

Issue: Group III Written Notice with Termination (falsifying records); Hearing Date: 02/26/14; Decision Issued: 02/27/14; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 19271; Outcome: No Relief - Agency Upheld; **Administrative Review**: EDR Ruling Request received 03/14/14; EDR Ruling No. 2014-3840 issued 03/27/14; Outcome: AHO's decision affirmed; **Administrative Review**: DHRM Ruling Request received 03/14/14; DHRM Ruling issued 04/09/14; Outcome: AHO's decision affirmed.



# ***COMMONWEALTH of VIRGINIA***

## ***Department of Human Resource Management***

### **OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

#### **DECISION OF HEARING OFFICER**

In re:

**Case Number: 10271**

Hearing Date: February 26, 2014

Decision Issued: February 27, 2014

#### **PROCEDURAL HISTORY**

On December 20, 2013, Grievant was issued a Group III Written Notice of disciplinary action with removal for falsifying records.

On January 9, 2014, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On February 4, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 26, 2014, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
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 a Probation Officer I at one of its facilities until his removal effective December 20, 2013. Grievant was employed by the Agency for approximately four years. Grievant had prior active disciplinary action. On September 9, 2013, Grievant received a Group I Written Notice for abuse of State time.

Grievant was responsible for supervising probationers. Some of his duties involved visiting the homes of probationers to determine where they were living. VACORIS is the Agency's electronic database in which employees record information about their contacts with offenders.

An Offender moved from one locality to Grievant's locality. Before Grievant's office could accept responsibility for the Offender, Grievant had to verify that the Offender lived in Grievant's locality by visiting the Offender's residence and speaking with someone living at that residence. On December 5, 2013 at 2:42 p.m., the Probation Officer in the first locality sent an email to Grievant with a copy to the Supervisor stating:

Where are you in the process of his transfer investigation, it was due on 11/29/13? He reported yesterday and stated that you advised him that you would be accepting his case. I do not see any notes logged in Coris as to whether or not you have completed his HC.

At 2:43 p.m., the Supervisor sent Grievant an email stating:

Are we taking this? Can u advise?

On December 5, 2013 at 4:27 p.m., Grievant sent the Supervisor an email with a copy to the Probation Officer from the first locality stating:

Yes, I just left his home and spoke with his mother-in-law whom was keeping his daughter. He works a very strict schedule and cannot get around unless he caught the bus in [first locality], but everything is all taken care of now.<sup>1</sup>

Grievant's statements in his December 5, 2013 email were untrue. He had not visited the Offender's home. He did not speak with the Offender's mother-in-law at the home. Grievant knew his statements were untrue when he wrote them.

Grievant made an entry in VACORIS consistent with the interaction he claimed to have occurred in his December 5, 2013 email.

When the Agency investigated the matter, Grievant admitted he had not visited the Offender's home and spoken with the mother-in-law.

The Agency issued Grievant a Group III Written Notice with removal, in part, because of Grievant's prior Group I Written Notice that the Agency perceived as reflecting a lack of truthfulness.

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

Group III offenses include:

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<sup>1</sup> Hearing Officer Exhibit 1.

<sup>2</sup> Virginia Department of Corrections Operating Procedure 135.1(V)(B).

<sup>3</sup> Virginia Department of Corrections Operating Procedure 135.1(V)(C).

<sup>4</sup> Virginia Department of Corrections Operating Procedure 135.1(V)(D).

Falsifying any records, including but not limited to all 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.<sup>5</sup>

Emails are records of the Agency. On December 5, 2013, Grievant wrote an email in response to a question from his Supervisor stating that he had visited the Offender's home and spoken with the Offender's mother-in-law. Grievant had not visited the Offender's home and spoken with the mother-in-law. Grievant knew at the time he wrote the email that his statements were false. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for falsifying records. 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.

Grievant argued that the disciplinary action was not consistent with the Department's philosophy of creating a "healing environment." This argument is not persuasive. The Agency established a Standards of Conduct which addressed its philosophy regarding employee behavior. The Agency's Standards of Conduct states that an employee who falsifies records may be removed from employment. The Agency has followed its Standards of Conduct.

*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 ...."<sup>6</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, and (3) the disciplinary action was free of improper motive.

Grievant argued that the Agency inconsistently disciplined its employees. He cited as an example Probation Officer C. The evidence showed that Probation Officer C used a template when completing part of his reports as he opened his cases. On occasion, the template would include incorrect information such as stating that a urine screen had been completed for an offender even though a urine screen had not actually been completed. The Agency reviewed Probation Officer C's files, spoke with Probation Officer C, and concluded that Probation Officer C did not intend to falsify but rather

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<sup>5</sup> DOC Operating Procedure 135.1 (V)(D)(2)(b).

<sup>6</sup> Va. Code § 2.2-3005.

failed to correctly update the template to reflect other information that Probation Officer C had written or placed in the offender's file. The Agency has presented sufficient evidence to show that it did not inconsistently discipline Grievant and Probation Officer C. The Agency investigated Probation Officer C's behavior and concluded that Probation Officer C did not have the intent to falsify. Grievant knew on December 5, 2013 that he had not visited the Offender's home when he wrote that he had visited the Offender's home. Grievant had the intent to falsify and the Agency concluded a Group III Written Notice with removal should be issued to Grievant. In addition, the Agency had concerns of Grievant's truthfulness because of his behavior giving rise to the Group I Written Notice.

Grievant presented evidence of Probation Officer J who falsely claimed to have called North Carolina regarding an offender and then entered that information into the Agency's records. Probation Officer J did not receive disciplinary action including removal. The evidence showed that Facility managers did not know about Probation Officer J's behavior. The Chief Probation Officer at the Facility issued Grievant a Group III Written Notice but did not know about Probation Officer J's behavior. The Agency did not inconsistently discipline Grievant and Probation Officer J because Facility Managers did not know or have the opportunity to investigate whether Probation Officer J falsified records.

In light of the standard set forth in the Rules, 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 14<sup>th</sup> St., 12<sup>th</sup> 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 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto: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.<sup>7</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].

*/s/ Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>7</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.