

Issue: Group III Written Notice with Termination (falsifying records); Hearing Date: 01/14/15; Decision Issued: 02/11/15; Agency: DSS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10504; Outcome: Partial Relief; **Administrative Review: DHRM Ruling Request received 02/25/15; DHRM Ruling issued 04/06/15; Outcome: AHO's decision affirmed; Attorney's Fee Addendum issued 04/14/15 awarding \$1,643.20.**



# ***COMMONWEALTH of VIRGINIA***

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

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

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

In re:

**Case Number: 10504**

Hearing Date: January 14, 2015  
Decision Issued: February 11, 2015

#### **PROCEDURAL HISTORY**

On October 16, 2014, Grievant was issued a Group III Written Notice of disciplinary action with removal for falsifying records.

On October 22, 2014, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On November 17, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 14, 2015, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
Grievant's Counsel  
Agency Party Designee  
Agency's 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 Social Services employed Grievant as an Accountant Senior at one of its locations. She began working for the Agency on May 18, 1987. The purpose of her position was:

As a member of the District's Executive Management Team, manages one or more of the Child Support Enforcement Program's operational functions within the DCSE District Office; provides programmatic and administrative assistance to the District Manager in the overall implementation of the Child Support Enforcement Program within the District Office's assigned geographical area.<sup>1</sup>

Grievant reported to the District Manager. The Enforcement Manager reported to the District Manager but was not in Grievant's chain of command. Mr. C was a Fiscal Tech.

The Agency manages receipt and payment of child support money. When a non-custodial parent sends the agency money to be paid to the custodial parent, the Agency is supposed to follow the "federal hierarchy." Under the federal hierarchy, money received from a non-custodial parent is "pushed" first to the custodial parent. Only in certain circumstances can money be paid to reimburse the TANF program for its prior expenditures involving the parents and their children.

---

<sup>1</sup> Agency Exhibit 3.

A Former Assistant Director created a competition among districts to see which district could show the greatest increase in the number of cases where money collected was repaid for TANF cases. A TANF case was one where money was owed to the Commonwealth because payments had been made under the TANF program.

The Enforcement Supervisor directed staff to identify child support cases where TANF payments had been made and money was owed to the Commonwealth. Some of these cases were to be selected and one dollar of each child support payment would be redirected to repay the TANF program instead of to the custodial parent. The effect of this action would be to deny money owed to the custodial parent and create errors in the reports the Agency filed with the Federal government.

Ms. J asked Mr. C to make an adjustment to a child support payment so that a dollar of the payment would be pushed to the TANF account. Mr. C knew that the adjustment would be contrary to the federal hierarchy and did not wish to make the adjustment without Grievant's approval. On July 21, 2014, Mr. C went to Grievant and told her he had been asked to make the adjustment by Ms. J and that the Enforcement Manager had approved the adjustment. Mr. C asked Grievant whether to approve the transaction.

Grievant knew Mr. C's request was contrary to Division policy so she informed the District Manager of the request and asked for guidance. Grievant explained the request to the District Manager. The District Manager said that she would take up the issue with the Enforcement Manager and that Grievant should go ahead and authorize the adjustment until notified otherwise. Grievant informed Mr. C he should push the funds to the TANF account.

Beginning on July 21, 2014, Grievant approved eight case adjustments in the amount of \$1.00 to three cases contrary to the federal hierarchy. Grievant did not benefit personally by authorizing Mr. C to make the adjustments.

On September 24, 2014, Grievant told Mr. C that she wanted all payments distributed in accordance with the federal hierarchy. She acted contrary to the District Manager's directive because she concluded she could no longer allow the misapplication of policy to continue. Grievant realized that the District Manager was preoccupied with personnel issues of her own.

The Assistant Director assumed her position in May 2014. She received several complaints that the District Manager was creating a hostile work environment. The Assistant Director investigated the allegations and concluded the allegations had merit. In September 2014, the Assistant Director met with the District Manager to present her with notice of the Agency's intent to take disciplinary action against the District Manager. The District Manager disclosed to the Assistant Director that the district was pushing money contrary to the federal hierarchy.

## CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “include acts of minor misconduct that require formal disciplinary action.”<sup>2</sup> Group II offenses “include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action.” Group III offenses “include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.”

Failure to follow policy is a Group II offense.<sup>3</sup> Under the Federal Regulation Desktop Guide:

Child support payments must be distributed based on federal guidelines identifying the hierarchy and priority of accounts.<sup>4</sup>

Under the federal hierarchy, money received from a non-custodial parent must be distributed first to the custodial parent. On eight occasions, Grievant approved fiscal adjustments that violated federal law by not adhering to the federal hierarchy as required by Agency policy. Grievant’s actions were contrary to policy thereby justifying the issuance of a Group II Written Notice. Upon the issuance of a Group II Written Notice, an agency may suspend an employee for up to ten work days. Accordingly, it is appropriate for Grievant to be suspended for ten work days.

