Issue: Group III Written Notice (falsifying a state document); Hearing Date: 11/21/02; Decision Date: 11/26/02; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 5575

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5575

Hearing Date: November 21, 2002
Decision Issued: November 26, 2002

APPEARANCES

Grievant
One witness 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 he 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 Chief Nurse for four years. As a supervisor, grievant is an exempt employee.[3] He supervises a registered nurse who is a non-exempt employee. Agency policy provides that non-exempt registered nurses shall be paid for all overtime hours worked over 40 hours or have their hours adjusted during the work period.[4]

The work period for the registered nurse supervised by grievant was a seven-day cycle, as determined by the facility. 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 the nurse for overtime when she worked it and when she properly accounted for it on time sheets. 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 the nurse to carry time over from one week to the next week.[5] The facility had been audited in early 2002 creating a heightened awareness of the necessity to properly record all time worked.

At times, nurses receive 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).[6] All such credited time is to be included on the time sheets as time worked.

For the week of June 5-11, 2002, the nurse completed a sign-in/out sheet[7] and a weekly time sheet,[8] both of which indicated that she had worked a total of

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[1] Exhibit 6. Written Notice, issued September 12, 2002.
[2] Exhibit 6. Grievance Form A, filed September 27, 2002.
[3] Exempt personnel means those employees who are not covered by the overtime provisions of the Fair Labor Standards Act. See Exhibit 10, DOC Procedure Number 5-35, *Overtime and Schedule Adjustments*, June 1, 1999.
[4] Exhibit 10. *Ibid.*
[5] The nurse has subsequently been switched to a 28-day cycle.
[6] Exhibit 10. DOC Procedure No. 5-35, Section 5-35.16, *Ibid.*
[7] Exhibit 4. Sign-in/out sheet for week of June 5-11, 2002.

40 hours. Grievant certified both time sheets by signing them, and turned them in to the office services specialist who is the timekeeper for all employees. On June 18, 2002, the nurse had a conversation with the timekeeper and mentioned that she had actually worked 44.9 hours but that grievant told her to put only 40 hours on the time sheets. Grievant had told the nurse that he would adjust the 4.9 hours the following week. The timekeeper then asked the nurse to fill out corrected time sheets reflecting the actual hours worked, which the claimant did.[9]

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.[10] 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 June 21, 2002, the facility superintendent met with grievant to discuss the matter. Grievant acknowledged that he allowed his staff to adjust their work hours after their workweek ended in an effort to avoid overtime.[11] However, in a meeting on August 1, 2002, grievant told the superintendent that he had directed the nurse to make the adjustment within the same workweek. In the same meeting the nurse maintained that she and grievant had "worked everything out." Subsequently, the superintendent sent a memorandum documenting the meeting to the health care administrator.[12] 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 the nurse had adjusted time off and compensated for it in the following week on several previous occasions.

The grievant's subordinate (registered nurse) has been disciplined with a Group II Written Notice for her involvement in this situation.

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[8] Exhibit 4. Weekly time sheet for week of June 5-11, 2002.
[9] Exhibit 4. Corrected sign-in/out and time sheets.
[10] Exhibit 12. Memorandum from Medical Services Director to chief medical supervisors, June 14, 2002.
[11] Exhibit 7. Memorandum from facility superintendent to Health Care Administrator, August 1, 2002.
[12] Exhibit 7. *Ibid*.

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 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.[13]

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[14] 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

[13] § 5.8, Grievance Procedure Manual, *Rules for the Hearing*, Effective July 1, 2001.
[14] Now known as the Department of Human Resource Management (DHRM).

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.[15]

Grievant contends that he did not realize that the nurse had not included her 4.9 hours of overtime when he signed the time sheets.[16] However, in the same written statement, grievant states that he, "did tell [the nurse] that I would adjust her time later in the week." If grievant did not know about the overtime, it is inconsistent that he would tell her that he would adjust her time later in the week. Therefore, it is concluded that grievant knew that the nurse had worked overtime and that he planned to adjust it later.

