

Issue: Group III Written Notice with Termination (falsifying records); Hearing Date: 06/13/14; Decision Issued: 07/03/14; Agency: CNU; AHO: Ternon Galloway Lee, Esq.; Case No. 10353; Outcome: No Relief – Agency Upheld.

DECISION OF HEARING OFFICER

In the matter of

Case Number: 10353

Hearing Date: June 13, 2014

Decision Issued: July 3, 2014

SUMMARY OF DECISION

The Agency had found Grievant engaged in misconduct by falsifying a record. The Agency then issued Grievant a Group III Written Notice with termination. The Hearing Officer found Grievant engaged in the misconduct as alleged and the discipline is consistent with policy and law. Thus, the Hearing Officer upheld the Agency's termination.

HISTORY

On March 27, 2014, the Agency issued Grievant a Group III Written Notice with termination for falsifying a record. Grievant timely filed his grievance to challenge the Agency's action. On April 30, 2014, the Office of Employment Dispute Resolution ("EDR") assigned the undersigned as the hearing officer to this appeal.

Based on the parties' availability, the Hearing Officer held a telephonic prehearing conference (PHC) the morning of May 23, 2014. At the beginning of the PHC, the Hearing Officer disclosed that she had a prior professional relationship with the Agency's Advocate when the Hearing Officer and the Agency Advocate were co-workers from 1989 to 1990. The Hearing Officer informed the parties that she had not had contact with the Agency Advocate since that time. Further, the Hearing Officer affirmed her impartiality. During the PHC, Grievant did not object to the Hearing Officer continuing to preside over the case. However, on the evening of May 23, 2014, Grievant submitted a motion to the Hearing Officer asking that she recuse herself from the case due to her prior work relationship with the Agency Advocate and because he could not hear what the Agency Advocate stated during the PHC. By order dated June 3, 2014, the Hearing Officer reaffirmed her impartiality and for the reasons stated therein, she denied the motion. (HO Exh. 10). Grievant then requested a compliance ruling. By EDR Ruling No. 2014-3904, EDR also denied Grievant's motion to recuse. (HO Exh. 7).

Based on representations of the parties and their availability provided during the above-referenced PHC, the Hearing Officer scheduled the hearing for June 13, 2014. (HO Exh. 11). During the course of the hearing, the parties were given an opportunity to present matters of concern to the Hearing Officer. The Agency objected to Grievant's proposed Exhibit 4. Grievant had identified this exhibit as a telephone voice mail recording. The Agency's Advocate argued that the exhibit was untimely and not relevant. After giving Grievant an opportunity to respond, the Hearing Officer found the proposed exhibit had not been disclosed by the date the scheduling order instructed the parties to exchange their witness lists and exhibits. The Hearing Officer then sustained the Agency's objection. The Agency also objected to Grievant's Exhibit 1

which consisted of narratives and emails. The Agency Advocate argued that this exhibit was not relevant. After hearing Grievant's response, the Hearing Officer overruled the Agency's objection. In addition, Grievant objected to the Agency's former director of human resources testifying. The issue was resolved when the Agency represented it would not seek the testimony of this witness.

During the course of the hearing, the Hearing Officer admitted the Agency's Exhibits 1 through 6, Grievant's Exhibits 1 through 3, and the Hearing Officer's Exhibits 1 through 13. Also each party was given an opportunity to make opening and closing statements and call witnesses. The Agency was represented by its Advocate. Grievant represented himself.

APPEARANCES

Advocate for Agency
Witnesses for the Agency (2 witnesses)
Grievant
Grievant's Witness (1, Grievant)

ISSUE

Was the written notice warranted and appropriate under the 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 Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") §5.8(2). 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 all the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

1. The Agency is a university. Grievant completed an application for employment with the Agency and signed it on April 18, 2012. When completing the application, Grievant was instructed and required to provide all of his work experience. (A Exh. 2, p. 6).
2. The Agency later hired Grievant as a housekeeping worker. (Testimony of Human Resource Manager; G Exh. 3).
3. On the application Grievant completed, immediately above the applicant's signature and date, appear the agreement and certification language set forth below:

Agreement

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 concerned 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 soon 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.

(A Exh. 1, p. 5).

4. Even though Grievant signed and dated the employment application on April 18, 2012, as noted above, Grievant failed to list all his former employers on the application. Particularly, Grievant did not record the regional jail as an employer. (Testimonies of Grievant and Human Resource Director).

5. Under the Standards of Conduct Policy 1.60 (Policy 1.60), the falsification of a record is considered misconduct of a severe nature that normally warrants termination for a first offense. (A Exh. 6, p. 9 and Attachment A).

6. On or about February 1, 2014, the Agency received an anonymous voice mail message regarding Grievant and a former employer of his. A transcription of that message appears below:

Yes this is a concerned citizen. Um, I'm calling concerning to see if you all have a [Grievant], ... on staff up there. Cause if yall do, yall did not do the right background check cause if you go through his background check he worked at a prison. Um the regional jail. And he was fired for stealing, bringing in contraband to the inmates, and he would fraternize with the inmates. Now is that a guy that yall want around yall round yall college students round here. Like I said his name is [Grievant]. He wears glasses and I seen the picture he got yall shirt on so I'm quite sure he works for [Agency]. Yall did not d... on this guy. So what yall need to do is check his background. I think his address is [123 John Doe Lane], he stay with his daddy. He was fired from the regional jail for writing a bad check and stealing money, bringing contraband to the inmates and everything. You dons have to listen to me, run his record through the state police and see what you get. [Grievant]. Have a nice day. And next time do a background check cause you don't want all that kind of foolishness around them little students round there. Cause he left his job at the jail, his wife, and he left with a inmate that got released from the jail and he skipped town with her. So yall don't let him do that to any of them girls up there. Check your, who you

background check on and have a nice day. *Beep*...hmmm already put his a**...*beep* better hope...,

(A Exh. 4).

