

Issue: Group III Written Notice with Termination (falsifying records); Hearing Date: 08/26/15; Decision Issued: 09/14/15; Agency: VPI&SU; AHO: Lorin A. Costanzo, Esq.; Case No. 10663; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA
OFFICE OF EMPLOYMENT DISPUTE RESOLUTION
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Grievance Case No. 10663

Hearing Date: August 26, 2015
Decision Issued: September 14, 2015

PROCEDURAL HISTORY

On July 8, 2015, Grievant was issued a Group III Written Notice with termination for Offense Category 74, "Falsifying records" (Offense dates: 5/05/15, 6/05/15, and 6/14/15).¹ On July 16, 2015, Grievant timely filed a Grievance Form A to challenge the Agency's action. Her request for hearing was qualified and undersigned was appointed hearing officer effective August 5, 2015.²

A telephone conference was held on August 8, 2015 and, by agreement, the grievance hearing was held on August 26, 2015 at Facility. Grievant requested the presence/assistance at hearing of an individual and this individual was present at the hearing. At hearing the exhibits were, by agreement, admitted *en masse*.

APPEARANCES

Agency Attorney
Agency Party Representative (who was also a witness)
Grievant (who was also a witness)
Grievant's assistant

ISSUES

Whether the issuance of a Group III Written Notice with termination was 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. A preponderance of the evidence is evidence which shows that what is intended to be proved is more likely than not; evidence that is more convincing than the opposing evidence.³

¹ Agency Ex. Tab 3.

² Agency Ex. Tab 1.

³ Dept. of Employment Dispute Resolution, *Grievance Procedure Manual*, Sections 5.8 and 9.

The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline.⁴

FINDINGS OF FACT

After reviewing all the evidence admitted and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

Grievant has been employed by Agency for approximately 34 years. At the time of her termination Grievant was a Supervisor in the dish room of a facility dining hall.⁵

"Hazard Analysis & Critical Control Points" (HACCP) standards have been adopted and implemented by Agency to provide standards in controlling food borne hazards (biological, chemical or physical).⁶

Agency employees are required to observe standards of conduct for HACCP. Agency policy provides that failure to follow HACCP Standards will result in corrective action up to and including the issuance of a Group III Written Notice.⁷

Grievant has received training on HACCP, its requirements, and standards, including HACCP training received on January 12, 2006. On March 13, 1998 Grievant received training on Health & Sanitation Standards, Thermometer Usage, and Dish Machine Operation. On 11/26/96 she received training on "Temperature Recording and Food Safety" and on "Temperature Recording".⁸ Additionally, monthly round table meetings are held discussing matters.

Grievant's duties including filling out the "Dishwasher Temperature Record" form, which is considered by Agency to be a HACCP log sheet. Grievant's duties included taking temperature readings on various stages of the dishwashing machine and entering the information on the form. A second employee was then required by Agency to verify the temperatures were correct and that she actually took the readings. Both employees initial the form to verify they each performed their respective duties.⁹

Grievant does not deny she signed another employee's initials to the Dishwasher Temperature Record forms on 5/05/15, 6/05/15, and 6/14/15. She also indicated to management this has been going on for about a year and a half.¹⁰

CONCLUSIONS:

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 of Virginia. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging, and training state employees. It also provides for a grievance procedure. Code of Virginia, §2.2-3000 (A) sets forth the Virginia grievance procedure and provides, in part:

⁴ Office of Employment Dispute Resolution, DHRM, *Grievance Procedure Manual*, Sections 5.8 and 9.

⁵ Agency Ex. Tab 1.

⁶ Agency Ex. Tab 10 and testimony.

⁷ Agency Ex. Tab 10.

⁸ Agency Ex. Tab 11.

⁹ Testimony.

¹⁰ Agency Ex. Tab 1 and Testimony.

"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 the resolution of employee disputes which may arise between state agencies and those employees who have access to the procedure under §2.2-3001."

To establish procedures on Standards of Conduct and Performance for employees pursuant to §2.2-1201 of the Code of Virginia, the Department of Human Resource Management ("DHRM") promulgated the *Standards of Conduct, Policy No. 1.60, effective April 16, 2008*.¹¹ 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 of Conduct* 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.

DHRM Policy 1.60 - *Standards of Conduct* organizes offenses into three groups according to the severity of the behavior. Group I Offenses include acts of minor misconduct that require formal disciplinary action. 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 would warrant termination.

