

Issue: Group III Written Notice with Termination (falsifying records); Hearing Date: 05/21/18; Decision Issued: 05/22/18; Agency: JMU; AHO: Carl Wilson Schmidt, Esq.; Case No. 11199; 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: 11199**

Hearing Date: May 21, 2018

Decision Issued: May 22, 2018

#### **PROCEDURAL HISTORY**

On March 30, 2018, Grievant was issued a Group III Written Notice of disciplinary action with removal for falsifying time records.

On March 30, 2018, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On April 16, 2018, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On May 21, 2018, a hearing was held at the Agency's office. Grievant was notified of the time, date, and location of the hearing but did not appear.

#### **APPEARANCES**

Agency Counsel  
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:

James Madison University employed Grievant as a Housekeeper. She had been employed by the Agency for approximately 18 years. No evidence of prior active disciplinary action was introduced during the hearing.

Employees were required to "clock in" when they arrived at the Facility to begin working and "clock out" when they left the Facility at the end of their shifts. Each employee had a unique logon identification and password. Employees were to clock in and clock out using one of several computers at the Facility. The Agency had cameras it could use to verify when someone clocked in or clocked out.

Grievant and Employee 1 disclosed to each other their respective login identifications and passwords. They agreed to clock in and clock out each other when necessary. Employee 1 was Grievant's niece.

On March 12, 2018, Employee 1 clocked in Grievant at 8:50 p.m. Grievant began working at 9 p.m.

On March 14, 2018, Employee 1 clocked in Grievant at 8:26 p.m. Grievant began working at 9:45 p.m.

On March 15, 2018, Employee 1 clocked in Grievant at the time of 9 p.m. Grievant arrived at work at 9:45 p.m.

On March 16, 2018, Employee 1 left work at 1:22 a.m. without clocking out. Grievant clocked out that employee at 2:14 a.m.

The Supervisor confronted Grievant with the discrepancies. Grievant did not deny making the false entries.

### **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>1</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.”

“Falsifying any records, including, but not limited to insurance claims, leave records, reports, vouchers, time records or other official state documents”<sup>2</sup> is a Group III offense.

Grievant coordinated with Employee 1 to report that Grievant was at work when Grievant was not working. Grievant and Employee 1 falsified time records to falsely claim that Grievant was at work when she not working. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for falsifying time records. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant’s removal must be upheld.

*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>3</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

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<sup>1</sup> The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

<sup>2</sup> JMU Standards of Conduct.

<sup>3</sup> *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.

Grievant asserted the penalty was too harsh given her length of service. Grievant's length of service is not a sufficient basis to mitigate disciplinary action. In light of the standard 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 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 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.

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.