Issue: Group III Written Notice (falsifying a state document); Hearing Date: 11/21/02; Decision Date: 11/25/02; Agency: DOC; AHO: David J. Latham, Esq.; Case No.: 5574

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5574

Hearing Date: November 21, 2002
Decision Issued: November 25, 2002

APPEARANCES

Grievant
Representative for Grievant
Two witnesses for Grievant
Health Care Administrator
Four witnesses for Agency

ISSUES

Did the grievant's actions warrant disciplinary action under the agency's Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

FINDINGS OF FACT

The grievant filed a timely appeal from a Group III Written Notice issued because she had falsified a state document between June 5 and 11, 2002.[1] Following failure to resolve the grievance, the agency head qualified the grievance for a hearing.[2]

The Department of Corrections (DOC) (hereinafter referred to as agency) has employed the grievant as a registered nurse for nine years. She is a non-exempt employee. Grievant had been counseled previously about the necessity to obtain supervisory approval for working overtime.[3] Agency policy provides that registered nurses shall be paid for all overtime hours worked over 40 hours or have their hours adjusted during the work period.[4]

Grievant's work period, determined by the facility, was a seven-day cycle. In completing her time sheets, she was required to account for all time actually worked in her normal workweek of Wednesday through Tuesday. Facility policy provides that overtime expense is to be avoided if at all possible in order to avoid exceeding budgeted salary expense. However, notwithstanding the effort to avoid overtime, the agency had previously paid grievant for overtime when she worked it and when she properly accounted for it on time sheets.[5] If an employee worked beyond her normal hours one day, the practice was to adjust that time off by working fewer hours on another day within the same workweek. It was not permissible for grievant to carry time over from one week to the next week.[6] The facility had been audited in early 2002 creating a heightened awareness of the necessity to properly record all time worked.

At times, grievant receives calls at home from the facility to deal with a medical situation. The standing practice is that any medical person handling such a phone consultation at home is to receive credit for 15 minutes of work (regardless of the actual length of the call). If it is necessary for the employee to return to the facility to handle the medical problem, she is to receive credit for two hours of work (regardless of the actual time involved).[7] All such credited time is to be included on the time sheets as time worked.

For the week of June 5-11, 2002, grievant completed a sign-in/out sheet[8] and a weekly time sheet,[9] both of which indicated that she had worked a total of 40 hours. Her supervisor signed both sheets and turned them in to the office

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[1] Exhibit 15. Written Notice, issued September 12, 2002.
[2] Exhibit 14. Grievance Form A, filed October 1, 2002.
[3] Exhibit 12. Counseling letter from superintendent to grievant, December 5, 2000.
[4] Exhibit 5. DOC Procedure Number 5-35, *Overtime and Schedule Assignments*, June 1, 1999.
[5] Exhibit 13. Grievant's pay voucher for December 28, 2001.
[6] Grievant has subsequently been switched to a 28-day cycle.
[7] Exhibit 5. Section 5-35.16, *Ibid.*
[8] Exhibit 6. Sign-in/out sheet for week of June 5-11, 2002.
[9] Exhibit 8. Weekly time sheet for week of June 5-11, 2002.

services specialist who is the timekeeper for all employees. On June 18, 2002, grievant had a conversation with the timekeeper and mentioned that she had actually worked 44.9 hours but that her supervisor told her to put only 40 hours on the time sheets.[10] Grievant's supervisor had told her to adjust the 4.9 hours the following week.[11] The timekeeper then asked grievant to fill out corrected time sheets reflecting the actual hours worked, which the claimant did.[12]

The timekeeper advised the superintendent, who notified the health care administrator about the situation. Prior to June 14, 2002, the supervision of health services personnel was bifurcated. The Office of Health Services had jurisdiction over all clinical matters while the facility superintendent had responsibility for certain administrative functions including discipline. After June 14, 2002, the entire supervision of health service employees, including discipline, was consolidated under the Office of Health Services.[13] Because this incident occurred at about the same time as the supervision consolidation, there was some confusion over who should be handling the matter.

On August 1, 2002, the facility superintendent met with grievant to discuss the matter. Grievant refused to say that her supervisor had told her not to put the full amount of time worked on the time sheet but neither did she deny it. She maintained only that she and her supervisor had "worked everything out." The superintendent asked grievant to provide a written statement documenting her statements in the meeting but grievant refused to follow this instruction. Subsequently, the superintendent sent a memorandum documenting the meeting to the health care administrator.[14] The case was assigned to an investigator who conducted his investigation between August 2 and 19, 2002.

On occasion, the timekeeper has returned time sheets to employees due to accidentally omitted entries, arithmetical errors in adding time, or forgotten signatures. However, there had not previously been any incidents involving the deliberate falsification of entries or omission of hours actually worked. Grievant and her supervisor had adjusted time off and compensated for it in the following week on several previous occasions.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes

[10] Exhibit 11. Memorandum from timekeeper, June 25, 2002.
[11] Exhibit 19. *Investigative Interview*, signed by grievant, August 8, 2002.
[12] Exhibits 7 & 9. Corrected sign-in/out and time sheets.
[13] Exhibit 20. Memorandum from Medical Services Director to chief medical supervisors, June 14, 2002.
[14] Exhibit 3. Memorandum from superintendent to health care administrator, August 1, 2002.

procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. Murray v. Stokes, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

> It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . . To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.[15]

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the Code of Virginia, the Department of Personnel and Training[16] promulgated Standards of Conduct Policy No. 1.60 effective September 16, 1993. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action. Section V.B.3 defines Group III offenses to include acts and behavior of such a serious nature that a first occurrence should normally warrant removal from employment.