Falsification of Records is listed as an example of a Group III offense in Attachment A. of Policy 1.60. The *Standards of Conduct* provide that the examples of offenses set forth therein are not all-inclusive, but are intended as examples of conduct for which specific disciplinary actions may be warranted. Section B. 2. of Policy No. 1.60, "*Standards of Conduct*" provides:

*Examples of offenses, by group, are presented in Attachment A. These examples are not all-inclusive, but are intended as examples of conduct for which specific disciplinary actions may be warranted. Accordingly, any offense **not specifically enumerated**, that in the judgment of agency heads or their designees undermines the effectiveness of agencies' activities, may be considered unacceptable and treated in a manner consistent with the provisions of this section.*

Note: Under certain circumstances an offense typically associated with one offense category may be elevated to a higher level offense. Agencies may consider any unique impact that a particular offense has on the agency and the fact that the potential consequences of the performance or misconduct substantially exceeded agency norms. Refer to Attachment A for specific guidance.¹²

Agency's ***TRAINING PERSONNEL & HACCP STANDARDS OF CONDUCT***¹³ provides:

In order to provide guidance in controlling foodborne hazards (biological, chemical or physical) standards of conduct for HACCP have been established. All employees as part of their performance must observe these guidelines. Failure to follow these standards will result in corrective action.

Additionally, Agency's ***TRAINING PERSONNEL & HACCP STANDARDS OF CONDUCT*** provides for corrective action for a violation relating to basic sanitation and/or HACCP procedures. The corrective action includes issuance of up to a Group III offense/Written Notice. HACCP

¹¹ Agency Ex. Tab 14.

¹² Agency Ex. Tab 14, Policy No. 1.60 "Standards of Conduct".

¹³ Agency Ex. Tab. 10.

standards of conduct provide that Group III Offenses include behavior of a serious nature and the first occurrence of a Group III offense should normally warrant removal. Furthermore, "Falsifying records" is listed as an example of a Group III offense under HACCP Standards of Conduct.¹⁴

Investigation:

In early June of 2015 management was made aware of matters involving a dishwashing machine in a dining facility not reaching proper temperature during final rinse. Individuals in the dish room were reported to be falsifying the temperature logs and writing in temperatures that were at least 180 degrees when the machine wasn't actually 180 degrees.¹⁵

In looking into matters management became concerned that individuals were not reading the temperature gages of the dishwashing machine but were writing into the HACCP log something that falls within HACCP temperatures.¹⁶ Concern was expressed that the Dishwasher Temperature Record was found, in one instance, to have been pre-filled indicating entries for future times. While investigating matters, attention was drawn to Grievant and allegations were received that she was writing the initials of another co-worker on Dishwasher Temperature Records logs.¹⁷

On Thursday, June 18, 2015, Grievant met with Assistant Director to review issues related to Dishwasher Temperature Records. During the meeting Assistant Director addressed completed Dishwasher Temperature Records for May 5, 2015 and June 5, 2015 on which Grievant had written her name and initials. A second employee was indicated on the forms, as evidenced by that employee's initials, as verifying the dishwasher temperatures Grievant documented. Grievant, when asked, stated that she had signed the initials of the second employee which appeared on these Dishwasher Temperature Record forms.

On July 1, 2015, Grievant again meet with Assistant Director. At this meeting Grievant stated she had signed another employee's initials on the June 14, 2015 Dishwasher Temperature Record form. Grievant also indicated that signing the initials of another employee had been going on for about a year and a half.

Both DHRM Policy 1.60 and The Standards of Conduct for HACCP provide that *Falsifying Records* is listed an example of a Group III Offense and both provide that the first occurrence of a Group III offense should normally warrant removal.

Dishwasher Temperature Record

Agency requires the use of a form entitled, "Dishwasher Temperature Record". This form is considered to be a HACCP log sheet by Agency. The "Dishwasher Temperature Record" is required to be used to document, in writing, the machine's operating temperatures, readings done of the operating temperatures, and a verification being made by a second employee. The employee making and documenting the temperature readings and the employee verifying matters are both required to initial the form indicating they performed their required actions.

The form indicates minimum acceptable temperatures and includes statements that "TEMPERATURES MUST BE TAKEN AT LEAST ONCE DURING EACH MEAL PERIOD...." and "STOP USING MACHINE AND REPORT TO A MANAGER ANYTIME TEMPERATURES DO NOT MEET THESE STANDARDS". The

¹⁴ Agency Ex. Tab. 10.

¹⁵ Agency Ex. Tab 5.

¹⁶ Agency Ex. Tab 5 and 6.

¹⁷ Agency Ex. 3.

form includes, among other matters, a number of rows with the below indicated columns for information to be filled in: *(below is an extract of form)*:

DATE/TIME	INITIALS	WASH TEMP 150°	RINSE TEMP. 160°	FINAL RINSE 180°	SANITIZER	CORRECTIVE ACTION

Management expressed strong concerns over the need to monitor the dishwashing machine temperatures due to food safety and health concerns in their dining facility. Due to these concerns Agency requires action and documentation by two separate employees who each are required to initial confirming their separate actions. Both sets of initials are written within column marked "INITIALS" for each time the process is done.

