

Issue: Group III Written Notice (conduct that undermines the agency's effectiveness);
Hearing Date: 06/17/14; Decision Issued: 07/07/14; Agency: VSP; AHO: Carl
Wilson Schmidt, Esq.; Case No. 10365; Outcome: Partial Relief.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10365

Hearing Date: June 17, 2014

Decision Issued: July 7, 2014

PROCEDURAL HISTORY

On January 22, 2014, Grievant was issued a Group III Written Notice of disciplinary action for engaging in conduct that undermines the effectiveness or efficiency of the Department's activities.

On February 20, 2014, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On May 13, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 17, 2014, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency 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 State Police employs Grievant as a Sergeant at one of its locations. She had been employed by the Agency for approximately 13 years. No evidence of prior active disciplinary action was introduced during the hearing.

The Department requires new employees seeking to become troopers to attend classes and pass tests to determine their understanding of their studies. Many of the tests are conducted using "scantron" sheets and pencils. Trooper trainees receive booklets with questions and are supposed to answer those questions by using their pencils to fill in one of five boxes associated with each question's number on the scantron sheet. Trainees must fill in their nine number identifier at the top left of the scantron sheet by filling in the appropriate numbered box. Tests are supervised by a training coordinator or proctor who has an answer key to the tests. The training coordinator is usually a sergeant and is responsible for taking the completed scantron sheets to Ms. S for scoring. Ms. S takes the sheets and places them into a scanner that reads each answer. After the sheets are scanned, the Agency knows which questions the student failed.

Trooper trainees are required to pass certain questions regarding first aid. If the trainees fail a question about first aid on their first test, they are required to take a "retest." The retest is an "open book" test. If a trainee fails the retest questions, the

trainee has failed the test. A trooper trainee who fails a certain number of tests may be at risk of removal from the Department.

Thirty-three trooper trainees took a retest on June 20, 2013. At approximately 8:30 a.m., Grievant took 33 scantron sheets to Ms. S for scoring. Grievant left Ms. S's office. Ms. S placed the sheets in the scanner for scoring. A few minutes after leaving Ms. S's office, Grievant returned. Grievant said that she needed to get the retests back. Ms. S said that she had already started to grade the tests and that some of the sheets had gone through the scantron machine. Grievant said she needed to get the retests back because some of the trainees had gotten the questions wrong and she "needed to change the answers." Grievant quickly corrected herself and said, "I mean, hand the tests back to the trainees." Ms. S returned to Grievant approximately 18 or 19 of the ungraded retests. Grievant looked through the retests and picked four of them. She returned the other retests to Ms. S and took the four retests she selected with her as she left Ms. S's office.

Approximately ten minutes after leaving Ms. S's office with the four sheets, Grievant returned to Ms. S's office and gave the four sheets to Ms. S. Ms. S placed the four sheets with the remaining un-scored sheets and placed them all in the scantron machine for grading. Of the 33 trainees, only three failed the retest. None of the four trainees whose sheets were retrieved by Grievant failed the retest.

Ms. S had graded thousands of tests over her years with the Agency. Only Grievant had asked to have scantron sheets returned after the test had been completed and before the sheets were scored.

On January 22, 2014, the Major met with Grievant to discuss the allegations. He told Grievant that a complaint was initiated against her as a result of conduct observed by Ms. S on June 24, 2013 which was brought to the Major's attention on August 20, 2013. The Major asked Grievant if she could provide a logical and legitimate explanation of her actions. Grievant initially said, "I don't recall." The Major handed her the scantron sheets and Grievant reviewed them. Grievant commented, "Now I remember I had the students come to my office and told them that they may want to reconsider their answers."

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force." General Order 12.02(11)(a). Group II offenses "include acts and behavior of a more severe and/or repetitive nature and are such that an additional Group II offense should normally warrant removal." General Order 12.02(12)(a). Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal." General Order 12.02(13)(a).