7. Considering the allegations in the message, the Agency determined it had an obligation to investigate Grievant's work history. (Testimony of Human Resource Director).

8. The investigation revealed that Grievant had worked at the regional jail as alleged by the anonymous caller. It also disclosed that Grievant had resigned from his job at the jail and was not eligible for rehire. (Testimony of Human Resource Director).

9. Thereafter, when Agency management asked Grievant about his application and whether he had worked at the regional jail, Grievant admitted he had been employed by the jail. He explained that he only listed on his employment application those jobs he believed were pertinent to the job he was seeking with the Agency. (Testimony of Human Resource Director and Grievant).

10. During his employment with the Agency as a housekeeping worker, Grievant had access to various areas in Agency buildings, to include but not limited to faculty and staff locker rooms. As such he had access to the personal belongings of staff in Agency buildings. In addition, Grievant had daily interactions with students, professional staff, and the university's president. (Testimony of Building Manager).

11. Upon learning of Grievant's failure to include his former employment with the jail on his application, Agency management believed it could not trust Grievant. (Testimony of Building Manager).

12. Grievant was then notified of an intent to terminate him for falsification of records and provided an opportunity to respond. On March 27, 2014, the Agency issued Grievant a Group III Written Notice with termination for falsification of records because he failed to list his employment with the jail on his employment application. Further, Grievant had certified that his application was true and complete. (Testimony of Building Manager).

13. For his 2012 through 2013 annual performance evaluation, Grievant was rated a contributor. (G Exh. 3).

DETERMINATIONS 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/her 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).

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

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.¹

To establish procedures on Standards of Conduct and Performances for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the *Code of Virginia*, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60 (Policy 1.60). The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

Policy 1.60 categorizes offenses in three groups. Group I offenses are less severe. Group II offenses are more severe. The third category of offenses is identified as Group III offenses. A first occurrence normally warrants dismissal.

On March 27, 2014, management issued Grievant a Group III Written Notice with termination for falsifying records. The Hearing Officer examines the evidence to determine if the Agency has met its burden.

I. Analysis of Issue before the Hearing Officer

Issue: Whether the discipline was warranted and appropriate under the circumstances?

A. Did the employee engage in the behavior described in the Group III Written Notice and did that behavior constitute misconduct?

The Agency contends that Grievant failed to list all his former employers on his application. And further, Grievant signed his employment application and certified that all entries on his application were true and complete. In addition, his signature on the application indicated that Grievant agreed that any falsification, regardless of when discovered by the Agency, may cause termination of his employment with the Agency.

¹ GPM §5.8

Grievant admitted that he did not include his former employment with the regional jail on his April 18, 2012 application. The evidence shows, Grievant was instructed to include all former employment and he certified that he had done so. Grievant has provided no sufficient explanation for his omission. Thus, the Hearing Officer finds that Grievant misrepresented his employment history on the application. That misrepresentation was in violation of the standards of conduct.

B. Was the discipline consistent with policy and law?

The Agency issued Grievant a Group III Notice with termination for falsifying a record. Grievant's misrepresentation constitutes such a violation. Also Policy 1.60 identifies falsification of a record as a group III offense. The policy also notes that even the first occurrence of a group III offense normally warrants termination. Having considered the above, the Hearing Officer finds the Agency's discipline is consistent with policy/law.

II. Mitigation

Under statute, hearing officers have the power and duty to “[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with the rules established by the Office of Employment Dispute Resolution [“EDR”].”² EDR's *Rules for Conducting Grievance Hearings* provides that “a hearing officer is not a super-personnel officer” therefore, “in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy.”³ More specifically, the *Rules* provide that in disciplinary, grievances, if the hearing officer finds that;

- (i) the employee engaged in the behavior described in the Written Notice.
- (ii) the behavior constituted misconduct, and
- (iii) the agency's discipline was consistent with law and policy, the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.⁴

Thus, the issue of mitigation is only reached by a hearing officer if he or she first makes the three findings listed above. Further, if those findings are made, a hearing officer must uphold the discipline if it is within the limits of reasonableness.

The Hearing Officer has found that Grievant's behavior established that he committed a group III offense and that that termination for the offense is consistent with policy.

² Va. Code § 2.2-3005 and (c)(6)

³ *Rules for Conducting Grievance Hearings* VI(A)

⁴ *Rules for Conducting Grievance Hearings* VI(B)

Next, the Hearing Officer considers whether the discipline was unreasonable. The Hearing Officer has carefully deliberated and considered all evidence, to include Grievant's "contributor" performance rating. She has also studied Grievant's claim that the anonymous call was from a disgruntled family member of his, and the assertion that the Agency should have already known that his application omitted some of his former employers.

The Hearing Officer also finds Grievant's conduct aggravating. Particularly, Grievant's job gave him access to many areas in the Agency's buildings, to include the personal lockers of staff. And his misrepresentation gave management reason not to trust him with such extensive access.

Having undergone a thorough consideration of all the evidence, the Hearing Officer finds the Agency's decision to terminate Grievant is reasonable.

DECISION

Hence for the reasons stated here, the Hearing Officer finds Grievant engaged in the conduct alleged. It was misconduct and the discipline was consistent with policy/law. Accordingly, the Hearing Officer upholds the Agency's discipline.

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
Departmental of Human Resource Management
101 N. 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 N. 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.⁵

Entered this 3rd day of July, 2014.

Ternon Galloway Lee, Hearing Officer
cc: Agency Advocate/Agency Representative
Grievant
Hearings' Program Director of EDR

⁵ Agencies must request and receive prior approval from EDR before filing a notice of appeal.