

Issue: Group III Written Notice with Termination (falsifying records); Hearing Date: 01/23/14; Decision Issued: 01/27/14; Agency: DOC; AHO: Cecil H. Creasey, Esq.; Case No. 10250; Outcome: No Relief – Agency Upheld.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION

In the matter of: Case No. 10250

Hearing Date: January 23, 2014

Decision Issued: January 27, 2014

PROCEDURAL HISTORY

Grievant was a parole officer for the Department of Corrections (“the Agency”). On October 28, 2013, the Grievant was charged with a Group III Written Notice for violation of Agency Policy 2.30, Workplace Harassment. The associated discipline was suspension for 24 hours. The Grievant had one other active Written Notice, a Group II.

Grievant timely filed a grievance to challenge the Agency’s disciplinary action. The outcome of the resolution steps was not satisfactory to the Grievant and she requested a hearing. On December 17, 2013, the Office of Employment Dispute Resolution (“EDR”) appointed the Hearing Officer. During a pre-hearing conference with the parties, the hearing was scheduled for the first date available between the parties and the hearing officer, January 23, 2014, on which date the grievance hearing was held, at the Agency’s facility.

At the scheduled time, the Grievant did not appear for the hearing. After waiting, and without any word or notice from the Grievant, the hearing proceeded. The Agency submitted documents for exhibits that were, without objection, accepted into the grievance record, and they will be referred to as Agency’s Exhibits. The hearing officer has carefully considered all evidence presented.

APPEARANCES

Representative/witness for Agency
Advocate for Agency

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?

Through her grievance filings, the Grievant requests rescission or reduction of the Group III Written Notice.

BURDEN OF PROOF

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as claims of retaliation and discrimination, the employee must present his evidence first and must prove his claim by a preponderance of the evidence. *In this disciplinary action, the burden of proof is on the Agency.* 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.

APPLICABLE LAW 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 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).

Code § 2.2-3000 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 the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

The Agency's Standards of Conduct, Operating Procedure 135.1, defines Group III offenses to include acts and behavior of such a serious nature that a first occurrence normally should warrant removal. Agency Exh. 3. An example of a Group III offense is falsifying any records.

The Offense

After reviewing the evidence presented and observing the demeanor of each testifying witness, the Hearing Officer makes the following findings of fact and conclusions:

The Agency employed Grievant as a parole officer. The Grievant has an active Group II Written Notice. Agency Exh. 2. The present Group III Written Notice charged:

On October 8, 2013, a COMPAS assessment was completed on [R.A.]. [R.A.'s] case is assigned to [Grievant] and she was identified as the screener. However, upon further investigation of his case, it was found that [Grievant] did not ask [R.A.] all of the questions in the assessment; but, actually provided answers based on her own assumption.

The Written Notice also included an attached offense summary and field itinerary. Agency Exh. 1.

The Agency's witness, the district chief, testified consistently with the charge in the Written Notice. He testified that the Grievant admitted the conduct during the grievance process. The chief described the COMPAS assessment as an important tool used to determine risk factors and the appropriate level of supervision for all clients who are incarcerated or assigned to supervision within the Department of Corrections. Without the client's input, the Agency jeopardizes the instrument's validity, accuracy, and even the general safety of the public. The chief also testified that the Grievant's conduct was particularly disturbing because of its essential connection to public safety.

As previously stated, the agency's burden is to show upon a preponderance of evidence that the discipline of the Grievant was warranted and appropriate under the circumstances. The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).

Va. Code § 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 § 2.2-3005.1 provides that the hearing officer may order appropriate remedies including alteration of the Agency's disciplinary action. Implicit in the hearing officer's statutory authority is the ability to determine independently whether the employee's alleged conduct, if otherwise properly before the hearing officer, justified the discipline. The Court of Appeals of Virginia in *Tatum v. Dept. of Agr. & Consumer Serv.*, 41 Va. App. 110, 123, 582 S.E. 2d 452, 458 (2003) (quoting Rules for Conducting Grievance Hearings, VI(B)), held in part as follows:

While the hearing officer is not a "super personnel officer" and shall 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.”

Under Virginia Code § 2.2-3005, the hearing officer has the duty to “receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Office of Employment Dispute Resolution.” 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.

The agency has proved (i) the employee engaged in the behavior described in the written notice, (ii) the behavior constituted misconduct, and (iii) the discipline was consistent with law and policy. Thus, the discipline must be upheld absent evidence that the discipline exceeded the limits of reasonableness. *Rules for Conducting Grievance Hearings* (“Hearing Rules”) § VI.B.1.

The Grievant did not appear for the hearing, and no witnesses presented any contrary evidence. The evidence is un rebutted and establishes the offense occurred. Further, I find the offense is appropriately a Group III offense. Termination is the normal discipline for a Group III offense, unless mitigating circumstances render termination outside the bounds of reasonableness. The Grievant presented no mitigation evidence and, accordingly, I find no mitigating circumstances that may render the termination beyond the bounds of reasonableness.

Accordingly, I find that the Agency’s action of imposing a Group III Written Notice for the October 8, 2013, offense is within the limits of reasonableness. The Hearing Officer, thus, lacks authority to reduce or rescind the disciplinary action.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of the Group III Written Notice with termination of employment 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.¹

I hereby certify that a copy of this decision was sent to the parties and their advocates shown on the attached list.



Cecil H. Creasey, Jr.
Hearing Officer

¹ Agencies must request and receive prior approval from EDR before filing a notice of appeal.