

Issue: Group III Written Notice with Termination (falsifying records); Hearing Date: 04/02/18; Decision Issued: 04/05/18; Agency: ABC; AHO: Carl Wilson Schmidt, Esq.; Case No. 11170; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11170

Hearing Date: April 2, 2018
Decision Issued: April 5, 2018

PROCEDURAL HISTORY

On January 9, 2018, Grievant was issued a Group III Written Notice of disciplinary action with removal for falsification of records.

On January 16, 2018, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On February 12, 2018, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On April 2, 2018, a hearing was held at the Agency's 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. 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 Department of Alcoholic Beverage Control employed Grievant as a Store Manager. He began working for the Agency in April 2015. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant was scheduled to begin working at 9:15 a.m. on October 17, 2017. Grievant arrived to the Store at 9:30 a.m. on October 17, 2017. He disabled the security system to enter the Store. He clocked in to Time Attendance and Leave (TAL) system at 9:30 a.m. He began his work duties. At 4:04 p.m., Grievant made a manual entry into TAL. Grievant wrote that "Tal down at Clock in." He entered the hours worked as 9:10 a.m.-9:30 a.m. The effect of this entry was to add approximately .3 hours of work and make it appear he was not late to work.

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."¹ Group II offenses "include acts of misconduct of a more serious

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

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.² 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*.

On October 17, 2017, Grievant was supposed to report to work at 9:15 a.m. Grievant reported late to work at 9:30 a.m. He clocked in at 9:30 a.m. using the TAL system. At 4:04 p.m., Grievant made a manual entry into TAL to show that he reported to work at 9:10 even though he knew he had not reported to work at 9:10 a.m. He wrote that TAL was down. He could not have known whether TAL was down at 9:10 a.m. since he was not inside the store and able to access TAL at 9:10 a.m. At 4:04 p.m., Grievant knew that he had not begun working at 9:10 a.m., but he wrote that he began working at that time. He knew he was falsifying time records. 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, the Agency’s decision to remove Grievant must be upheld.

Grievant argued that he devoted a lot of his time and attention to improving the operations of his ABC store. He pointed out he was concerned about having adequately trained staff for the upcoming busy holiday season. It is clear that Grievant recognizes and regrets his mistake. Although the Agency could have issued a lesser level of disciplinary action, its decision to issue a Group III Written Notice with removal is authorized by the Standards of Conduct. There is no basis to change the Agency’s disciplinary action.

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

² See, Attachment A, DHRM Policy 1.60.

Management³ 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. In light of this standard, 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 with removal is **upheld**.

APPEAL RIGHTS

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

Please address your request to:

Office of Equal Employment and 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.

³ Va. Code § 2.2-3005.

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 EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

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