Issues: Group II Written Notice (insubordination), Group III Written Notice with Termination (falsifying records); Hearing Date: 01/17/19; Decision Issued: 05/02/19; Agency: UVA; AHO: Carl Wilson Schmidt, Esq.; Case No. 11288; Outcome: Partial Relief; **Attorney's Fee Addendum issued 05/22/19 awarding $1,965.00.**

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11288

Hearing Date: January 17, 2019
Decision Issued: May 2, 2019

PROCEDURAL HISTORY

On October 4, 2018, Grievant was issued a Group II Written Notice of disciplinary action for insubordination. On October 4, 2018, Grievant was issued a Group III Written Notice with removal for falsifying records.

On October 19, 2018, Grievant timely filed a grievance to challenge the Agency's actions. The matter advanced to hearing. On November 13, 2018, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 17, 2019, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
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 University of Virginia employed Grievant as a Fiscal Controller. She has been employed by the Agency since 2004. Grievant received favorable evaluations and performance bonuses. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant was a non-exempt employee meaning she had to be paid for working over 40 hours in a week. Grievant did not work over 40 hours per week. Her regular shift was from 8:30 a.m. until 5 p.m. with a 30-minute lunch.[1] She was allowed to take 15-minute breaks in the morning and in the afternoon at her discretion.

Grievant completed a pre-printed Timecard addressing each day of the week over a 14-day period including weekends. The Timecard showed the "Hours Type" as "Hours Worked", "Sick Leave" and "Family Personal Leave". The Timecard had a space to write in the "Start", "Stop" and "Hrs" for each "Hours Type."

[1] Grievant understood her work shift to begin between 8 a.m. and 8:30 a.m. and end between 4:30 p.m. and 5 p.m.

Grievant consistently reported a total of 8 hours of work and leave each day. She consistently left blank the Start and Stop times. Grievant completed her Timecards the same way over many years and with different supervisors who approved her Timecards.

Mr. M was Grievant's supervisor from 2006 to April 2008. Grievant completed a Timecard while supervised by Mr. M. As long as Grievant worked 40 hours per week, he did not care how she filled out the Timecard. Mr. M allowed Grievant to "make up time" meaning if she worked fewer than eight hours in a day, she would work additional time on another day so that her total hours worked for the week were 40.

Grievant began working in the Division on May 2014. She performed asset administration duties. She reported directly to Mr. R beginning in May 2014. Their offices were right next to each other. Mr. R often went to different locations of the campus to perform work duties. Grievant also went to different locations of the campus to perform work duties. Mr. R did not train Grievant regarding how to complete a Timecard because he assumed she already knew how to do so as an existing UVA employee. Mr. R approved Grievant's leave and Timecards. Mr. R did not have occasion to criticize Grievant for incorrectly filling out her Timecards. He believed that as long as Grievant "put in 40 hours" per week she was "ok." Grievant did a good job while working for Mr. R and received good performance reviews from him.

Mr. R understood "flex time" to mean that, for example, if an employee needed to go to the doctor, then instead of leaving at 5 p.m. on Tuesday, the employee would work until 6 p.m. or the employee would come in early to make up the time missed for the doctor's appointment. Mr. R allowed Grievant to "make up time" during her lunch period.

Mr. R understood that employees including Grievant could use flex time. He did not distinguish between exempt and non-exempt employees. Grievant was the only non-exempt employee working for Mr. R when he supervised her. Use of flex time was "common practice."

Mr. R stopped supervising Grievant in February 2016.

Grievant began reporting to Ms. G in the Spring of 2016. Grievant was supposed to let Ms. G know prior to taking leave.

On April 18, 2017, Grievant sent Ms. G an email stating:

> I have a late appt this afternoon at 3:45 pm so I'm going to try to leave here around 3:30 p.m.[2]

Grievant submitted a Timecard to Ms. G showing that Grievant worked 8 hours on April 18, 2017. Grievant did not enter a Start or Stop time.

[2] Grievant Exhibit 1.

On August 21, 2017, Grievant sent Ms. G an email stating:

> I will be in around 10 a.m. as I had a long day yesterday and did not sleep very well last night.[3]

Grievant submitted a Timecard to Ms. G showing that Grievant worked 8 hours on August 21, 2017. Grievant did not enter a Start or Stop time.

On January 2, 2018, Grievant sent Ms. G an email indicating, "I'll be in around 9 am this morning."[4] Grievant submitted a Timecard showing that she worked 8 hours. Grievant did not enter a Start or Stop time.

Ms. G approved Grievant's Timecards. Ms. G did not tell Grievant she had completed her Timecards incorrectly.

