

Issue: Group III Written Notice with termination (falsifying state documents); Hearing Date: 12/06/02; Decision Date: 12/13/02; Agency: DCE; AHO: Carl Wilson Schmidt, Esq.; Case No.: 5555; **Administrative Review: Hearing Officer Reconsideration Request received 12/23/02; Reconsideration Decision date: 12/26/02; Outcome: No newly discovered evidence introduced. Request denied. Administrative Review: DHRM Ruling Requested 12/23/02; DHRM Ruling Date: 01/13/03; Outcome: No policy violation identified; no basis to interfere with decision. Judicial Review: Appealed to the Circuit Court in the County of Chesterfield on 01/11/03; Outcome pending**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5555

Hearing Date: December 6, 2002
Decision Issued: December 13, 2002

PROCEDURAL HISTORY

On August 19, 2002, Grievant was issued a Group III Written Notice of disciplinary action with removal for falsifying State documents. On September 7, 2002, Grievant timely filed a grievance to challenge the disciplinary action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On October 7, 2002, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 6, 2002, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's Counsel
Principal
Corrections Officer
Treatment Program Supervisor
Major

ISSUE

Whether Grievant should receive a Group III Written Notice of disciplinary action with removal for falsifying State documents.

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. 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 Correctional Education employed Grievant as an Academic Teacher from November 27, 1995 until her removal on August 19, 2002. The purpose of her position was to "Provide quality educational programs that meet individual needs of inmate students, as well as standards defined under the Commonwealth's statutes and program certification requirements."¹ No evidence of prior disciplinary action against Grievant was introduced. Her performance as a teacher typically exceeded the Agency's expectations.²

Grievant's classroom is in the basement of the Agency's Facility. Employees are required to sign in and sign out when they exit the Facility. The logbook is located on the first floor near the gate next to the parking lot.

On February 20, 2002, Grievant attended a staff meeting during which class schedules and employee schedules were discussed. During this meeting DCE Procedure 1-1 was distributed and discussed. This policy states in part:

- A. Each full-time staff member is expected to work five eight hour days and a forty hour week. ***

¹ Grievant Exhibit 5.

² Grievant Exhibits 3 and 4.

C. Each staff member is expected **to sign in and out accurately**, based on the clock at the facility, in the DCE daily log. (Emphasis added).

Grievant's work hours were from 7:30 a.m. to 4:00 p.m., Monday through Friday.³ On at least seven days, Grievant left work early but recorded her exit time as 4:00 p.m. These dates and exit times were as follows:

April 10, 2002 at 3:45 p.m.
May 6, 2002 at 3:47 p.m.
May 9, 2002 at 3:50 p.m.
May 30, 2002 at 3:52 p.m.
June 3, 2002 at 3:50 p.m.
June 6, 2002 at 3:48 p.m.
June 7, 2002 at 3:50 p.m.

Grievant was observed leaving early on these occasions by Agency staff or by staff of the Department of Corrections who also work at Grievant's Facility.

During the Agency's investigation, Grievant provided a statement as follows:

Principal says ok leave little early, 2 min., to avoid cross-over which is crossing through cafeteria to other gate prior to gate exit.

When signing in, this is time I'm coming into building, when I sign out, this is time I'm leaving the building. **I'm signing out the exact time I'm leaving building.**

Once I leave the corrections facility where I teach I need not go to any other building.

When I sign out I use the prison clock to sign out when leaving.

Principal says use your own discretion when leaving to get through crossover.

Sign out book is after you have finished the crossover. So when I sign out at 4 PM I'm not forging the sign out book by leaving earlier at 3:50 or 3:45 PM.

So if I leave at 3:50 PM – I sign out at 3:50 PM.

There is no reason for me to sign out at 4:00 PM and leave the building at a different time.⁴ (Emphasis added).

CONCLUSIONS OF LAW AND POLICY

³ Agency Exhibit 7.

⁴ Agency Exhibit 5.

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force.” DHRM § 1.60(V)(B).⁵ Group II offenses “include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal.” DHRM § 1.60(V)(B)(2). Group III offenses “include acts and behavior of such a serious nature that a first occurrence should normally warrant removal.” DHRM § 1.60(V)(B)(3).

Group III offenses include, “Falsifying any records, including, but not limited to, vouchers, reports, insurance claims, time records, leave records, or other official state documents.” (Emphasis added). DHRM § 1.60(V)(B)(3)(b). “Falsifying” is not defined by DHRM Policy 1.60, 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*.

After attending the February 20, 2002 staff meeting, Grievant knew or should have known that she was obligated to accurately state the time she entered and left the building based on the clock in the Facility. By regularly writing her exit time as 4:00 p.m., Grievant falsified the logbook and inaccurately informed the Agency of her time at work.

Grievant contends she did not intend to falsify the time log. Portions of her evidence are inconsistent. Grievant’s written statement indicates she signs out at the “exact time” she leaves the building. Her testimony showed she believed she was instructed to sign out at 4 p.m. even if she left early. Grievant testified that she asked the Principal what time she should put on the log if she left early and the Principal supposedly stated to sign out at 4 p.m. and then the Principal turned to a coworker and said words to the effect “so we can get her (Grievant) fired.” The Principal denies making these statements, but if she had made them, it would show that Grievant knew the Principal intended to terminate her by having her sign the logbook to show 4 p.m. rather than the time she left work. With this information, Grievant should have known

⁵ The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

she was at risk of being terminated if she wrote 4 p.m. on the logbook when she left earlier.

