

Issues: Group II (failure to follow instructions), Group II (abuse of State time), Group III (falsifying records), and Termination; Hearing Date: 01/13/14; Decision Issued: 01/16/14; Agency: VCU; AHO: William S. Davidson, Esq.; Case No. 10236; Outcome: Partial Relief. **Administrative Review: EDR Ruling Request received 01/23/14; EDR Ruling No. 2014-3801 issued 02/06/14; Outcome: AHO's decision affirmed.**

COMMONWEALTH OF VIRGINIA  
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT  
DIVISION OF HEARINGS  
DECISION OF HEARING OFFICER  
In Re: Case No: 10236

Hearing Date: January 13, 2014  
Decision Issued: January 16, 2014

**PROCEDURAL HISTORY**

A Group II Written Notice was issued to the Grievant on October 15, 2013, for the following reason:

Violation of State Policy 1.60, "Standards of Conduct". Specifically, you are charged with '**abuse of state time**'. On 10/4/2013, when asked why you had not contacted UPS as directed by me, you admitted to AB, the department head, that you spent most of the day (10/3/2013) investigating the lost interlibrary loan book which had been checked out to you. A review of the ILLiad staff activities indicates that your productivity was low during this time. Per your own admission on 10/8/13, you failed to follow established procedures for investigating lost materials to avoid paying the replacement fee. <sup>1</sup> (Emphasis added)

A Group II Written Notice was issued to the Grievant on October 15, 2013, for the following reason:

Violation of State Policy 1.60, "Standards of Conduct". Specifically, you are charged with '**failure to follow instructions**.' On 10/2/2013 you were asked to contact UPS about a problem with printing shipping labels. On 10/4/2013, AB, the department head asked you about calling UPS. She instructed you to contact UPS immediately, on that day. You did not comply with either request from me or AB. On 10/8/2013, you admitted that you could not follow directions all the time because of your personality. You intentionally disregarded our instructions which caused undue burden on the department staff. <sup>2</sup> (Emphasis added)

A Group III Written Notice was issued to the Grievant on October 15, 2013, for the following reason:

Violation of State Policy 1.60, "Standards of Conduct". Specifically, you are charged with '**falsifying records**' for personal gain and failure to follow instructions and/or policy. On 9/16/2013, a lender notified us that a book borrowed for you through our interlibrary phone services was overdue. On 9/19/2013, you advised me that the book was in Charlottesville. Request was moved to the appropriate lost status for billing in ILLiad by AB. On 9/23/2012, you changed the status of the lost book in the system to avoid paying the lost

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<sup>1</sup> Agency Exhibit 1, Tab 1, Page 2

<sup>2</sup> Agency Exhibit 1, Tab 1, Page 1

replacement fee. By changing the system, you falsified the record giving the appearance that the book was received by VCU Libraries. On 10/8/2013, you admitted that you changed the ILLiad record to avoid paying the replacement cost. You failed to follow the library practices for handling lost materials. Your actions were not in compliance with VCU Code of Ethics which promotes honesty (not misleading others) and compliance with policies and procedures that govern our university activities. <sup>3</sup> (Emphasis added)

Pursuant to these Group II and Group III Written Notices, the Grievant was terminated on October 16, 2013. <sup>4</sup> On November 14, 2013, the Grievant timely filed a grievance to challenge the Agency's actions. <sup>5</sup> On December 3, 2013, the Office of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. On January 13, 2013, a hearing was held at the Agency's location.

### **APPEARANCES**

Advocate for Agency  
Counsel for Grievant  
Grievant  
Witnesses

### **ISSUE**

Did the Grievant violate State Policy 1.60, "Standards of Conduct" by abusing state time, failing to follow instructions and/or falsifying records?

