

Issues: Group I Written Notice (insubordination), and Group III Written Notice with Termination (falsifying documents); Hearing Date: 07/10/13; Decision Issued: 08/27/13; Agency: DSS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10107, 10108; Outcome: Partial Relief.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10107 / 10108

Hearing Date: July 10, 2013
Decision Issued: August 27, 2013

PROCEDURAL HISTORY

On March 26, 2013, Grievant was issued a Group I Written Notice of disciplinary action for insubordination. On April 4, 2013, Grievant was issued a Group III Written Notice with removal for falsification of a State record.

On April 22, 2013, Grievant timely filed a grievance to challenge the Group I Written Notice. The outcome of the Third Resolution Step was not satisfactory to the Grievant and requested a hearing. On April 29, 2013, Grievant timely filed a grievance to challenge the Group III Written Notice. The matter proceeded to hearing. On May 21, 2013, the Office of Employment Dispute Resolution issued Ruling No. 2013-3608, 2013-3609 consolidating the two grievances for a single hearing. On June 5, 2013, EDR assigned this appeal to the Hearing Officer. On July 10, 2013, 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 Notices?
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 Administrative Staff Assistant at one of its facilities. She had been employed by the Agency for approximately 20 months prior to her removal. Grievant began reporting to the Supervisor on January 25, 2012.

Grievant worked as an Administrative Office Specialist II with the Former Employer. She was as a probationary employee. On September 24, 2010, Grievant received a Classified Probationary Progress Review. She received an overall rating of "Below Contributor" because her performance showed deficiencies. On February 22, 2011, Grievant received a ninth month Classified Probationary Progress Review in which her probationary period was extended to March 10, 2011 "for performance reasons."¹ Grievant responded to the ninth month review by writing, "I was very shocked that [Dr. H and Ms. F] had issues with me on: authority, communication tone,

¹ Agency Exhibit 2.

and scope of responsibilities? This was the first time that it was 'brought to my attention' that these existed."²

She was discharged from employment by letter dated March 3, 2011 which provided, in part:

Based on your performance during the probationary period, your employment with [Former Employer] is terminated effective March 3, 2011.³

Grievant used the Commonwealth's online application system to apply for several positions offered by State agencies. Grievant completed an application for employment and listed her prior employers. She listed her prior work experience with eight employers. The online application had a drop down menu box from which an applicant could select among several reasons for leaving a former employer. Grievant selected "Other" for three former employers as the reason for leaving.

On April 25, 2011, Grievant submitted an application for employment to the Agency for the position of Administrative Staff Assistant. She listed her reason for leaving the Former Employer as "Laid Off". At the bottom of the online application appeared the following certification:

I hereby certify that all entries on both sides and attachments are true and complete, and I agree and understand that any falsification of information herein, regardless of time of discovery, may cause forfeiture on my part of any employment in the service of the Commonwealth of Virginia. I understand that all information on this application is subject to verification and I consent to criminal history background checks. I also consent that you may contact references, former employers and educational institutions listed regarding this application. I further authorize the Commonwealth to rely upon and use, as it sees fit, any information received from such contacts. Information contained on this application may be disseminated to other agencies, nongovernmental organizations or systems on a need-to-know basis for good cause shown as determined by the agency head or designee.

BY SIGNING BELOW, I certify that I have read and agree with these statements.

When Grievant submitted the application through the online system she "signed" the application electronically. She received a confirmation number to show the application had been received by the Agency.

² Agency Exhibit 2.

³ Agency Exhibit 2.

Grievant was one of several applicants selected for a first round of interviews. She was interviewed on June 7, 2011. The three member hiring panel reviewed her application for employment and it showed that Grievant was laid off from the Former Employer.

On June 8, 2011, the three member hiring panel recommended four applicants including Grievant to the District Manager for second interviews.

Grievant was interviewed by the District Manager on June 13, 2011. Grievant's application for employment showed that she was laid off by the Former Employer.

On June 15, 2011, the District Manager sent the HR Director a memorandum requesting approval to hire Grievant.

On June 15, 2011, Grievant changed the existing application in her online account. She changed the information regarding the Former Employer to show that her reason for leaving was "Other" instead of "Laid Off." Grievant called the Agency's Central Office and spoke with a human resource employee to advise that she wanted to amend her application. On June 15, 2011 at 1:45 p.m., Mr. B accessed the online application system to change the application information and noted, "Application Updated to Most Recent Application on File."⁴

The District Manager sent Grievant a letter dated June 21, 2011 to "confirm our offer and your acceptance of employment". The letter specified Grievant's salary and informed Grievant to report for work on July 11, 2011.⁵

On March 20, 2013, the Supervisor gave Grievant a notice of improvement needed/substandard performance.