Grievant began reporting to the Supervisor in July 2018 when the Supervisor became Acting Supervisor.[5]

On June 7, 2018, the Manager met with Grievant. Grievant said her work hours were from 8:30 a.m. to 5 p.m. Grievant told the Manager she wanted to return to asset management duties. The Manager later spoke to Mr. R who was in charge of asset management and he told the Manager it was not possible for Grievant to return to asset management. The Manager told Grievant this conclusion.

Grievant had pre-approved leave of two hours between 2 p.m. and 4 p.m. on July 26, 2018. Grievant did not return to work after 4 p.m. Grievant wrote on her Timecard that she worked 8 hours on Wednesday July 26, 2018. She did not write a Start or Stop time.

On August 6, 2018, Grievant sent the Supervisor an email stating:

> I have an appointment to attend at 8:30 a.m. Friday morning so I will be later in the day coming in.[6]

Grievant's leave for August 10, 2018 was approved.

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[3] Grievant Exhibit 1.

[4] Grievant Exhibit 1.

[5] Ms. C was the Acting Supervisor in July 2018 and became the Supervisor on September 18, 2018.

[6] Grievant Exhibit 1. Friday was August 10, 2018.

On August 10, 2018, Grievant sent the Manager an email stating, "Please disregard the previous message for today, it should be for Monday."[7] Grievant asked to be off of work on August 13, 2018 from 2 p.m. to 4 p.m.

On Friday August 10, 2018, the Agency closed for two hours in the afternoon. Grievant arrived to work at approximately 12:30 p.m. or 1 p.m. and left work at approximately 3 p.m. Grievant wrote on her Timecard that she worked 4 hours, 2 hours for Agency closing, and 2 hours for Sick leave on Friday August 10, 2018. She did not enter a Start or Stop time.

On Monday August 13, 2018, Grievant had pre-approved leave from 2 p.m. until 4 p.m. Grievant did not return to work after 4 p.m. Grievant wrote on her Timecard that she worked 8 hours on Monday August 13, 2018. She did not enter a Start or Stop time.

On Tuesday August 28, 2018, the Supervisor asked Grievant to meet with the Supervisor on Wednesday August 29, 2018 at 8:30 a.m. Grievant understood the meeting on August 29, 2018 was to discuss changes in her job duties that would result in a reduction in asset management duties that she preferred. She considered the changes to be drastic. She knew the meeting was to start at 8:30 a.m. On August 29, 2018, Grievant did not report to the Supervisor's office at 8:30 a.m.[8] Grievant and the Supervisor's offices were approximately 15 feet apart. The Supervisor went to Grievant's office at 8:45 a.m. to remind Grievant of the meeting. Grievant became annoyed. Grievant responded, "I'll be there in a minute." The Supervisor said they needed to meet right away. Grievant raised her voice and said she did not see the point of meeting. Grievant loudly told the Supervisor, "You need to watch your attitude or you will ruin our relationship!" Grievant was upset as she spoke to the Supervisor. The Supervisor told Grievant she did not mean to offend Grievant but directed Grievant to come to her office as soon as possible. Grievant went to the Supervisor's office approximately 15 minute later at about 9 a.m.[9] They discussed changes in Grievant's job duties such as invoicing for purchases with which Grievant did not agree. Grievant said, "This is bulls-it!" The Supervisor told Grievant there were classes Grievant could take. Grievant said, "I don't want to go to a conference; I don't want to take a class; I will do my job but not anymore than that!"

On August 29, 2018, the Supervisor presented Grievant with a letter indicating a predetermination meeting would be held on August 30, 2018 at 2 p.m. as "an opportunity for your to share any thoughts/comments you may have regarding timecard discrepancies that have come to our attention."[10] The Agency did not provide Grievant

[7] Agency Exhibit 4.

[8] Grievant mistakenly thought that another part time employee would be involved in the meeting so she did not report immediately to the Supervisors office.

[9] The Supervisor had to cancel a meeting she had with the Director at 9 a.m. Grievant was not aware that the Supervisor was scheduled to meet with the Director at 9 a.m.

[10] Grievant Exhibit 1.

with a written notice indicating she would be subject to disciplinary action for insubordination. The Agency did not provide Grievant with verbal notice 24 hours before discussing the possibility of issuing a written notice for insubordination.

Prior to the predetermination meeting, Grievant had not been told how to fill out properly the Timecard. During the predetermination meeting, Grievant was instructed for the first time to let the Agency know when she arrived to and departed from work.

During the predetermination meeting, Grievant explained that she made up the time missed on the days questioned by the Agency. Grievant was asked to show she had made up the time she missed on the three days. She later was unable to do so because she could not remember when she had worked additional time.

