:

I have read the above statement of my rights and I understand each of those rights, and having these rights in mind I waive them and willingly make a statement.²

The Investigator asked questions about Grievant's actions and the missing money. Grievant initially denied stealing any money. The Assistant Investigator asked questions of Grievant when Grievant was not responding to the questions of the Investigator.

Towards the end of the meeting, Grievant asked to speak with her mother who was also an employee at the Facility. Grievant's mother left her office and went to the Building where the Investigator's office was located. Grievant and her mother talked about the interview and what Grievant should do under the circumstances. They talked privately for approximately 20 minutes outside of the Investigator's office but within the Building. Grievant went to the restroom during that time period. Grievant returned to the Investigator's office to write her statement. Grievant sat in front of the Investigator's computer and wrote a statement, in part:

I [Grievant] never stole any money. I took the money with intent of paying it back. The money was from t-shirt [sales] and donut sales. It was approximately \$615.00. [Grievant discusses illness in her family].

² Agency Exhibit 2.

At the time of the incident (August 24, 2012) my ex-husband and myself was in and out of court over our [child]. [Grievant discusses her concerns about her ex-husband and her child]. My ex-husband owes almost \$8,000 in back child support and hasn't [been] paying at all. He was given the order to pay (which he has not yet done) *** He continues not to pay child support.

[Grievant discusses her other child and the father's injuries and that he has been unable to pay child support.]

I needed to retain an attorney because my [child's] safety was on the line. [Grievant discusses medical concerns.]

With both fathers not paying child support, my parents going through what they are going through, I did not want to burden them and it was spur of the moment and in a time crush to get an attorney. The fee to retain an attorney was \$650 and I only had about \$40. The money was needed and used for the attorney. I never meant for it to go this far and was hoping to have it back to the fund within a week or so of taking it. [Grievant discussed her child's medical concerns.]

Now that all this has occurred I can pay the money back by mid February, 2013 no later than March 1, 2013.

My kids only have me for support. I provided housing, clothing, food, etc, with no help from their fathers and I need my job to keep providing for them.³

Based on Grievant's statement, the Agency concluded Grievant had engaged in behavior justifying the issuance of disciplinary action with removal.

The Agency was ordered to disclose the Investigator's notes of the interview to the Grievant. The Agency failed to do so. Grievant proffered that had the notes been disclosed they would have shown that the Agency had no other evidence showing that Grievant took the money except for her statement. The notes would have shown that the procedures followed for the Employee Fund were sloppy and enabled others to take money from the Fund. Other employees at the Facility had similar motives to Grievant to take the money. Several employees did not believe Grievant had taken the money. The Business Manger did not like Grievant and pointed the Investigators toward Grievant as a likely suspect. These proffers are accepted as fact by the Hearing Officer because of the Agency's failure to fully comply with the Hearing Officer's order for production of documents.

³ Agency Exhibit 2.

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.”⁴ 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.”⁵ Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”⁶

Theft or unauthorized removal of state records, state property or property of other persons, including but not limited to employees, supervisors, patients, offenders, visitors, volunteers, contractors, and students” is a Group III offense.⁷

Grievant received several hundred dollars from employees which she was supposed to deposit into the Employee Fund and spend for the benefit of employees at the Facility. Instead of spending the funds as she was supposed to do, she diverted the funds for her own use as she confessed in her statement. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for theft or unauthorized removal of State property. 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 she took \$585 in cash to the Business Office to be deposited into the Employee Fund. Aside from Grievant’s assertion during the hearing, no evidence was presented to show that this occurred. Indeed, the Agency’s Business Manager testified that the employees in the business office said they had no recollection of Grievant depositing cash on or about August 24, 2012. Grievant’s written statement regarding the incident shows that she “borrowed” the money rather than making sure it was deposited into the Employee Fund.

Grievant argued that other employees could have taken the money. Although that is true, the money missing related to donut sales and t-shirt sales and Grievant was responsible for depositing money for those activities. No other employee confessed to taking the money.

Grievant’s statement is the most compelling evidence supporting the Agency’s case. Grievant argued that her statement and, thus, her admission resulted from a false

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

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

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

⁷ DOC Operating Procedure 135.1(V)(D)(2)(d).

confession. She claims the confession was false because (1) she was questioned for over three hours, (2) she was not permitted to leave the Investigator's office, (3) the Investigator told her she would lose her job and (4) she experienced severe migraine headache during the questioning.

Grievant has not established that her confession was false for several reasons. First, Grievant was read her Miranda rights and signed her name acknowledging she understood her rights. Thus, Grievant began the interview knowing that she did not have to say anything at all. Second, Grievant perceived the Investigator as a friend, not as an enemy. He did not "strong arm" her or engage in harsh rhetoric, tone, or demeanor to compel her to confess to something involuntarily. Grievant argued that the Investigator told her he would "go to bat for her" by speaking with the Warden on her behalf but that the final decision was the Warden's decision. The Investigator's comment is not sufficient to make Grievant's confession false. The Investigator's comment was that he would help Grievant retain her job even though the decision remained with the Warden. Grievant should have realized that by admitting to taking money she could jeopardize her job in the eyes of the warden and that the warden could take disciplinary action regardless of the Investigator's opinion. Third, Grievant asked to speak with her mother who also worked at the Facility. Grievant's mother left her office within the Facility and entered the Building containing the Investigator's office. Grievant spoke with her mother for approximately twenty minutes and went to the restroom while her mother was at the Building. Grievant discussed how to respond to the Investigator's questioning and asked what actions she should take. Grievant's decision-making was likely more influenced by her mother than by the Investigator. Neither the Investigator nor the Assistant Investigator had instructed Grievant she could not leave. Grievant could have left when her mother left the Building. Grievant could have claimed her migraine headache as a medical reason to leave the Building and end the interview. Fourth, Grievant typed the statement herself over a period of fifteen to twenty minutes. The words selected were those of Grievant. Grievant claimed she asked the Investigator how much money was missing and he told her the amount so she would know what to write in her statement. Whether the amount taken was \$615 or \$585 is not of significance. The fact that some amount was taken is significant. In addition, Grievant asked the Investigator for assistance rather than this being a scenario where an Investigator demands that an interviewee write a specific number to please the Investigator. Fifth, no evidence was presented showing that having a migraine headache would cause someone to make a false confession. The evidence presented suggested that Grievant's migraine headache may have been annoying to her but no evidence was presented showing that a migraine headache was a medical condition that would cause someone to falsely confess to improper behavior. Grievant's statement was not a false confession.

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"⁸ Under the *Rules for Conducting Grievance Hearings*, "[a] hearing

⁸ Va. Code § 2.2-3005.

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

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.⁹

[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

⁹ Agencies must request and receive prior approval from EDR before filing a notice of appeal.