### **AUTHORITY OF HEARING OFFICER**

Code Section 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code Section 2.2-3005.1 provides that the Hearing Officer may order appropriate remedies including alteration of the Agency's disciplinary action. By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government. <sup>6</sup> Implicit in the Hearing Officer's statutory authority is the ability to independently determine whether the

employee's alleged conduct, if otherwise properly before the Hearing Officer, justified termination. The Court of Appeals of Virginia in *Tatum v. VA Dept of Agriculture & Consumer Servs.*, 41VA. App. 110, 123, 582 S.E. 2d 452, 458 (2003) held in part as follows:

While the Hearing Officer is not a "super personnel officer" and shall

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<sup>3</sup> Agency Exhibit 1, Tab 1, Page 5

<sup>4</sup> Agency Exhibit 1, Tab 1, Pages 2, 1 and 5

<sup>5</sup> Agency Exhibit 1, Tab 3, Page 1

<sup>6</sup> See Va. Code § 2.2-3004(B)

give appropriate deference to actions in Agency management that are consistent with law and policy...the Hearing Officer reviews the facts de novo...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action. Thus the Hearing Officer may make a decision as to the appropriate sanction, independent of the Agency's decision.

### **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. The employee has the burden of proof for establishing any affirmative defenses to discipline such as retaliation, discrimination, hostile work environment and others, and any evidence of mitigating circumstances related to discipline. A preponderance of the evidence is sometimes characterized as requiring that facts to be established more probably than not occurred, or that they were more likely than not to have happened. <sup>7</sup> However, proof must go beyond conjecture. <sup>8</sup> In other words, there must be more than a possibility or a mere speculation. <sup>9</sup>

### **FINDINGS OF FACT**

After reviewing the evidence presented and observing the demeanor of each witness, I make the following findings of fact:

The Agency provided me with a notebook containing seven tabs. That notebook was accepted in its entirety as Agency Exhibit 1. During the course of the hearing, Attachment "A" to Policy 1.60, was, by agreement from both parties, added to Tab 7 of Agency Exhibit 1.

The Grievant provided me with a notebook containing five tabs. That notebook was accepted in its entirety as Grievant Exhibit 1.

The first issue that came before me was whether or not the Grievant had properly grieved the Group II Written Notice for "abuse of state time." In the Grievant's Form A, which was filed on November 14, 2013, he grieved issues regarding falsifying records" and "failure to follow instructions." He did not specifically set forth an issue of "abuse of state time." However, it is clear that the Grievant was grieving his termination and it begs logic to think that his intent was to grieve two Written Notices that terminated him and not the third. The Agency, in each of the three Written Notices indicates that the Written Notice resulted in a termination. I find that the

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<sup>7</sup> *Ross Laboratories v. Barbour*, 13 Va. App. 373, 377, 412 S.E. 2d 205, 208 1991

<sup>8</sup> *Southall, Adm'r v. Reams, Inc.*, 198 Va. 545, 95 S.E. 2d 145 (1956)

<sup>9</sup> *Humphries v. N.N.S.B., Etc., Co.*, 183 Va. 466, 32 S.E. 2d 689 (1945)

Written Notice regarding “abuse of state time” is inextricably linked with the Written Notice regarding “failure to follow instructions.” Accordingly, all three of the Written Notices are properly before me.

The two Group II Written Notices deal with a UPS meter that was improperly printing receipts. This meter caused a blank line to be drawn vertically down the receipt and resulted in parts of addresses being eliminated.<sup>10</sup> I heard testimony from the Grievant’s first-line supervisor that she pointed this out to the Grievant on October 2, 2013. There is some dispute as to whether or not she advised the Grievant to fix the problem then, immediately, or to simply fix the problem as one of his items of work. On October 3, 2013, the Grievant did not call UPS to seek a solution to the problem. The Grievant testified that he had been in touch earlier with UPS and had been sent a cleaning kit in order to clean various parts of the meter to remedy the problem. He had done that once and was under the belief that the problem had been solved. On October 4, 2013, the Grievant’s second-line supervisor’s boss discovered this problem and instructed the Grievant to fix it immediately. The Grievant testified that he was at another location that day and he did not call UPS to order a new meter. Subsequently on the following Monday, while the Grievant was out on sick leave, the Grievant’s first-line supervisor called UPS and ordered a new meter which was delivered.

