

Issue: Group III Written Notice with Termination (falsifying records); Hearing Date: 08/02/12; Decision Issued: 09/24/12; Agency: DSS; AHO: Carl Wilson Schmidt, Esq.; Case No. 9844; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 9844

Hearing Date: August 2, 2012
Decision Issued: September 24, 2012

PROCEDURAL HISTORY

On March 8, 2012, Grievant was issued a Group III Written Notice of disciplinary action with removal for falsifying records.

On March 28, 2012, 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 he requested a hearing. On June 4, 2012, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The Hearing Officer found just cause to extend the time frame for issuing a decision in this case due to the unavailability of a party. On August 2, 2012, 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 a Senior Financial Compliance Analyst until his removal effective March 8, 2012. He had been employed by the Agency for approximately four years. No evidence of prior active disciplinary action against Grievant was introduced during the hearing. Grievant received an overall rating of "Contributor" for his 2008, 2009, 2010, and 2011 annual performance evaluations.

Grievant reported to the Supervisor. Their working relationship evolved into a personal friendship. Grievant considered the Supervisor to be his "best friend".

The Agency abolished one of the positions reporting to the Supervisor. The work performed by the employee assigned to that position was distributed among the other employees including Grievant reporting to the Supervisor. In September 2009, Grievant received responsibility for County F which had one of the largest social services departments in the Commonwealth. Grievant was given responsibility for testing the employee payroll and fringe benefits records of County F employees and testing several invoices obtained from County F.

Grievant was responsible for auditing local departments of social services to ensure compliance with budget and other regulations. He would verify the operating expenses and salaries for each locality. The process was tedious and time consuming.

In order to conduct tests, Grievant would obtain documents from counties and cities regarding their expenditures, etc. He would then use checkmarks and make notations on those documents showing specific financial transactions reconciled with summary reports for budget expenditures. For example, Grievant determined whether general operating costs satisfied certain attributes such as that the costs were properly reported in the appropriate budget line, cost code, account code, and fund type, and were net of all applicable credits.

The Supervisor required Grievant to submit weekly status reports showing the work Grievant had completed as of specific dates. The Supervisor developed a template to be used each week to provide information about each employee's work status. On October 18, 2011, the Supervisor sent four subordinates including Grievant an email stating, in part:

For your weekly status report that you submit each Wednesday by 9 a.m., I would like for you to include some additional information that I'm hoping will prove to be helpful to both of us. The following is an example of the format I'd [like] for you to try and use, beginning this week. As the example shows, I'd like for you to include dates that you perform various tasks (e.g. Send, Receive, Begin, Complete, Submit, etc.)

On October 25, 2011, the Supervisor sent his subordinates including Grievant an email stating, in part:

As a follow-up to last week's request re: your status report, I want to reiterate that you need to indicate the dates that you perform the major review steps (see highlighted below). Also, I want an up-to-date status of where you stand on each step ... e.g. the tests of Salaries and FBs, as well as the Operating Costs, (also see the example directly below, which includes the major outstanding steps). As stated, I'm trying to have you provide me with an accurate weekly snap shot of your progression, so please follow these instructions, and if you are still unsure about the request, please make it a point to come see me.¹

On November 2, 2011, Grievant sent the Supervisor an email with the subject line of "status report" listing 11 counties and cities. For County F, Grievant wrote:

60% complete
WP-10 Review Notification completed
WP-20-27 LRR reports for July and August for BL 853, 854, 856, 857 completed
WP-30 for Journal Reconciliation and Testing completed 10-27-11
WP-40 18 out of 34 employees tested for BL 853

¹ Agency Exhibit 5.

WP-41 20 out of 32 employees tested for BL 854

WP-50 11 out of 30 invoices tested for BL 853

WP-51 24 out of 64 invoices tested for BL 854

WP-52 6 out of 22 invoices tested for BL 856

WP-53 4 out of 15 invoices tested for BL 857

Completed WP-60 10-24-11

Completed WP-70 10-20-11

Outstanding Steps and/or items Hindering Completion of Program:

Need to continue the process of testing the operating expenditure invoices.