The Agency did not check Grievant's computer usage to determine when she logged in or logged out of her office computer. The Agency considered reviewing this information to be a violation of privacy.

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."[11] 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."

Group II Written Notice

Insubordination is a Group II offense. The essence of insubordination is an employee's disregard for a supervisor's authority. The Agency has established that Grievant was insubordinate on August 28, 2018 for several reasons. First, Grievant was instructed to meet with the Supervisor at 8:30 a.m. Grievant disregarded that instruction. Second, the Supervisor reminded Grievant of the meeting at 8:45 a.m. Grievant replied that she would be there in a minute but arrived 15 minutes later. Third, Grievant raised her voice and expressed annoyance with the Supervisor's requests to meet. Fourth, Grievant raised her voice and told the Supervisor to watch her attitude even though the Supervisor was behaving appropriately. Fifth, Grievant told the Supervisor's action was bulls—t. When these factors are considered together, the Agency has shown that Grievant was insubordinate to the Supervisor. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

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

Grievant argued that the Supervisor had used profanity including bulls—t. Although cursing may have occurred in the workplace, Grievant's cursing was directed at the Supervisor's actions.

Grievant asserted that she did not report to the Supervisor's office at 8:30 a.m. because she was waiting for another employee to report to work. That employee, however, did not work that day of the week and Grievant did not mention to the Supervisor the reason for Grievant's delay.

The Agency failed to provide Grievant with adequate notice of its predetermination meeting on August 30, 2018 regarding the issue of insubordination. The Agency's failure to comply with its obligation to provide Grievant with adequate notice of the predetermination hearing is harmless error in his case. Grievant had the opportunity during the hearing to present any defense she could have provided to the Agency had she received adequate notice of the predetermination meeting. The hearing process cured the Agency's failure to provide adequate notice of the predetermination meeting regarding insubordination.

Group III Written Notice

To establish a Group III offense for falsifying records, the Agency must show that Grievant knew or should have known at the time she completed the Timecards that they were false.[12] The Agency has not met this burden of proof.

The Agency alleged Grievant falsified her Timecards for July 26, 2018, August 10, 2018, and August 13, 2018 by writing that she worked more hours than she actually worked.

Grievant claimed she was allowed to use "flex time" to work additional hours in a given day to make up for time she was away from work on other days.[13] The evidence was clear that Grievant believed she was allowed to be away from work and make up the time on another day. She believed she was permitted to write 8 hours worked on her Timecard as long as she made up the time on another day. At the time Grievant completed her Timecard for July 26, 2018, August 10, 2018, and August 13, 2018, she did not intend to falsify her Timecard. She believed she was following the Agency's accepted practice and the same practice she had followed for many years.

The evidence did not show that Grievant should have known she was falsifying a document at the time she entered the hours worked on her Timecards.

[12] Falsity is not necessarily the same as accuracy. Grievant understood the Timecards to account for 40 hours of work or leave each week regardless of whether the hours actually worked in a particular day were 8.

[13] The Agency did not have a written "flex time" policy. Flex time refers to a practice followed by some supervisors and employees.

None of Grievant's supervisors required her to fill in the Start and Stop time on her Timecard. All of her supervisors monitored whether Grievant accounted for 40 hours each week. This is consistent with Grievant's claim that as long as she worked (or accounted for) 40 hours in a week, she could make up her time away from work as she needed.

Grievant often reported working (or accounting for) 8 hours in a day even when she reported to work late or left work early. Mr. R testified he allowed Grievant to make up time on another day when she was away from work. Mr. R would allow this practice when Grievant had doctor appointments for which she should have otherwise taken sick leave. Grievant would indicate on her Timecard that she worked 8 hours even though she had not worked 8 hours and Mr. R knew she had not worked 8 hours. Nevertheless, Mr. R approved Grievant's Timecard containing the inaccurate time recording. Because Mr. R had the practice of knowingly approving Grievant's Timecard containing dates with inaccurate time reporting, the Hearing Officer does not believe Grievant should have known her Timecards governing the dates of July 26, 2018, August 10, 2018, and August 13, 2018 could be construed as falsifying records.

Ms. G's testimony differed from Mr. R's testimony. Ms. G testified that Grievant was in error to write that she worked 8 hours on April 18, 2017 and August 21, 2017. At the time Grievant submitted the Timecards for these dates, Ms. G did not inform Grievant she had made an error. This is consistent with Grievant's assertion that none of her supervisors told her she was incorrectly completing her Timecard. Ms. G testified that Grievant was ok with respect to her entry on January 2, 2018 because she worked through lunch that day. This is consistent with Grievant's assertion that she was permitted to make up time by working through her lunch period. Ms. G's testimony does not show that Grievant should have known that her Timecard entries on July 26, 2018, August 10, 2018, and August 13, 2018 could be construed as falsifying records.