The Agency alleged that Grievant “was responsible for answers on tests being administered to students in the Basic Academy being changed from incorrect responses to correct responses.” The Agency has established that Grievant removed four tests with the intent to have the answers changed but has not established that any answers were actually changed. The four students consistently told Agency’s investigator and Agency managers that they had not taken a retest and then were called by a test coordinator or protector to change an answer on a test. Two of the students testified at the hearing that they had not been asked by Grievant to change an answer to a retest after having completed the retest. The Agency has not established that Grievant caused the four trainees to change the answers to their retests after the tests were completed.

Both questions of Trainee W appear to have been changed from an original marking. Trainee W used a dark pencil and was careful to fill in all corners of each rectangle box when he wrote his identification number. The changed answers reflect a similar color pencil and the corners are filled in of each box. It appears that Trainee W filled in the two boxes on his retest.

Trainee Sa used a lighter pencil than Trainee W to fill in his identification number. The boxes he filled in for his identification number were not consistently drawn. The one retest question is of a similar shading to the shading in Trainee Sa’s identification number boxes, but it is not clear that the drawing in the answer box is the same as Trainee Sa’s drawing in other boxes.

Trainee Z used a distinctive “left to right” stroke for the boxes he filled in to specify his identification number. The two retest answers have a similar distinctive left to right stroke.

Trainee S1 did not use a distinctive left to right stroke when filling out the boxes to show his identification number. The retest answer, however, shows a left to right stroke and is of a darker shade than the pencil used to complete the identification number boxes. For example, one can see the underlying number of “2” where Trainee S1 filled in the 2 box for his identification number, but the underlying “C” is not visible for the retest question.

When looking at the handwriting on the score sheet, the Hearing Officer concludes that it is most likely that the changes to the retest answer sheet for Trainee W were made by Trainee W. For Trainee Sa, the retest answers could have been filled by Trainee Sa or by someone else. For Trainee Z, the retest answers could have been filled in by Trainee Z or by someone else. For Trainee S1, the retest answers were most likely completed by someone other than Trainee S1.

When the Hearing Officer compares the retest entries among the four trainees, it is clear that different people made the retest entries. If Grievant had made four corrections as alleged by the Agency, it is likely she would have used the same pencil

and made a similar mark for each entry. Instead, the retest marks vary by color, type of stroke used, and fullness of the mark. The Hearing Officer cannot conclude that Grievant made changes to the retests of each of the four trainees. Accordingly, the Agency has not met its burden of proving that Grievant undermined the effectiveness of its operations by altering test scores.

Grievant's statement to the Major on January 22, 2014 does not control the outcome of this case. The Agency alleged that Grievant changed the answers but her "admission" was that she called the students to her office and told them they may want to reconsider their answers. Insufficient evidence was presented to show that the four students went to Grievant's office and changed the answers to the questions. Grievant later explained that her answer was directed as describing what she would have done upon discovering an incorrect retest, not what she actually did in that instance.

Although the Agency has not established a Group III offense by Grievant, it has established a lesser included offense of unsatisfactory job performance. General Order ADM 12.02 (11) provides that Group I offenses include "[i]nadequate or unsatisfactory job performance." Grievant's work performance was unsatisfactory to the Agency because she removed four scantron sheets and expressed an intent to change the answers to the questions. Grievant believed that changing answers to questions was consistent with testing procedures. Although Grievant may have believed this based on her interaction with a prior testing coordinator, other Agency proctors knew that such a practice was unacceptable. It should have been obvious to Grievant that permitting students to change their answers to the correct answer after having completed a test would undermine the reliability and the purpose of testing students. At a minimum, Grievant should have confirmed with Agency managers the information she received from a prior proctor before relying on it. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.

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"¹ 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.

¹ *Va. Code § 2.2-3005.*

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action is **reduced** to a Group I Written Notice.

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.²

[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

² Agencies must request and receive prior approval from EDR before filing a notice of appeal.