Need additional Salary information to complete test work.

Will compile list of questions for the office manager and request additional information.²

On January 11, 2012, Grievant sent the Supervisor an email with the subject line of "Status Report" listing 11 counties and cities. For County F, Grievant wrote:

67% complete

WP-10 Review Notification completed

WP-20-27 LRR reports for July and August for BL 853, 854, 856, 857 completed

WP-30 for Journal Reconciliation and Testing completed 10-27-11

WP-40 18 out of 34 employees tested for BL 853

WP-41 22 out of 32 employees tested for BL 854

WP-42 07 out of 15 employees tested for BL 856

WP-43 06 out of 10 employees tested for BL 857

WP-50 16 out of 30 invoices tested for BL 853

WP-51 28 out of 64 invoices tested for BL 854

WP-52 9 out of 22 invoices tested for BL 856

WP-53 10 out of 15 invoices tested for BL 857

Completed WP-60 10-24-11

Completed WP-70 10-20-11

Outstanding Steps and/or items Hindering Completion of Program:

Need to continue the process of testing the operating expenditure invoices.

Need to continue the process of testing salary information.³

On February 1, 2012, Grievant sent the Supervisor an email with the subject line of "status report" listing several counties. For County F, Grievant wrote:

67% complete

WP-10 Review Notification completed

² Agency Exhibit 2. "WP" refers to work paper. "BL" refers to budget line.

³ Grievant Exhibit 15.

WP-20-27 LRR reports for July and August for BL 853, 854, 856, 857 completed

WP-30 for Journal Reconciliation and Testing completed 10-27-11

WP-40 18 out of 34 employees tested for BL 853

WP-41 22 out of 32 employees tested for BL 854

WP-42 07 out of 15 employees tested for BL 856

WP-43 06 out of 10 employees tested for BL 857

WP-50 16 out of 30 invoices tested for BL 853

WP-51 28 out of 64 invoices tested for BL 854

WP-52 9 out of 22 invoices tested for BL 856

WP-53 10 out of 15 invoices tested for BL 857

Completed WP-60 10-24-11

Completed WP-70 10-20-11

Outstanding Steps and/or items Hindering Completion of Program:

Need to continue the process of testing the operating expenditure invoices.

Need to continue the process of testing salary information.⁴

On February 2, 2012, the Supervisor replied to Grievant's email and wrote, in part:

Last week you reported [County F] at 68% and now it's going back down. That can't happen ☺. Same thing for [County W] ... going from 95% to 94%??? Please provide me with a correct status.⁵

On February 22, 2012, Grievant sent the Supervisor an email with the subject line of "status report" listing 11 counties and cities. For County F, Grievant wrote:

67% complete

WP-10 Review Notification completed

WP-20-27 LRR reports for July and August for BL 853, 856, 857 completed

WP-30 for Journal Reconciliation and Testing completed 10-27-11

WP-40 18 out of 34 employees tested for BL 853

WP-41 22 out of 32 employees tested for BL 854

WP-42 07 out of 15 employees tested for BL 856

WP-43 06 out of 10 employees tested for BL 857

WP-50 16 out of 30 invoices tested for BL 853

WP-51 28 out of 64 invoices tested for BL 854

WP-52 9 out of 22 invoices tested for BL 856

WP-53 10 out of 15 invoices tested for BL 857

Completed WP-60 10-24-11

⁴ Grievant Exhibit 17.

⁵ Grievant Exhibit 17.

Completed WP-70 10-20-11

Outstanding Steps and/or items Hindering Completion of Program:

Need to continue the process of testing the operating expenditure invoices.

Need to continue the process of testing salary information.⁶

On February 24, 2012, Grievant met with the Supervisor to review the testwork on invoices Grievant had claimed to have performed. Grievant admitted to the Supervisor that he had not tested any operating transactions and had only provided account journal totals within the workpaper templates. The Supervisor became suspicious that other information Grievant had told him might not be true.

