

Issue: Group III Written Notice with change of duties and pay reduction (falsifying records); Hearing Date: 09/24/15; Decision Issued: 10/09/15; Agency: VPI&SU; AHO: Carl Wilson Schmidt, Esq.; Case No. 10669; Outcome: Partial Relief.



# **COMMONWEALTH of VIRGINIA**

*Department of Human Resource Management*

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

## **DECISION OF HEARING OFFICER**

In re:

**Case Number: 10669**

Hearing Date: September 24, 2015

Decision Issued: October 9, 2015

### **PROCEDURAL HISTORY**

On June 1, 2015, Grievant was issued a Group III Written Notice of disciplinary action with a change of duties and disciplinary pay reduction for falsification of records. During the Step Process, the University reduced the disciplinary action to a Group II Written Notice with a change of duties and disciplinary pay reduction.

On June 28, 2015, 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 August 17, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 24, 2015, a hearing was held at the Agency's office.

### **APPEARANCES**

Grievant  
Agency Party Designee  
Agency's Counsel  
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:

Virginia Tech employed Grievant as a Housing Maintenance Manager until he was moved to the position of Administrative Coordinator for Maintenance, Projects, and Scheduling. He has been employed by the University for approximately 17 years. Grievant supervised approximately 20 employees. No evidence of prior active disciplinary action was introduced during the hearing.

The University operates a Total Maintenance Authority Management System (TMAMS). This system tracks preventive and responsive work orders, labor, parts requested and installed, and work completion. One of Grievant's duties was to schedule, validate, and close work orders<sup>1</sup> in the system for the staff he supervised. Grievant was responsible for validating work requests and scheduling work orders, reviewing finished work orders for accuracy in recording of labor performance and material used, and then closing all finished work orders. Grievant was expected not to close work orders until such time as the work had been completed.

In February or March 2015, a University Manager, Mr. G, opened an air handling unit in one of the University's buildings. He noticed the filter had not been changed in approximately a year. He observed problems with other air handling units. Grievant's staff were expected to remove dirty air filters and replace them with new filters every

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<sup>1</sup> Grievant closed approximately 12,000 work orders per year.

three to six months. The University reviewed the work orders Grievant had entered into the TMAMS for the prior year. Grievant had closed over two hundred work orders even though the work had not been completed. Grievant was supposed to review each work order before closing the work order. Among the work orders closed by Grievant were work orders to replace the filters Mr. G discovered had not been changed.

On March 18, 2015, Mr. G and the Supervisor met with Grievant to discuss the closed work orders. Grievant indicated he would review the work orders and then determine his response. On March 20, 2015, Grievant met with the Supervisor. Grievant said he had been behind in closing out work orders and that he had closed some work orders in bulk. Grievant admitted it was an error of judgment on his part. He apologized and said it would not happen again.

During the Step Process, the Second Step Respondent revised the Group III Written Notice. The Second Step Respondent wrote:

Given the evidence you presented during our meeting, I find that you were not falsifying records. Thus, I am reducing the disciplinary action to a Group II Written Notice (for failure to follow instructions/policy) as well as unsatisfactory performance). Given that you acknowledge difficulty managing your position's responsibilities (which impacted significantly the productivity of important maintenance activities), I find it reasonable that your duties were reduced and reassigned. Moreover, since these duties incur a reduction in responsibility, a pay reduction is warranted. I am altering the reduction, however, from 7.0% to 5.0%.<sup>2</sup>

### **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>3</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."

Because the University retracted its allegation that Grievant falsified the work orders, the Hearing Officer will not consider whether Grievant falsified documents. By reducing the disciplinary action to a Group II Written Notice, the University has limited its sanction to issuing a Group II Written Notice with a ten work day suspension. Grievant has no prior active disciplinary action. The University is without authority

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<sup>2</sup> Agency Exhibit 4.

<sup>3</sup> The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

under DHRM Policy 1.60 to impose a disciplinary pay reduction or to impose a reduction in duties and reassignment.<sup>4</sup> These sanctions must be reversed regardless of the merits of the disciplinary action.

“[U]nsatisfactory work performance” is a Group I offense.<sup>5</sup> In order to prove unsatisfactory work performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

Grievant knew he was not supposed to close work orders unless he had reviewed the work orders and determined that the work had been completed. Grievant closed in bulk approximately 200 work orders during an approximately eight month period of time. His actions were unsatisfactory to the University.<sup>6</sup> The University has presented sufficient evidence to support the issuance of a Group I Written Notice for unsatisfactory work performance.

The University argued that Grievant should receive a Group II Written Notice for failure to follow instructions. The University argued that Grievant had been instructed by a supervisor not to close work orders in bulk. The Supervisor admitted Grievant had not been instructed not to close work orders in bulk prior to March 20, 2015. The University argued that Grievant should receive a Group II Written Notice for failure to follow policy. The Supervisor testified he was unaware the University had a policy governing bulk closings. There is no reason for the Hearing Officer to believe Grievant had notice of the University’s policy governing bulk closing of work orders. No basis exists for the Hearing Officer to conclude that Grievant’s actions were sufficient to justify the issuance of a Group II 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 ....”<sup>7</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-

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<sup>4</sup> A Hearing Officer cannot increase disciplinary action above the discipline authorized under the Standards of Conduct.

<sup>5</sup> See Attachment A, DHRM Policy 1.60.

<sup>6</sup> The Supervisor testified that one of Grievant’s duties was to ensure that technicians performed their assignments. Closing a work order before the work was completed by a technician could give a technician the wrong impression that he or she could avoid completing assignments.

<sup>7</sup> *Va. Code § 2.2-3005.*

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 University's issuance to the Grievant of a Group III Written Notice of disciplinary action with a change in duties and disciplinary pay reduction is **reduced** to a Group I Written Notice. The University is ordered to **reinstate** Grievant to Grievant's same position prior to his change of duties, or if the position is filled, to an equivalent position. The Agency is directed to provide the Grievant with **back pay** representing a reduction in compensation resulting from the disciplinary action.<sup>8</sup>

## 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 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

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<sup>8</sup> The University represented that it has not yet imposed Grievant's disciplinary pay reduction.

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>9</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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>9</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.