

Issues: Group I Written Notice (misuse of State property), Group III Written Notice (abuse of State time and sleeping during work hours), Group III Written Notice (falsifying records), and Termination; Hearing Date: 05/03/18 Decision Issued: 05/23/18; Agency: JMU; AHO: Carl Wilson Schmidt, Esq.; Case No. 11185; Outcome: Partial Relief; **Administrative Review: Ruling Request received 06/05/18; EEDR Ruling No. 2018-4738 issued 06/19/18; Outcome: AHO's decision affirmed.**



# **COMMONWEALTH of VIRGINIA**

## ***Department of Human Resource Management***

### **OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION**

#### **DECISION OF HEARING OFFICER**

In re:

**Case Number: 11185**

Hearing Date: May 3, 2018  
Decision Issued: May 23, 2018

#### **PROCEDURAL HISTORY**

On February 21, 2018, Grievant was issued a Group I Written Notice of disciplinary action for abuse/misuse of State Property. On February 21, 2018, Grievant received a Group III Written Notice for Abuse of State Time and Sleeping During Work Hours. On February 21, 2018, Grievant was issued a Group III Written Notice with removal for falsifying records.

On March 3, 2018, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On March 20, 2018, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On May 3, 2018, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
Agency Counsel  
Witnesses

#### **ISSUES**

1. Whether Grievant engaged in the behavior described in the Written Notices?
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:

James Madison University employed Grievant as a Utilities Lead Worker. He had been employed by the University for approximately five and a half years. No evidence of prior active disciplinary action as introduced during the hearing.

Grievant worked in several University buildings including A1, A2, A3, Building M, Building R, and Building W. In Building A2 there were mechanical rooms including ones on the first and second floors. These mechanical rooms contained pipes, boilers, and other items. Supplies such as light bulbs and ceiling tiles and other items were also in the mechanical rooms.

The University had security cameras aimed down the hallways containing the mechanical rooms. The security cameras were motion activated.

During his shift, Grievant was supposed to complete tasks to fulfill work orders. If he completed all of his work orders or was not assigned any work orders, Grievant was supposed to perform building inspections.

Grievant worked the third shift which began at 8:30 p.m. on one day and ended at 7 a.m. on the following day. At the end of Grievant's shift he was supposed to report the hours he worked and the location of his work throughout his shift.

On February 5, 2018, Grievant entered the mechanical room at 10:45 p.m. He remained there until 4:30 p.m. He did not perform any significant work duties while in the mechanical room. On February 9, 2018, Grievant entered the mechanical room at 12:30 a.m. He remained there until 6 a.m. He did not perform any significant work duties while in the mechanical room. On February 14, 2018, Grievant entered the mechanical room at 3:05 a.m. He remained there until 6:03 a.m. He did not perform any significant work duties while in the mechanical room. On February 16, 2018, Grievant entered the mechanical room at 1:15 a.m. He remained there until 4:35 a.m. He did not perform any significant work duties while in the mechanical room.

It would be unusual for an employee to remain in the mechanical room for more than 45 minutes. This might occur if an employee was restocking the mechanical room. Grievant was not assigned responsibility to restock any mechanical rooms on the days at issue in this grievance.

At the end of his shift, Grievant recorded how he spent his time and where he worked by entering information into a Time Card system. Grievant entered into the system that on: (1) February 8, 2018<sup>1</sup>, he spent three hours in Building A2 performing general repair/building inspections, three hours in Building A1 performing general repair/building inspections, and three hours in Building M performing general repair/building inspections; (2) February 13, 2018, he spent two hours in Building A2 performing general repair/building inspections, three hours in Building A3 performing general repair/building inspections, one hour in Building W repairing a corridor trouble alarm, and one hour in Building R repairing a left main door that would not lock; and (3) February 15, 2018, he spent two hours in Building A2 performing general repair/building inspections, three hours in Building A1 performing general repair/building inspections, and three hours in Building M performing general repair/building inspections.

On February 9, 2018, Grievant changed the direction of a security camera.

### **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>2</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.”

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<sup>1</sup> The date of February 8, 2018 covers Grievant’s shift which began on February 8, 2018 and ended on February 9, 2018.

<sup>2</sup> The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

### Group I Written Notice

The Agency alleged Grievant should receive a Group I Written Notice for changing the direction of a security camera. The Agency did not establish that Grievant should have known he was not supposed to change the direction of a security camera. The Group I Written Notice must be reversed.

### Group III Written Notice Abuse of State Time and Sleeping

Abuse of State time is a Group I offense.<sup>3</sup> Grievant abused State time because he did not perform his work duties while he was in the mechanical room. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice for abuse of State time.

The Agency alleged Grievant was sleeping during work hours. No one was inside the mechanical rooms to observe whether Grievant was asleep. The Agency has not presented sufficient evidence to support the allegation of sleeping during work hours.

### Group III Written Notice – Falsifying Records

“Falsifying records” is a Group III offense. When Grievant was in the mechanical room, he was not working. On February 9, 2018, Grievant was in the mechanical room for five and a half hours. He filled out his time record showing he worked in A2 for three hours, A1 for three hours and Building M for three hours. On February 14, 2018, Grievant was in the mechanical room for three hours. He filled out his time record showing he worked two hours in A2, three hours in A3, one hour in Building W, one hour in Building R and one hour in Building M. On February 16, 2017, Grievant was in the mechanical room for three hours and twenty minutes.

At the time Grievant completed his time records, he knew the information he was entering was not true. Grievant falsely recorded the time he worked and his locations. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for falsifying records. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant’s removal must be upheld.

Grievant argued that he was told by supervisors to write down a certain amount of time regardless of how much time he actually worked. Grievant argued that employees were told to write down a certain amount of time regardless of how much time they actually worked. Thus, he claimed he did not have the intent to falsify documents. Insufficient evidence was presented to support this assertion. The Hearing Officer does not believe this assertion to be true.

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<sup>3</sup> See, Attachment A, DHRM Policy 1.60.

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>4</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-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 Agency’s issuance to the Grievant of a Group I Written Notice of disciplinary action is **rescinded**. The Agency’s issuance to the Grievant of a Group III Written Notice for abuse of State time and sleeping is **reduced** to a Group I Written Notice. The Agency’s issuance to the Grievant of a Group III Written Notice with removal for falsifying records 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 14<sup>th</sup> St., 12<sup>th</sup> Floor  
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 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.

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<sup>4</sup> Va. Code § 2.2-3005.

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.<sup>[1]</sup>

[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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>[1]</sup> Agencies must request and receive prior approval from EEDR before filing a notice of appeal.