Grievant was a supervisor and was trained in HACCP standards and Agency record keeping requirements related to the dishwashing machine in an Agency dining Facility. Grievant was aware of the requirement for two employees to each initial the form and provide documentation of their separate actions. However, Grievant placed another employee's initials on the 5/5/15, 6/5/15, and 6/14/15 Dishwasher Temperature Record and confirmed to management that this had been going on for a while, about a year and a half.¹⁸

Mitigation:

Va. Code § 2.2-3005.1 authorizes a hearing officer to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with the rules established by the Department of Human Resources Management ...".¹⁹ The hearing officer must receive and consider evidence in mitigation or aggravation of any offense charged by an agency.²⁰

The *Rules for Conducting Grievance Hearings* provide that a hearing officer is not a "super-personnel officer" and, 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. A hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness and, if the hearing officer mitigates the Agency's discipline, the hearing officer is charged with stating in the hearing decision the basis for mitigation.

Grievant has the burden to raise and establish mitigating circumstances that justify altering the disciplinary action consistent with the "exceeds the limits of reasonableness" standard. The Agency has the burden to demonstrate any aggravating circumstances that might negate any mitigating circumstances.²¹

Grievant has a long work history with Agency (approximately 34 years). Additionally, there is no evidence admitted of her having a prior active disciplinary action. However, in addition to consideration of these matters, consideration is given to Grievant's obligation as a supervisor. Consideration is given to documentation requirements set up by Agency to insure and verify

¹⁸ Testimony.

¹⁹ Va. Code § 2.2-3005.

²⁰ Va. Code § 2.2-3005 (C)(6).

²¹ Rules for Conducting Grievance Hearings, § VI. (B.)(2.).

temperature was being monitored and there was a verification by a second employee. Documentation requirements related to such activities were instigated by Agency for a valid business concern, the health and safety of people at the dining facility. Grievant did not contest her actions of signing another employee's initials to the Dishwasher Temperature Records of 5/5/15, 6/5/15, and 6/14/15 and she further indicated this had been going on over an extended period of time (approximately a year and a half).

Based upon review of all the evidence in this cause, and for the reasons discussed above, the Hearing Officer does not find that the issuance of a Group III Written Notice exceed the limits of reasonableness.

CONCLUSION

For the reasons stated above, based upon the evidence presented at hearing, Agency has proven, by a preponderance of the evidence, that:

1. Grievant engaged in the behavior described in the Written Notice.
2. The behavior constituted misconduct.
3. The Agency's discipline was consistent with law and policy.
4. There are not mitigating circumstances justifying a reduction or removal of the disciplinary action.

Furthermore, Agency has proven by a preponderance of the evidence that the disciplinary action of issuing a Group III Written Notice with termination was warranted and appropriate under the circumstances and Agency's discipline does not exceed the limits of reasonableness.

DECISION

For the reasons stated above, the Agency's issuance to Grievant of a Group III Written Notice with termination is **UPHELD**.

APPEAL RIGHTS

As the *Grievance Procedure Manual (effective date: July 1, 2012)* sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

A. Administrative Review:

A hearing officer's decision is subject to administrative review by both EDR and Director of DHRM based on the request of a party. Requests for review may be initiated by electronic means such as facsimile or e-mail. A copy of all requests for administrative review must be provided to the other party, EDR, and the Hearing Officer.

A party may make more than one type of request for review. All requests for administrative review must be made in writing and **received by** the reviewer within 15 calendar days of the date of the original hearing decision. "**Received by**" means delivered to, not merely postmarked or placed in the hands of a delivery service.

1. A challenge that the hearing decision is inconsistent with state or agency policy is made to the Director of DHRM. This request must refer to a particular mandate in state or agency policy with which the hearing decision is inconsistent. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests must be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, VA 23219 or faxed to (804) 371-7401 or e-mailed.

2. Challenges to the hearing decision for noncompliance with the grievance procedure and/or the Rules for Conducting Grievance Hearings, as well as any request to present newly discovered evidence, are made to EDR. This request must state the specific requirement of the grievance procedure with which the hearing decision is not in compliance. The Office of Employment Dispute Resolution's ("EDR's") authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests must be sent to the Office of Employment Dispute Resolution, 101 N. 14th Street, 12th Floor, Richmond, VA 23219, faxed to EDR (EDR's fax number is 804-786-1606), or e-mailed to EDR (EDR's e-mail address is edr@dhrm.virginia.gov).

B. Final Hearing Decisions:

A hearing officer's decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or
2. All timely requests for administrative review have been decided and, if Ordered by EDR or DHRM, the hearing officer has issued a revised decision.

C. Judicial Review of Final Hearing Decision:

Once an original hearing decision becomes final, either party may seek review by the circuit court on the ground that the final hearing decision is contradictory to law. A notice of appeal must be filed with the clerk of the circuit court in the jurisdiction in which the grievance arose within 30 calendar days of the final hearing decision.

S/ Lorin A. Costanzo

Lorin A. Costanzo, Hearing Officer

Copy transmitted to:
Grievant (via Cert: Mail Ret. Rec. Req.)
Agency Advocate (via e-mail)
EDR via e-mail (via e-mail)