The Grievant’s first-line supervisor was essentially brand new in her role as supervising the Grievant. The testimony before me was that she had been his supervisor for less than a month and perhaps no more than a week when this event with the UPS meter came to a head. The Grievant’s testimony was that he felt that he had a solution to the problem, the cleaning kit, and that he did not recognize that it was an issue of some immediacy.

In considering the testimony of the Grievant, his first-line supervisor and his second-line supervisor, I find that the testimony of the second-line supervisor was clear that she directed the Grievant to call UPS immediately and he did not. Accordingly, I find that the Grievant did, in fact, fail to follow her instruction.

Regarding the second Group II Written Notice that arises from this incident, when the first and second-line supervisors talked to the Grievant pursuant to the due process policy, they testified that the reason he stated that he did not work on this matter on October 3, 2013, was that he spent most of the day investigating a lost book matter. Under oath, the Grievant denied making such a statement. His second-line supervisor testified that she had looked at some productivity metrics that were available to her and determined that the Grievant’s productivity for October 3, 2013, was lower than normal. No evidence was presented to me as to the relative amount that productivity was decreased for this day, nor was any evidence presented to me as to why productivity was decreased for this day. No witness was presented before me to testify that he or she witnessed that the Grievant was spending most of his day dealing with a lost book issue. I find that this Group II Written Notice is a gratuitous add-on to the first Group II Written Notice for “failure to follow instructions” and that the Agency has offered no compelling evidence that the Grievant “abused state time” dealing with a personal issue.

Regarding the Group III Written Notice for “falsifying records”; that issue involves an inter-library book loan. The Agency involved has arrangements with various other libraries

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<sup>10</sup> Agency Exhibit 1, Tab 4, Page 7

across the country to lend and borrow books. On or about July 9, 2013, the Grievant utilized this inter-library lending ability to obtain a book from the library of another university. That book was due to be returned on or about August 29, 2013. In point-of-fact, the Grievant had loaned that book to a friend. First and second overdue Notices were sent by this Agency to the Grievant and simultaneously, the lending library notified the Agency that the book was overdue. The notification of the lending library was received by the Agency on September 16, 2013. On September 17, 2013, the Grievant told his immediate supervisor where the book was. On September 18, 2013, the Grievant told his second-line supervisor that he thought he had returned the book. On September 19, 2013, the Grievant's first-line supervisor called the lending library requesting information on the book and was told that the book was not back with the lending library. On September 23, 2013, the Agency's timeline indicates that the Grievant told his first-line supervisor that he had the book and was returning it that day. As it turns out, the friend to whom the Grievant had lent the book, returned it directly to the library and it was received by that lending library on September 23, 2013.<sup>11</sup>

At 3:52 p.m., on September 23, 2013, the Grievant made an entry into the tracking computer system indicating that the lost book was now in the lending institution's possession. He included an internet link that would show the book was in fact at the lending institution. This entry was made under his own name.<sup>12</sup> Pursuant to that entry, the tracking system for the Agency stopped tracking this book and indicated a status of "finished."<sup>13</sup>

The Agency's belief is that the Grievant made the entry into the tracking system for the sole purpose of avoiding a lost book fine. At the time he made his entry, no invoice had been generated for a lost book; no one from the Agency had said to the Grievant that he would be responsible for a lost book fine; and, indeed, the book was returned on September 23, 2013, and subsequently, the lending library acknowledged that the book was back in its possession.