The Agency argued that it gave Grievant the opportunity to provide evidence she worked additional time and Grievant was unable to do so. Grievant testified she worked additional time but because of the length of time that had passed, she did not remember which days she worked additional time. Grievant asserted that she often worked through her lunch period and did not take breaks to make up time. Grievant's failure to provide emails or other evidence she worked additional hours, does not prove she falsified records. The Agency easily could have determined the hours Grievant most likely worked by calculating the times Grievant logged in and out of the Agency's computer network. The Agency refused to do so for privacy concerns. The Agency did not ask if Grievant would consent to its examination of her log in and log out records.

In conclusion, the Agency failed to train Grievant regarding how to properly complete Timecards. The Agency failed to monitor Grievant's accounting of hours worked and leave time. This renders the Agency's allegation of falsification unsustainable. The Group III Written Notice with removal must be reversed.

Mitigation

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 …."[14] 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 received several awards for good work performance. Those awards are not sufficient to mitigate the Group II Written Notice.

Attorney's Fees

The Virginia General Assembly enacted *Va. Code § 2.2-3005.1(A)* providing, "In grievances challenging discharge, if the hearing officer finds that the employee has substantially prevailed on the merits of the grievance, the employee shall be entitled to recover reasonable attorneys' fees, unless special circumstances would make an award unjust." Grievant has substantially prevailed on the merits of the grievance because he is to be reinstated. There are no special circumstances making an award of attorney's fees unjust. Accordingly, Grievant's attorney is advised to submit an attorneys' fee petition to the Hearing Officer within 15 days of this Decision. The petition should be in accordance with the EDR Director's *Rules for Conducting Grievance Hearings*.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is **upheld**. The Agency's issuance to the Grievant of a Group III Written Notice with removal is **rescinded**. The Agency is ordered to **reinstate** Grievant to Grievant's same position, or if the position is filled, to an equivalent position. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal. The Agency is directed to provide **back benefits** including health insurance and credit for leave and seniority that the employee did not otherwise accrue.

[14] Va. Code § 2.2-3005.

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].

/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.

COMMONWEALTH of VIRGINIA
Department of Human Resource Management

ADDENDUM TO DECISION OF HEARING OFFICER

In re:

Case No: 11288-A

Addendum Issued: May 22, 2019

DISCUSSION

The grievance statute provides that for those issues qualified for a hearing, the Hearing Officer may order relief including reasonable attorneys' fees in grievances challenging discharge if the Hearing Officer finds that the employee "substantially prevailed" on the merits of the grievance, unless special circumstances would make an award unjust.[15] For an employee to "substantially prevail" in a discharge grievance, the Hearing Officer's decision must contain an order that the agency reinstate the employee to his or her former (or an objectively similar) position.[16]

To determine whether attorney's fees are reasonable, the Hearing Officer considers the time and effort expended by the attorney, the nature of the services rendered, the complexity of the services, the value of the services to the client, the results obtained, whether the fees incurred were consistent with those generally charged for similar services, and whether the services were necessary and appropriate.

Grievant's Counsel submitted a petition for 15 hours of work relating to the grievance. Attorneys' fees are awarded at the rate of $131 per hour. Accordingly, Grievant must be awarded $1,965.

AWARD

The Grievant is awarded attorneys' fees in the amount of $1,965.00.

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[15] Va. Code § 2.2-3005.1(A).

[16] § 7.2(e) Department of Human Resource Management, *Grievance Procedure Manual*, effective August July 1, 2017. § VI(E) EEDR *Rules for Conducting Grievance Hearings*, effective July 1, 2017.

APPEAL RIGHTS

If neither party petitions the EDR Director for a ruling on the propriety of the fees addendum within 10 calendar days of its issuance, the hearing decision and its fees addendum may be appealed to the Circuit Court as a final hearing decision. Once the EDR Director issues a ruling on the propriety of the fees addendum, and if ordered by DHRM, the hearing officer has issued a revised fees addendum, the original hearing decision becomes "final" as described in §VII(B) of the *Rules* and may be appealed to the Circuit Court in accordance with §VII(C) of the *Rules* and §7.3(a) of the *Grievance Procedure Manual*. The fees addendum shall be considered part of the final decision. Final hearing decisions are not enforceable until the conclusion of any judicial appeals.

/s/ Carl Wilson Schmidt

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Carl Wilson Schmidt, Esq.
Hearing Officer