On February 28, 2012, the Supervisor checked the shared drive to see if Grievant had tested the payroll information he had claimed. The Supervisor observed that the tests Grievant reported as being completed had not been completed. The number of employees tested appeared to have been made up. The Supervisor observed that as of February 28, 2012, Grievant had completed payroll testing on only one employee in the file "WP-41 BL 854" and that Grievant had not performed any payroll testing of employees in the files:

WP-40, 18 out of 34 tested for BL 853

WP-42, 7 out of 15 employees tested for BL 856

WP-43, 6 out of 10 employees tested for BL 857

Grievant was expected to document each time he completed an audit test of the data he was reviewing. Grievant had a template work paper which he could use to record information about each test. For example, for Work Paper 40, Grievant wrote that he tested 18 of 34 employees. The Supervisor asked Grievant to provide records of his work with respect to that test but he was unable to do so. Grievant did not provide any documentation to the Supervisor showing that he actually tested information on 18 employees.

With respect to County F, the Supervisor observed that Grievant had made notes on some of the Work Papers but that he had not scheduled any employees in the work papers and had not indicated any actual expenditures he tested. Grievant had not made any check marks indicating he had tested any information.

Grievant was placed on pre-disciplinary leave effective February 29, 2012.

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

⁶ Agency Exhibit 5.

disciplinary action.”⁷ 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.”

"[F]alsification of records" is a Group III offense.⁸ 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*.

In October 2011, the Supervisor informed Grievant that he wanted a detailed and up to date weekly status report of Grievant’s work. Grievant drafted weekly status reports representing his work for County F. On February 22, 2012, Grievant represented to the Supervisor that he had completed work as follows:

WP-40, 18 out of 34 tested for BL 853
WP-42, 7 out of 15 employees tested for BL 856
WP-43, 6 out of 10 employees tested for BL 857

Grievant had not performed the work he claimed to have performed on his February 22, 2012 status report. Grievant knew that he had not completed the work. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for falsification of records. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant’s removal must be upheld.

Grievant argued that he had conducted the necessary testing but had not made notations on the worksheets. Grievant claimed he was waiting for additional documentation from County F before updating his worksheets. This argument is untenable. Grievant’s practice was to make notations such as check marks on his worksheets for most of his localities. It is unclear why Grievant would adopt a different

⁷ The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

⁸ See, Attachment A, DHRM Policy 1.60.

practice for County F especially given that County F was one of his largest counties with the many records to test. In addition, Grievant reported “WP-40 18 out of 34 employees tested for BL 853” on November 2, 2011 through February 22, 2012. It is difficult for the Hearing Officer to believe that Grievant could remember what items he had tested with the expectation that he would update his worksheets at a later date. It is also difficult to believe that it would take over three months for Grievant to receive documents requested from County F before November 2, 2011. Insufficient evidence exists for the Hearing Officer to conclude that Grievant performed the work he represented on his February 22, 2012 status report.

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 Employment Dispute Resolution....”⁹ 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 discipline reflected a personal vendetta by the Supervisor against Grievant because the Supervisor felt betrayed by Grievant’s actions. The evidence was clear that the Supervisor was disappointed in Grievant’s behavior on both a professional and personal level. Insufficient evidence was presented for the Hearing Officer to conclude that the Supervisor’s personal friendship with Grievant caused him to issue disciplinary action in excess of what would otherwise be appropriate under the facts of this case. Falsification of records is a Group III offense and the Agency’s discipline was consistent with the Standards of Conduct.