Black's Law Dictionary defines "falsified" to mean, to make something false; to counterfeit or forge. Merriam-Webster defines "falsified" as, to make something false; **to change something in order to make people believe that it is not true.** The entry that the Grievant made into the tracking system was in fact completely accurate. I find that the Grievant did not falsify any record. The Agency is disgruntled because the entry that he made stopped the tracking process. If this book was returned in what the Agency deems as the proper manner, it would have been received back into the Agency's library and that library would have forwarded it to the lending library. That way the tracking system would have followed the book from A to B and would have indicated receipt. In this case, when the Grievant's friend directly mailed the book to the lending library, the tracking system was effectively aborted. The Grievant put a true statement in the system to indicate that the book was back in the proper hands. He falsified nothing. It is quite possible that he did not follow proper procedure, but nothing was falsified. Indeed, when an invoice finally was issued for an overdue book, the Grievant promptly paid that invoice. Because the book was not lost and the book was returned, there never was a lost-book fee. It is interesting to note that, even when the Agency was fully aware that the book was not lost, in its due-process letter to the Grievant, it continued to act as if the book was lost, some

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<sup>11</sup> Agency Exhibit 1, Tab 4, Pages 8 and 9

<sup>12</sup> Agency Exhibit 1, Tab 4, Page 4

<sup>13</sup> Agency Exhibit 1, Tab 4, Page 3

several weeks after the book was returned. Accordingly, I find that there was no “falsifying records” in this matter.

### **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 Employment Dispute Resolution...”<sup>14</sup> 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, (3) the disciplinary action was free of improper motive, (4) the length of time that the Grievant has been employed by the Agency, and (5) whether or not the Grievant has been a valued employee during the time of his/her employment at the Agency.

The Agency, in each of the Written Notices in this matter, essentially stated the same fact pattern regarding mitigation. Part of that fact pattern was that the Grievant had been counseled, both verbally and in writing, regarding prior infractions. I note that no such written documents were produced before me and no evaluation was produced before me that would support prior counseling. Finally, I note that even after the Grievant was terminated, a Performance Evaluation was signed by his second-line supervisor indicating that he was an achiever.<sup>15</sup>

### **DECISION**

For reasons stated herein, I find that the Agency has borne its burden of proof regarding the Group II Written Notice dealing with “failure to follow instructions.” I find that the Agency has not borne its burden of proof regarding the Group II Written Notice dealing with “abuse of state time” and I further find that the Agency has not borne its burden of proof regarding the Group III Written Notice dealing with “falsifying records.” Accordingly, inasmuch as this is the first Group II Written Notice for this Grievant, I find that the appropriate remedy in this matter was suspension without pay for ten days. That suspension would commence on October 16, 2013. Starting with the end of the appropriate ten day period after that, I order that the Agency reinstate the Grievant to the same position or an equivalent position. I further order that the Agency award full back pay, from which interim earnings must be deducted, to the Grievant and that he have a restoration of full benefits and seniority. The Grievant is entitled to receive reasonable attorney’s fees. Counsel for Grievant shall have 15 days from the date of this Decision to deliver to me his Petition for Reasonable Attorney’s Fees.

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<sup>14</sup> *Va. Code § 2.2-3005*

<sup>15</sup> Grievant Exhibit 1, Tab 5, Pages 1 through 5

## APPEAL RIGHTS

You may file an administrative review request 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. You may fax your request to 804-371-7401, or address your request to:

Director of the Department of Human Resource Management  
101 North 14<sup>th</sup> Street, 12<sup>th</sup> Floor  
Richmond, VA 23219

2. 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. You may fax your request to 804-786-1606, or address your request to:

Office of Employment Dispute Resolution  
101 North 14<sup>th</sup> Street, 12<sup>th</sup> Floor  
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 of the original hearing decision. A copy of all requests for administrative review must be provided 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 administrative requests for a review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.<sup>16</sup> 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.<sup>17</sup> [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]

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William S. Davidson  
Hearing Officer

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<sup>16</sup>An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. Virginia Department of State *Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

<sup>17</sup>Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.