The Department of Corrections, pursuant to Va. Code § 53.1-10, has promulgated its own Standards of Conduct and Performance, which is modeled very closely on the DHRM Standards of Conduct. Group III offenses include acts and behavior of such a serious nature that a first occurrence should normally warrant removal from employment; one example of a Group III offense is falsifying any records or other official state documents.[17]

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[15] § 5.8, Grievance Procedure Manual, *Rules for the Hearing*, Effective July 1, 2001.

[16] Now known as the Department of Human Resource Management (DHRM).

[17] Exhibit 1. Section 5-10.17A & B.2, Department of Corrections Procedure Number 5-10, *Standards of Conduct*, June 1, 1999.

Grievant complains that the agency failed to comply with its own policy which requires that, prior to discipline, the agency must inform the employee of the evidence in support of the charge and give the employee a reasonable opportunity to respond. The agency did not rebut grievant's complaint. It is not within the purview of this hearing to investigate that allegation. However, if the agency was out of compliance with its own policy, it should take whatever steps are necessary to avoid future repetition. In any case, the grievant did have ample notice of the agency's evidence prior to this hearing and has been given full opportunity to respond during the hearing. Therefore, this due process hearing has cured the earlier procedural defect.

The agency has demonstrated that grievant knowingly submitted time sheets that she knew to be inaccurate. Grievant has admitted that she worked 44.9 hours during the week of June 5-11, 2002 but she initially submitted time sheets that showed only 40 hours of work. Further, she knew that she is a non-exempt employee and that the agency is required to pay registered nurses for all overtime hours over 40 worked within the work period. Thus, the agency has borne the burden of proof, by a preponderance of the evidence, to show that grievant committed an offense subject to discipline under the Standards of Conduct.

Grievant argues that she would have preferred to take an adjustment of time rather than accurately record the overtime she worked.[18] Grievant fails to understand that the accurate recording of time worked is not an option that employees may decide on their own. Both state and federal law require the accurate recording of hours worked by non-exempt personnel. While the adjusting of hours is permitted, such time must be adjusted within the same work period.

Grievant contends that disciplinary action must be administered within 30 days from the time of the incident.[19] However, grievant has submitted no evidence to support this assertion. The Standards of Conduct provides that as soon as a supervisor becomes aware of an employee's unsatisfactory behavior or performance, or commission of an offense, the supervisor and/or management should use corrective action to address such behavior. Management should issue a written notice as soon as possible after an employee's commission of an offense. In this case discipline was issued nearly three months after the offense. The jurisdictional issue clouded for a time who should be administering discipline and this accounted for a portion of the delay. Nonetheless, the issue herein was not so complicated that it could not have been investigated and brought to a conclusion in a shorter period of time. Therefore, the agency should take steps in the future to promptly investigate and conclude potential disciplinary matters.

[18] Exhibit 14. Attachment to grievance form.
[19] Exhibit 14. *Ibid*.

There are factors in this case that mitigate in the grievant's favor. First grievant has been employed with the Commonwealth for nine years. Second, she has no record of any previous disciplinary action. Third, her performance evaluations have been good. Fourth, the offense was not intended to cost the agency any money and, in fact, actually would have saved money. Grievant was not attempting to obtain money to which she was not entitled; rather, she was foregoing money to which she was legally entitled. Fifth, grievant had taken to heart the superintendent's counseling letter of December 2000. Grievant (whose first language is not English) believed that any overtime might result in disciplinary action. Finally, grievant was complying with the instructions of her supervisor. Her supervisor had led her to believe that the adjusting of time was consistent with the practice at other agency facilities. While grievant should have known better than to falsify a document, the undue influence of a direct supervisor is a powerful motivator.

Because of these mitigating factors, and the unique circumstances of this case, the hearing officer concludes that grievant's offense was not one that requires immediate termination of employment (definition of a Group III offense). Rather, her offense is one that if repeated in the future, should warrant her immediate removal (definition of a Group II offense). Her offense was essentially a failure to comply with established written policy.

DECISION

The disciplinary action of the agency is modified.

The Group III Written Notice for falsifying an official state record is hereby REDUCED to a Group II Written Notice for failure to comply with established written policy. The disciplinary action shall remain active pursuant to the guidelines in Section VII.B.2 of the Standards of Conduct.

It is recommended that the agency take appropriate steps to assure that employees who receive disciplinary action are afforded, in advance, the proper due process notice specified by agency procedure number 5-10.14.

It is further recommended that the agency take appropriate steps to assure that future offenses by employees are investigated expeditiously and that disciplinary actions are issued promptly.

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.[20]

[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]

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David J. Latham, Esq.
Hearing Officer

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