Grievant contends that the Agency has suffered no injury because of her falsification. Since Grievant is a salaried employee and not a wage employee, the precise time she left did not affect her compensation, according to Grievant. This argument is untenable because it ignores the fact that Grievant's compensation includes limited annual leave benefits. When an employee leaves work early for personal reasons, the employee must use annual leave thereby reducing the employee's paid annual leave balances. Grievant's pattern of leaving early without taking annual leave meant her annual leave balances were not being decreased appropriately. Thus, Grievant retained paid annual leave for which she was not entitled.

Grievant argues the Agency targeted her for removal based on personal disagreements between her and her co-workers. Although the evidence showed disagreements among workers, the evidence was not sufficient to show that Grievant was targeted for disciplinary action or that other employees were treated differently.

Grievant argues she was given permission to leave the Facility early. The evidence showed that Grievant was given permission to leave her classroom in the basement in order to walk to the gate and avoid inmate traffic. Because of her leg injury, she needed additional time to walk from the basement upstairs. No credible evidence was presented suggesting Grievant could leave the workplace before 4 p.m. Even if Grievant had been given permission to leave the workplace early, she should have signed out with the correct time she left. She was not disciplined for leaving early; she was disciplined for incorrectly recording the time she left the workplace.

Grievant contends the Agency could have simply counseled her following the first time she left early thereby giving her an opportunity to correct her behavior. Although Grievant is correct that the Agency could have done so, the Agency is not obligated to do so. Grievant was given adequate notice of the Agency's expectations regarding recording entry and exit times, yet Grievant failed to comply with those expectations.

Grievant argues she is being treated differently from other staff who incorrectly recorded their entry or departure times. If the Hearing Officer assumes Grievant's evidence is correct, no evidence was presented suggesting the Agency Principal or managers were aware of the practices of other employees. Grievant admits she did not tell anyone about the alleged abuse of time by other staff.

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 file an administrative review request within **10 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy.
3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 10 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 10-calendar day period has expired, or when administrative requests for 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 final.⁶

[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].

Carl Wilson Schmidt, Esq.
Hearing Officer

⁶ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5555-R

Reconsideration Decision Issued: December 26, 2002

RECONSIDERATION DECISION

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. “[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis ...” to grant the request.

Grievant contends she has new evidence which could not have been discovered before the hearing. She does not describe that evidence. The Hearing Officer cannot grant a reconsideration when a party does not specify the evidence upon which reconsider is sought. Merely an allegation of new evidence is insufficient. For this reason, Grievant’s request for reconsideration is **denied**.

APPEAL RIGHTS

A hearing officer’s original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 10 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the

circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

Carl Wilson Schmidt, Esq.
Hearing Officer

POLICY RULING OF DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the matter of the Virginia Department of Correctional Education
January 13, 2003

The grievant is challenging the hearing officer's December 13, 2002, decision in Grievance No. 5555. The grievant has requested an administrative review of her case because she disagrees with the hearing officer's decision. The grievant raised several concerns with the outcome of the hearing officer's decision. Summarily, her concerns were related to evidence and testimony utilized at the hearing and how the hearing officer assessed. The agency head, Ms. Sara Redding Wilson, has requested that I conduct this review.

FACTS

The Virginia Department of Correctional Education (DCE) employed the grievant as an Academic Teacher. The DCE issued her a Group III Written Notice and terminated her for falsifying state documents. She filed a grievance and the hearing officer issued his decision on December 13, 2002. In his decision, the hearing officer upheld DCE's disciplinary action. The grievant challenged the decision by appealing to the Department of Human Resource Management (DHRM) for an administrative review.

To support her contention that the hearing officer's decision should be modified, the grievant contends that several procedural matters at the hearing were not appropriate. More specifically, she contends that she was not given an opportunity to confront her accuser or other witnesses at the hearing; her explanation from a former school principal regarding an understanding that she was to leave the facility early made no difference in the outcome of the hearing; the hearing officer failed to include in his written summary certain items that were discussed at the hearing; and she implied that there was a conspiracy against her by two other individuals.

DISCUSSION

Hearing officers are authorized to make findings of fact as to the material issues in the case, to determine whether witnesses will testify based on the relevancy of their testimony, and to determine the grievance based on the evidence. The Department of Employment Dispute Resolution administers the grievance procedure and rules on procedural matters. By statute, the Department of Human Resource Management has the authority to determine whether the

hearing officer's decision is consistent with policy as promulgated by this Agency or the agency in which the grievance is filed. The challenge must cite a particular mandate or provision in policy. This Department's authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

In the present case, the issues you raised are procedural and evidentiary matters and are outside the statutory authority of the DHRM to review. In summary, you have not raised an issue that this Office is authorized to review because you have not identified either a DCE or DHRM policy that the hearing officer violated when making his decision. Rather, it appears to this Office that you are disagreeing with the hearing officer's decision that is unrelated to any policy violation. Thus, we have no basis to interfere with this decision. Because the issues are outside the purview of this Office, we suggest that you pursue your appeal through the Department of Employment Dispute Resolution.

If you have any questions regarding this determination, please call me at (804) 225-2136.

Ernest G. Spratley

Manager, Employment
Equity Services