The Agency alleged but has not established that Grievant falsified records. In order to prove that Grievant falsified records, the Agency was obligated to prove that Grievant had the intent to falsify. Grievant knew that the eight requests to vary from the federal hierarchy were inconsistent with policy so she brought the matter to the attention of the District Manager. The District Manager told her to approve the variances. When Grievant acted to approve the eight requests, she did so with the intent to carry out her supervisor’s instructions<sup>5</sup> and not to falsify records. Grievant’s behavior does not support the issuance of a Group III Written Notice for falsification of records. Grievant must be re-instated.

The Virginia General Assembly enacted *Va. Code § 2.2-3005.1(A)* providing, “In grievances challenging discharge, if the hearing officer finds that the employee has substantially prevailed on the merits of the grievance, the employee shall be entitled to

---

<sup>2</sup> The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

<sup>3</sup> See, Attachment A, DHRM Policy 1.60.

<sup>4</sup> Agency Exhibit 5.

<sup>5</sup> Grievant’s desire to follow the District Manager’s instruction is understandable. The prior Assistant Director sanctioned and promoted the District Manager’s routine abuse of her managerial discretion. The District Manager managed the local office as if it were her fiefdom. She did so with the Agency’s imprimatur until she was forced out by a new executive team.

recover reasonable attorneys' fees, unless special circumstances would make an award unjust." Grievant has substantially prevailed on the merits of the grievance because he is to be reinstated. There are no special circumstances making an award of attorney's fees unjust. Accordingly, Grievant's attorney is advised to submit an attorneys' fee petition to the Hearing Officer within 15 days of this Decision. The petition should be in accordance with the EDR Director's *Rules for Conducting Grievance Hearings*.

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. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce further 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 reduced to a Group II Written Notice with a ten workday suspension. The Agency is ordered to **reinstate** Grievant to Grievant's same position prior to removal, or if the position is filled, to an equivalent position. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal and credit for leave and seniority that the employee did not otherwise accrue. The Agency may reduce the award of back pay to account for the ten work day suspension.

## 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

---

<sup>6</sup> Va. Code § 2.2-3005.

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*

---

Carl Wilson Schmidt, Esq.  
Hearing Officer

---

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



**COMMONWEALTH of VIRGINIA**  
**Department of Employment Dispute Resolution**

**DIVISION OF HEARINGS**

**ADDENDUM TO DECISION OF HEARING OFFICER**

In re:

**Case No: 10504-A**

Addendum Issued: April 14, 2015

**DISCUSSION**

The grievance statute provides that for those issues qualified for a hearing, the Hearing Officer may order relief including reasonable attorneys' fees in grievances challenging discharge if the Hearing Officer finds that the employee "substantially prevailed" on the merits of the grievance, unless special circumstances would make an award unjust.<sup>8</sup> For an employee to "substantially prevail" in a discharge grievance, the Hearing Officer's decision must contain an order that the agency reinstate the employee to his or her former (or an objectively similar) position.<sup>9</sup>

To determine whether attorney's fees are reasonable, the Hearing Officer considers the time and effort expended by the attorney, the nature of the services rendered, the complexity of the services, the value of the services to the client, the results obtained, whether the fees incurred were consistent with those generally charged for similar services, and whether the services were necessary and appropriate.

Grievant's attorney submitted a petition and affidavit showing he devoted 10.4 hours to representing Grievant. The hourly rate allowed by EDR is \$158.

**AWARD**

Grievant is awarded attorneys' fees in the amount \$1,643.20.

---

<sup>8</sup> Va. Code § 2.2-3005.1(A).

<sup>9</sup> § 7.2(e) Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004. § VI(D) *EDR Rules for Conducting Grievance Hearings*, effective August 30, 2004.



## APPEAL RIGHTS

If neither party petitions the DHRM Director for a ruling on the propriety of the fees addendum within 10 calendar days of its issuance, the hearing decision and its fees addendum may be appealed to the Circuit Court as a final hearing decision. Once the DHRM Director issues a ruling on the propriety of the fees addendum, and if ordered by DHRM, the hearing officer has issued a revised fees addendum, the original hearing decision becomes “final” as described in §VII(B) of the *Rules* and may be appealed to the Circuit Court in accordance with §VII(C) of the *Rules* and §7.3(a) of the *Grievance Procedure Manual*. The fees addendum shall be considered part of the final decision. Final hearing decisions are not enforceable until the conclusion of any judicial appeals.

*/s/ Carl Wilson Schmidt*

---

Carl Wilson Schmidt, Esq.  
Hearing Officer