



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11431

Hearing Date: December 3, 2019
Decision Issued: December 20, 2019

PROCEDURAL HISTORY

On September 4, 2019, Grievant was issued a Group III Written Notice of disciplinary action with removal for falsifying records.

On September 26, 2019, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On October 15, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 3, 2019, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Representative
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. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. 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 Virginia Employment Commission employed Grievant as a Director of one of its units. He began working for the Agency in 2012. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant earned a Master's degree in English from University M. University M offered students an opportunity to "study abroad" at University O. University O was located in another country. Some Students from University M would attend classes at University O during the summer. Grievant did not hold a Doctor of Philosophy or "DPhil" designation from University O.

On June 10, 2012, Grievant sent the Agency a letter with a resume attached showing that he was "Commissioner. July, 1998 to June, 2002" of a former State agency employer. On November 16, 2012, Grievant signed a State application for employment for his Director position with the Agency. He listed a former employer as the "Commonwealth of Virginia" and his job title as "Commissioner [Agency name]." He wrote his dates of employment as, "07-1998 to 02-2002." He listed his starting and ending salaries.

Grievant listed on the State application one of his "Educational Institutions" as University O, a foreign university. He indicated his major or specialty as "Early Modern Literature" with a begin date of "7-2005." He left unfilled the space for "Credit/Hours".

Grievant did not ask Agency employees to refer to him as “Doctor”.

On August 13, 2019, the Chief Deputy participated in an interview panel for another agency. One of the applications was an employee who asserted that he worked for Grievant several years earlier. The applicant mentioned that Grievant had been a Deputy Commissioner as well as Commissioner at a Grievant’s former employer. The Chief Deputy returned to the Agency and asked the Human Resource Director to investigate Grievant’s prior positions.

The Agency determined that Grievant had been Deputy Commissioner at the former agency from November 25, 1998 through May 7, 2000 and was Commissioner from May 8, 2000 through February 11, 2002.

The Chief Deputy believed that Grievant had falsified his application for employment by failing to list his position of Deputy Commissioner.¹

The Agency reviewed all of Grievant’s emails and information stored on Grievant’s work computer.

Grievant drafted a resume entitled “Resume 2018.” He applied for a job with a University and sent the University an email on March 19, 2018 with his resume. The resume showed his Education as, “Doctor of Philosophy (ABD), English [University O].” “ABD” refers to All But Dissertation meaning that Grievant claimed he had completed all of his work towards a Doctor of Philosophy except for his dissertation. Grievant applied for a job with another State agency and sent that agency his Resume 2018 on May 24, 2018.

On May 30, 2018, Grievant sent an email to an employee of another State agency. He sent a copy of the email to two Agency employees and several employees of the other State agency. He also sent a copy of his email to an employee working in the Governor’s office. Below the signature line, Grievant wrote:

[Grievant’s name], DPhil
Director [Unit name]
Virginia Employment Commission

On July 20, 2019, Grievant sent a copy of his Resume 2018 to an Executive reporting to the Governor. Grievant listed his EDUCATION to include: “Doctor of

¹ The evidence is not sufficient for the Hearing Officer to conclude Grievant falsified his 2012 State application for employment that he submitted to the Agency. Grievant explained that he listed his highest position with the former agency instead of both of his positions. The State application seeks a summary of an applicant’s work history and does not specify that every position held within an agency must be identified. Grievant’s interpretation of how to complete his application shows he did not intend to falsify that application.

Philosophy, English [University O].”² On August 12, 2019, Grievant again sent his resume to the Executive showing that he had earned a Doctor of Philosophy in English.

On August 26, 2019, Grievant sent the HR Manager an email:

I finished my doctoral work sometime in 2016 (many years after my initial work in 2005) and I am waiting for [an] opportunity to go back to [Foreign location] to do the paperwork and get my diploma. [University O] has a ceremony called “Encaenia, which is somewhat equivalent to a graduate here. I do not want to miss the opportunity to participate in the ceremony, so while I have done all of the necessary academic work, I have not yet received any of the paperwork one normally gets to prove his academic degree. Please remember that all of my work was done through my tutors at [University O] of my [University M] connection to them; however, [University M] does not confer doctoral degrees.³

Ten minutes later, Grievant added:

I was writing quickly. I am waiting for an opportunity ... and Encaenia is equivalent to graduation. Also, I looked back at my timeline, and I finished my work in late 2015.⁴

On August 26, 2019, Grievant sent the HR Manager an email:

As I explained in the documents I shared with you this morning. I studied at [University O] through my affiliation with [University M]. I did not apply to, nor was I admitted to a traditional program at [University O]. I will not be an official [University O] alumnus until I return to Encaenia and sign the conferral of my work. This form from the University will bear no fruit regarding any of the work I have done up to 2012.⁵

The Agency concluded:

As Director [of a unit] you oversee agency programs and systems used to assist, counsel and guide unemployed citizens seeking employment. These programs work with individuals in drafting their resumes and in seeking credentials. Your leadership position in these job programs make it necessary to remove [you] from your position.⁶

² Agency Exhibit 5.

³ Agency Exhibit 5.

⁴ Agency Exhibit 5.

⁵ Agency Exhibit 5.

⁶ Agency Exhibit 2.

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.”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. Grievant did not have a Doctor of Philosophy from University O. In an email and in several resumes, he represented that he held a Doctor of Philosophy. Grievant had not completed “All But Dissertation” as he claimed on one resume. Grievant knew he had not completed the requirements for a Doctor of Philosophy at the time he wrote he possessed the degree. The documents were records of the Agency because they were found on the Agency-owned computer used by Grievant. The Agency 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 asserted that he had completed his course work for a Doctor of Philosophy from University O and only had to travel overseas to University O in order to receive his credentials. This assertion is not supported by the evidence. The Agency provided Grievant with a consent form to be signed by Grievant authorizing the Agency to receive information from University O. Grievant refused to sign the consent form and stated that such an inquiry would “bear no fruit.” Grievant could have asked any of his tutors at University O to write a letter explaining Grievant’s work or have any of his tutors testify by telephone during the hearing. Grievant did not present such evidence.

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”⁸ 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

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

⁸ *Va. Code § 2.2-3005.*

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.

The evidence showed that Grievant was passionate about his English studies. His academic studies, however, had no relationship to his work duties. This distinction is a mitigating factor. Grievant held an executive level position with Agency for which the Agency had high performance and character standards. This distinction was an aggravating factor that offset any mitigating factors. This case is unfortunate. Grievant possesses significant experience and skills. The Agency could have corrected Grievant's behavior with a lesser level of discipline. The Agency's discipline does not exceed the limits of reasonableness and, thus, the Hearing Officer cannot reduce the Group III Written Notice with removal.

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 request an administrative review by EDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EDR within 15 calendar days of the date the decision was issued.

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 must also provide a copy of your appeal to the other party 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.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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.^[1]

[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].

Carl Wilson Schmidt, Esq.
Hearing Officer

^[1] Agencies must request and receive prior approval from EDR before filing a notice of appeal.