The agency has demonstrated that grievant knowingly submitted time sheets that he knew to be inaccurate. He knew that the nurse had worked 44.9 hours during the week of June 5-11, 2002 but he initially submitted time sheets that showed only 40 hours of work. Further, he knew that the nurse 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 the Group III offense of falsification of a state document.

Grievant was convinced that other DOC facilities had nurses working on a 28-day cycle, thereby giving nurses the flexibility to adjust overtime off at any time during the 28-day period. He believed that it was only his facility that had nurses on a seven-day cycle, and that his facility was not handling the overtime issue correctly. Grievant fails to understand that accurate recording of time 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 may not take it upon himself to decide which rules should be observed and which should be ignored. Even if grievant believed he was correct about the cycle issue, it is incumbent upon him to enforce the rules at his facility until such time as the proper authority effects a change in those rules.

Not only did grievant ignore the facility's rule but he also influenced his subordinate to go along with the rule violation. The subordinate should have known that she was violating established written policy but grievant convinced her that he would be able to "work everything out." Supervisors are expected to set the correct example for subordinates and therefore are held to a higher standard than non-supervisory employees. Moreover, grievant has changed his story. On June 21, 2002 he admitted what he was doing because he believed it was the practical solution of a problem, and because he believed other facilities were using the same approach. When he learned that the matter was being

[15] Section 5-10.17A & B.2, Department of Corrections Procedure Number 5-10, *Standards of Conduct*, June 1, 1999.
[16] Exhibit 1. Grievant's signed statement to investigator, August 13, 2002.

taken very seriously, he denied his admission and claimed that he just made a mistake. This type of behavior is not acceptable from any employee but it is especially unacceptable from a supervisor.

Grievant alleges that the agency's investigator, the facility superintendent, and the office service specialist (timekeeper) all lied during the hearing. He also alleges that the health care administrator and the regional director engaged in a conspiracy designed to discharge grievant. The hearing officer finds these allegations to be unsupportable for the following reasons. First, grievant has provided no corroborative testimony or evidence to prove his allegations; mere allegations without some form of supporting evidence are not proof. Second, the investigator is a totally independent investigator who has no interest other than ascertaining the facts in the situation. Third, if the health care administrator had wanted to discharge grievant, the administering of a Group III Written Notice gave him the perfect opportunity to do so. However, the health care administrator noted on the Written Notice that he found mitigating circumstances (19 years of state service, excellent performance evaluations, and no prior discipline). As a result of the mitigation, grievant was given only a Written Notice; he was not discharged, and he was not suspended, transferred or demoted - all potential forms of discipline that could have accompanied the Written Notice.

Grievant contends that when he signed the time sheets, he was distracted by the personal situation of another nurse. It is commendable that grievant had compassion for another nurse's personal problem. However, as a supervisor, grievant is responsible for certifying that documents he signs are correct and accurate. In fact, time sheets are considered by the agency to be a sufficiently important document that the form includes a certification statement just above the grievant's signature.

Grievant contends that he had nothing to gain by submission of inaccurate time sheets. However, grievant testified at length that the agency was attempting to avoid overtime expense. In fact, the matter was considered so important that the regional director had advised his superintendents that supervisors who allowed their subordinates to work overtime should be disciplined. Grievant was well aware of this directive and it was for this reason that he always made sure that overtime worked was adjusted off – within the same week if possible, but (as in this case) in the following week if necessary. Thus, grievant knew he had a lot to lose if he allowed anyone to work overtime.

State agencies are in a squeeze situation. On one hand the Fair Labor Standards Act mandates that non-exempt employees must be paid for overtime worked. On the other hand, agencies are struggling to keep a cap on budgets by avoiding overtime expense. To comply with both requirements, it is essential that supervisors manage the hours worked by their employees so as to assure that any necessary overtime is adjusted off within the designated work cycle – in this

case, the same workweek. Grievant thought he could skirt the rule by adjusting into the following workweek without telling management what he was doing.

DECISION

The disciplinary action of the agency is affirmed.

The Group III Written Notice for falsifying an official state record is hereby UPHELD. The disciplinary action shall remain active pursuant to the guidelines in Section VII.B.2 of the Standards of Conduct.

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.[17]

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

[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