

Issue: Group III Written Notice (falsifying documents); Hearing Date: 09/19/07;
Decision Issued: 09/20/07; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case
No. 8679; Outcome: Partial Relief (reduced to Group II Written Notice).



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8679

Hearing Date: September 19, 2007
Decision Issued: September 20, 2007

PROCEDURAL HISTORY

On May 5, 2007, Grievant was issued a Group III Written Notice of disciplinary action for falsifying documents. On June 1, 2007, 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 22, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 19, 2007, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
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 Virginia of Department of Transportation employs Grievant as a Coin Counting Manager at one of its facilities. He has been employed by the Agency for approximately 34 years. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

One of Grievant's duties is to maintain the integrity of funds used in the Agency's toll road operations. When he begins his shift, he is responsible for counting money that he receives from the outgoing Coin Counting Manager. During his shift, Grievant and another employee are responsible for taking rolls of quarters to tollbooth operators and exchanging the quarters for dollar bills. At the conclusion of his shift, Grievant is responsible for counting the money he has under his control, identifying any shortages, and completing the necessary paperwork in preparation of the next shift.

On January 31, 2007, Grievant began his shift by counting the money another Coin Counting Manager intended to transfer to his control. He counted the money and concluded that he had \$82,000. During his shift, Grievant and the Fiscal Assistant took rolls of quarters from that \$82,000 and drove to the various tollbooths. They approached of tollbooth operators and gave them rolls of quarters in return for dollars. Although Grievant and the Fiscal Assistant were supposed to be together at all times when money was being exchanged, there was a brief period of time when each went to a different tollbooth operator.

Towards the end of Grievant's shift, he counted the money for which he was responsible. He concluded that he was \$230 short. In other words, he began his shift with \$82,000 but was about to end the shift with \$81,770. Grievant and the Fiscal Assistant discussed the shortage. They attempted to locate the funds by returning to the tollbooths. They were unable to find the lost funds. Grievant told the Fiscal Assistant that they might be disciplined because of the shortage. They agreed to use their own money to make up the shortage. Each employee took \$115 of his personal money and placed it with the Agency's money. This brought the total amount of money under Grievant's control to \$82,000. Grievant drafted a Fiscal Supervisor Cash Room form which described the type of money held and its location. For sample, Grievant wrote that the Coin Drawer had \$560 in quarters and \$80 in nickels. The form contains a section entitled Shortages and has three blank lines in which to write the amount of missing funds from the \$82,000 received at the beginning of the shift. Grievant left that section blank thereby informing the Agency that he had a zero shortage.

On the following day, Grievant's conscience began bothering him so he decided to tell the Fiscal Manager about the shortage. The Agency began an investigation regarding the shortage but was unable to find the money. Under the Agency's policy, if the shortfall is not recovered during the Agency's investigation, the employees responsible for the shortfall must pay the Commonwealth the missing money.

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." DHRM § 1.60(V)(B).¹ Group II offenses "include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal." DHRM § 1.60(V)(B)(2). Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal." DHRM § 1.60(V)(B)(3).

"Falsifying any records, including, but not limited to, vouchers, reports, insurance claims, time records, leave records, or other official state documents" constitutes a Group III offense. DHRM § 1.60(V)(B)(3)(b). "Falsifying" is not defined by DHRM § 1.60(V)(B)(3)(b), 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:

¹ The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

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*.

Standard Operating Procedure 3.11, Overage/Shortage Report Procedures provides, in part:

All overage/shortage forms shall be submitted to the Fiscal department at the completion of each shift. The forms shall be deposited into the Fiscal mailbox.

Security Procedures for the Coin Counting Area provide, in part:

13. The outgoing Supervisor shall verify the Operating fund and turn it over to the successor. The oncoming Supervisor shall sign and verify for the total Operating fund. ***

15. Any variances experienced with Operating funds shall be recorded on the appropriate forms in a timely manner.²

The Agency contends Grievant falsified the Fiscal Supervisor Cash Room form because he wrote on the form that there was no shortage even though a shortage existed. The Agency's argument fails. Once Grievant co-mingled \$230 of personal money with the Agency's funds and with the intent to transfer ownership of the \$230 to the Agency, the \$230 became part of the Agency's operating funds.³ At the moment Grievant signed the Fiscal Supervisor Cash Room form, he wrote that he had counted \$82,000 and had that sum under his control. By leaving the blank spaces empty under the Shortage portion of the form, Grievant asserted that there was no shortage of money. His assertion was true at the time he signed the form. Because Grievant had placed \$230 into the operating fund, the fund was not short. At the beginning of Grievant's shift he received \$82,000 and at the end of the shift he left Agency with \$82,000. The Agency has not presented sufficient evidence to show that Grievant falsified an official State document.

² Agency Exhibit 8.

³ Under the Agency's procedures, if an employee reports a shortage and the Agency investigates that shortage but cannot find the lost money, then the employee becomes liable for the shortage and must transfer money to the Agency to make up the shortage. In this case, Grievant essentially circumvented the Agency's customary procedures and paid the Agency for the shortage.

“Failure to ... comply with established written policy” is a Group II offense.⁴ Agency policy required that “variances experienced with Operating funds shall be recorded” Grievant experienced a variance in his operating funds in the amount of \$230. He was required to report that on the Fiscal Supervisor Cash Room form. He failed to report that information thereby acting contrary to Agency policy. The Agency has presented sufficient evidence to support 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 Employment Dispute Resolution....”⁵ 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 contends that the Agency's discipline should be mitigated because it is too harsh.⁶ With a reduction of the disciplinary action from a Group III to a Group II Written Notice, the disciplinary action is not too harsh and is in accordance with the Standards of Conduct. In light of the standards set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

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 II Written Notice.

⁴ DHRM Policy 1.60.

⁵ *Va. Code § 2.2-3005.*

⁶ Grievant also argued that the Agency took too long to issue the disciplinary action. The offense date was January 31, 2007, but the Written Notice was not issued until May 7, 2007. The Hearing Officer finds that the Agency's delay was not excessive because of the amount of time it required to complete its investigation and determine the appropriate level of discipline. In addition, Grievant was absent from work due to health concerns and the Agency was not able to present him with the Written Noticed during his absence.

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

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR 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:

Director
Department of Employment Dispute Resolution
830 East Main St. STE 400
Richmond, VA 23219

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 the EDR Director. 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.⁷

⁷ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

[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