Grievant argued that the Agency inconsistently disciplined its employees. He argued another employee, Ms. S, engaged in similar behavior but was not removed from employment. Grievant argued that Ms. S was given nine months to correct her behavior while Grievant was only given a few weeks. The evidence showed that the Supervisor did not recognize that Ms. S was falsifying her status reports as quickly as he recognized that Grievant was falsifying his status reports. The Supervisor testified that he had concerns about whether Ms. S was presenting accurate status reports and he spoke with her in December 2011. After meeting with Ms. S, the Supervisor believed that she was not falsifying documents but rather experiencing delays in receiving documents from the counties she was auditing. Within two days of Grievant’s removal, the Supervisor reviewed Ms. S’s work again and asked her to retrieve test work for

⁹ *Va. Code § 2.2-3005.*

several of her reviews. She was able to do so and the Supervisor concluded Ms. S was not falsifying her status reports. In May 2012, the Supervisor again looked at Ms. S's work and was able to determine that Ms. S had falsified her status reports. The Supervisor began disciplinary proceedings against Ms. S with the objective of issuing her a Group III Written Notice with removal. Ms. S elected to resign in lieu of termination thereby ending the disciplinary process. There is sufficient evidence for the Hearing Officer to conclude that the Agency did not single out Grievant for disciplinary action.

Grievant presented evidence he is suffering from two serious medical conditions. He did not present any evidence to show that his medical condition would cause him to falsify records.

In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

In Ruling 2012-3377, the Office of Employment Dispute Resolution ruled:

That a party may charge for reasonable costs associated with collecting and producing requested documents to the opposing party under the grievance procedure is well-established. However, EDR has not yet ruled upon the issue of whether the language in Section 8.2 of the *Grievance Procedure Manual* that allows for such charges is equally applicable to those documents ordered produced by a hearing officer. Generally speaking, the answer to that question is, yes. A party may be charged similarly for documents ordered produced by a hearing officer as they are for those requested during the management steps. However, the application of that rule must and should be subject to the considerations and discretion of the hearing officer, as reviewed by EDR. In short, the answer to the ultimate question of whether a party may be charged for a particular document request during the hearing phase of a grievance is that it depends on a variety of factors.

While we cannot detail all the potential reasons why a party ought not be charged for requested documents in such situations, we will attempt to provide guidance to hearing officers in addressing current and future matters. The default should be that a party may be charged the reasonable costs to collect and produce such documents consistent with EDR's precedents under Section 8.2 of the *Grievance Procedure Manual*. However, the hearing officer has the authority to determine that those costs may not be collected in part or in whole for just cause.

In making such a determination, EDR and hearing officers, will ultimately look to a balancing test: the reasons why charging would be appropriate in relation to the importance of the documents requested must be considered. The more important the document, the less appropriate it

would be to charge for obtaining it. We must balance the interests of creating unreimbursable burdens on a party against the requirements of a fair hearing. Without full and free access to the relevant facts, how can a fair hearing be had?

For instance, for documents central and material to the case at hand, it is reasonable to assume that a party should have free access to such documents for purposes of a fair hearing. An example of this might be documents that were the direct basis of a disciplinary action taken against an employee that is the subject of the current grievance. On the other hand, where the documents sought entertain a potential fishing expedition, or one that requires extensive time and effort to collect, such as reviewing the files of a large number of employees, it would equally be reasonable to expect that an agency could recover the reasonable costs associated with that search.

Grievant's attorney is highly competent and knowledgeable regarding the elements necessary to present Grievant's defenses and counter the Agency's allegations. Her requests for documents were designed to accomplish this and were not a "fishing expedition." Many of the documents obtained from the Agency pursuant to the Hearing Officer's document production order were used by Grievant as hearing exhibits. Once Grievant was removed from employment he was no longer able to access documents and it was necessary for him to seek an order of production. The documents requested were central and material to his defense and necessary for him to obtain a fair hearing. Grievant lost his employment with the Agency and his source of income. Requiring him to pay for the cost of documents would present a hardship on him that would be inappropriate under the circumstances of this case. The Hearing Officer finds just cause to award no costs to the Agency.

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 have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.

2. 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 email.

3. 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 the Office of Employment Dispute Resolution to 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 email 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 give a copy of all of your appeals to the other party and to EDR. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for 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.¹⁰

[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].

¹⁰ Agencies must request and receive prior approval from EDR before filing a notice of appeal.

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer