

Issue: Group III Written Notice with Termination (falsifying records); Hearing Date: 12/04/17; Decision Issued: 12/22/17; Agency: DOC; AHO: Thomas P. Walk, Esq.; Case No. 11092; Outcome: Full Relief; **Attorney's Fee Addendum issued 01/11/18 awarding \$4,246.15.**

VIRGINIA: IN THE VIRGINIA DEPARTMENT OF HUMAN RESOURCE  
MANAGEMENT, OFFICE OF EQUAL EMPLOYMENT AND DISPUTE  
RESOLUTION

IN RE: DEEDR CASE No.: 11092

### **DECISION OF HEARING OFFICER**

HEARING DATE: DECEMBER 4, 2017

DECISION DATE: DECEMBER 22, 2017

#### **I. PROCEDURAL BACKGROUND**

The agency issued the grievant a Group III Written Notice on August 3, 2017 and terminated him from employment. He filed this grievance on August 31. I was appointed as Hearing Officer on September 18. I conducted a prehearing conference by telephone on September 25 with the agency advocate and attorney for the grievant. With the agreement of both parties, the matter was set to be heard on December 4. I conducted the hearing on that date. The hearing lasted approximately four hours, ten minutes.

#### **II. APPEARANCES**

The agency was represented by an attorney as its advocate. It presented four witnesses. A total of 14 exhibits were presented by the agency and accepted into evidence, except as noted below.

The grievant was represented by an attorney. The grievant and two additional witnesses testified on his behalf. Twenty-four exhibits were introduced by him

#### **III. ISSUE**

Whether the agency acted appropriately in issuing the grievant a Group III Written Notice for falsifying records and terminating him from employment on August 3, 2017?

#### **IV. SUMMARY OF EVIDENCE**

The grievant worked for the agency as a food service manager. It terminated him from employment on August 3, 2017. At the time of his termination he had in excess of eleven years of service with the agency and a “solid performance history.” The termination occurred because of what the agency viewed as his failure to perform additional part-time duties teaching an apprenticeship baking class to inmates. The grievant was expected to spend three hours each week in these teaching duties. He was compensated for these duties in addition to his regular pay as the food service manager. In order to be paid for teaching the class, the grievant was required to submit time sheets showing the dates and times of those duties being performed. He submitted time sheets reflecting that he taught the class on the following dates: May 5, 2017; May 12, 2017; May 19, 2017; and June 16, 2017.

The agency began its investigation of the grievant upon receiving a complaint from a supervisor that the class was not being taught. Due to technical issues, the Agency Investigator was unable to review video footage of the kitchen area for those four dates.

Two of the students in the class were interviewed by the Investigator. The inmates gave vague or inconsistent answers regarding whether the class had been taught. Students had been provided with a notebook in which to record the dates, time, and type of instruction received. These notebooks were to be submitted for the student to receive credit for taking the class. The notebook of one student was reviewed and found to have contained no entries.

When notified of possible disciplinary action, the grievant provided no satisfactory response initially. He subsequently attempted to explain that no agency policy prevented him

from teaching the class during his regular work hours. He pointed out that the agency had no set curriculum for the class and that he had been given no specific, detailed directions on how to conduct the class. During the hearing on December 4, the grievant adamantly denied that the classes had not been taught on those four dates. The grievant received compensation for teaching the classes on those dates. He had resigned the teaching position on July 18.

## **V. ANALYSIS**

The Commonwealth of Virginia provides certain protections to employees in Chapter 30 of Title 2.2 of the Code of Virginia. Among these protections is the right to grieve formal disciplinary actions. The Department of Employment Dispute Resolution has developed a *Grievance Procedure Manual (GPM)*. This manual sets forth the applicable standards for this type of proceeding. Section 5.8 of the *GPM* provides that in disciplinary grievances the agency has the burden of going forward with the evidence. It also has the burden of proving, by a preponderance of the evidence, that its actions were warranted and appropriate. The *GPM* is supplemented by a separate set of standards promulgated by the Department of Employment Dispute Resolution, *Rules for Conducting Grievance Hearings*. These *Rules* state that in a disciplinary grievance (such as this matter) a hearing officer shall review the facts *de novo* and determine:

- I. Whether the employee engaged in the behavior described in the Written Notice;
- II. Whether the behavior constituted misconduct;
- III. Whether the discipline was consistent with law and policy; and
- IV. Whether there were mitigating circumstances justifying the reduction or removal of the disciplinary action, and, if so, whether aggravating circumstances existed that would overcome the mitigating circumstances.

The agency disciplined and terminated the grievant pursuant to its Operating Procedure 135.1(V)(D)(2)(b). That section makes the falsification of any agency record a Group III offense. That level of offense is reserved for that behavior “of such a serious nature that a first occurrence should normally result in termination.”

The agency has failed to meet its burden of proof that the classes were not taught. Only if the classes were not taught were the time records submitted by the grievant false. The evidence raised suspicion that the classes were not taught on the subject dates. The strongest pieces of its evidence were:

- The reports by the supervisor of the grievant that the classes were not being taught;
- The hearsay statements of the students as to whether the classes were being taught;
- The notebook of one student being blank; and
- The absence of an immediate denial by the grievant of the allegations.

These pieces of evidence are offset by the testimony of the grievant during the hearing. I cannot find that the agency evidence is sufficient to tip the balance of evidence to the point where I can say it has met its burden of proving the allegations by the preponderance of the evidence.

No witness was testified in direct contradiction to the grievant’s testimony of that he taught the classes on the four dates listed in the Written Notice. The testimony of the Supervisor who first made the report possibly could have provided useful corroboration of the circumstantial evidence presented by the agency. The hearsay statements of the students to the Investigator are greatly discounted by me, those students being convicted felons, in addition to being hearsay

evidence. The absence of entries in the notebook of the one student can just as easily be explained by other factors, such as the student being derelict or the notebook being a replacement one given after another notebook had been lost or destroyed. The failure of the grievant to immediately deny the allegations is suspicious. I believe, however, that his testimony in the hearing denying the allegations was sufficiently credible.

The agency attempted to introduce portions of a video purporting to show that the grievant failed to conduct the baking classes also on July 7, 2017 and July 14, 2017. The counsel for the grievant objected to the introduction of those portions of the video to establish that the grievant failed to teach classes on those dates and that the disciplinary action can be supported by those events. I sustained the objection. The Written Notice contained no reference to classes on those dates. The agency requested that the July 7 and July 14 video be allowed for purposes of contradicting the grievant. Although I ruled that the videos could be considered for that purpose, I do not believe that such evidence is sufficient to overcome the shortcomings in the agency evidence in this case. To be clear, however, I am not making any determination that the grievant failed to teach the classes on those dates or whether any additional disciplinary action based on those dates would be appropriate.

## **VI. DECISION**

For the reasons stated above, I order that the Group III Written Notice of August 3, 2017 be rescinded. The grievant shall be restored to his former position as food service manager. He shall be awarded partial back-pay, being for the period from August 3, 2017 to November 16, 2017, subject to the offset for interim earnings subsequent to August 3, 2017 and unemployment benefits received during that period. His back-pay shall not include any compensation for teaching the baking class; his resignation from that position precludes any such consideration.

He shall further be entitled to a full restoration of benefits. Counsel for the grievant shall submit his claim for attorney's fees within 15 days of the date of this decision.

## **VII. APPEAL RIGHTS**

Pursuant to Section 7.2(a) of the Grievance Procedure Manual, you may file an administrative review request within **15 calendar** days from the date the decision was issued to the Director of the Office of Equal Employment and Dispute Resolution, Department of Human Resource Management, 101 North 14<sup>th</sup> Street, 12<sup>th</sup> Floor, Richmond, VA 23219. Alternatively you may send by e-mail: [EDR@dhrm.virginia.gov](mailto:EDR@dhrm.virginia.gov), or by fax to (804) 786-1606.

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 provide a copy of all of your appeals to the other party, EDR, 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.

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 this final.

ORDERED this December 22, 2017.

/s/Thomas P. Walk  
Thomas P. Walk, Hearing Officer

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MANAGEMENT, OFFICE OF EQUAL EMPLOYMENT AND DISPUTE  
RESOLUTION

IN RE: CASE No.: 110092

**ORDER UPON PETITION FOR ATTORNEY'S FEES**

On January 5, 2018 counsel for the grievant submitted his verified Petition for attorney's fees. I had previously reinstated the grievant to employment and made a limited award of back-pay.

Upon a review of the Petition I award counsel the sum of \$4,246.15. In determining this amount, I used the hourly rate claimed by counsel, \$131.00. I find this rate to be reasonable for this matter.

I reduced the time claimed by counsel by 1.60 hours. For the time entries on August 31, 2017, September 7, 2017, September 19, 2017, and September 20, 2017, I reduced each amount to one-tenth of an hour. I note that throughout the Petition that the lowest time increment time charged was 0.25 hours. Given the documents involved for the charges on these four dates, I believe that no more than one-tenth of an hour is reasonable. Similarly, for reviewing my decision counsel has claimed one-half of an hour. Given the limited issue addressed in the decision, I have awarded fees for only one-fourth of an hour. I have also not allowed any fees for time subsequent to December 22, 2017.

The Agency shall remit payment to counsel forthwith.

ENTERED this January 11, 2018.

/s/Thomas P. Walk  
Thomas P. Walk, Hearing Officer