Grievant asked to meet with the Supervisor on March 21, 2013. Grievant brought a folder full of employee leave slips on which she was working. The Supervisor discussed regarding how to keep up with keying leave into the leave system. They discussed how long it would take for Grievant to key 10 leave slips. Grievant replied 20 minutes. The Supervisor said that if Grievant had 30 leave slips she would be able to key all of them within an hour. Grievant had been bringing her work to the Supervisor and asking the Supervisor what to do. Grievant asked the Supervisor to help her prioritize her work. The Supervisor said she would not help Grievant prioritize her work since that is what Grievant should be able to do. Their meeting ended and Grievant began walking towards the door. As she walked away from the Supervisor, Grievant said, "You are a mean woman."

⁴ Agency Exhibit 7.

⁵ Hearing Officer Exhibit 1.

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.”⁶ 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.”

Group I Written Notice

Grievant called the Supervisor a mean woman within the context of a meeting in which she was attempting to resolve problems and complaints. Her words were protected under Va. Code § 2.2-3000(A) which provides

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints. To that end, employees shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management. 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 that may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

Va. Code § 2.2.-3000(A) is broadly construed to define as protected activities (otherwise protected by law) attempts by employees to freely discuss their concerns with Agency management. Grievant expressed her opinion that the Supervisor was a mean woman for failing to provide assistance that Grievant needed. Grievant did not engage in any behavior that could be construed as workplace violence. To the extent the Supervisor perceived Grievant’s behavior as insubordinate or disrespectful, Grievant was expressing her opinion regarding the Supervisor’s unwillingness to provide assistance Grievant needed to perform her job duties. The Group I Written Notice must be reversed.

Group III Written Notice

"[F]alsification of records" is a Group III offense.⁷ DHRM § 2.10 states:

Before an applicant is eligible for employment with the Commonwealth, several records must be reviewed or verified. This information is considered part of the application process and, as with information

⁶ The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

⁷ See, Attachment A, DHRM Policy 1.60.

contained on the application form, if it is later discovered that an applicant falsified any information related to his or her employment, the employee may be terminated.

Falsification is not defined by the Standards of Conduct but the Hearing Officer interprets this provision to require proof of an intent to falsify by the employee in order for the falsification to rise to the level justifying termination. This interpretation is less rigorous but is consistent with the definition of “Falsify” found in Blacks Law Dictionary (6th Edition) as follows:

Falsify. To counterfeit or forge; to make something false; to give a false appearance to anything. To make false by mutilation, alteration, or addition; to tamper with, as to falsify a record or document. ***

The Hearing Officer’s interpretation is also consistent with the New Webster’s Dictionary and Thesaurus which defines “falsify” as:

to alter with intent to defraud, *to falsify accounts* || to misrepresent, *to falsify an issue* || to pervert, *to falsify the course of justice*.

Whether an employee has been removed from employment based on poor performance or without fault is a material fact which must be appropriately disclosed on the Commonwealth’s application for employment. An employee who is “laid off” typically is an employee who is removed without fault.

On April 25, 2011, Grievant submitted an application for employment stating that she had been “Laid Off” by the Former Employer. Once an application for employment is submitted to an agency, it becomes a record of the agency. Grievant knew that she had been removed for poor performance. She had received negative performance reviews and was informed in a letter that she was being removed for her performance. Grievant knew that she was not being laid off without fault. When she wrote on her application that she was laid off from the Former Employer, she falsified her application for employment. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for falsification of a record.

Grievant argued that she believed she had been laid off because her workload had been reduced significantly with a change in unit leadership. The letter she received clearly states that she was removed from employment for performance and not because of a reduction in workload. Grievant’s assertion is not credible.

Grievant argued that to the extent her April 25, 2011 submission was inaccurate, she amended her application on June 15, 2011 so that when she started her application stated “Other.” When she began work in July 2011, the application no longer read that she was laid off. Grievant’s argument fails. If the Hearing Officer assumes for the sake of argument that Grievant’s reason for leaving the Former Employer could fairly be described as “Other”, Grievant’s assertion is not supported by the evidence. Grievant

claimed that she checked her online application and noticed the error and then immediately contacted the Agency's central office to have the application revised. She also testified that she received a telephone call from the District Manager approximately a week prior to the written offer of June 21, 2011. This means Grievant received a telephone call indicating she would be hired for the position with the Agency near the same time frame as June 15, 2011 when Grievant contacted Mr. B and asked him to revise her application to state "Other" instead of "Laid Off" as her reason for leaving the Former Employer. It is just as likely that Grievant sought to amend her application after receiving a telephone call indicating she would be hired as it is that she realized by happenstance that her application was incorrectly drafted and took steps to correct it.

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 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 I Written Notice of disciplinary action is **rescinded**. The Agency's issuance to 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:

⁸ *Va. Code § 2.2-3005.*

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.