

Issues: Group II Written Notice (failure to follow supervisor's instructions, perform assigned work, or otherwise comply with established written policy) and Group III Written Notice with termination (falsifying time sheets); Hearing Date: 05/08/03; Decision Issued: 06/04/03; Agency: UVA; AHO: Carl Wilson Schmidt, Esq.; Case No. 5708; **Administrative Review: HO Reconsideration Request received 06/13/03; Reconsideration Decision issued 06/23/03; Outcome: No newly discovered evidence or incorrect legal conclusions identified. Request to reconsider denied.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5708

Hearing Date: May 8, 2003

Decision Issued: June 4, 2003

PROCEDURAL HISTORY

On January 28, 2003, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow supervisor's instructions, perform assigned work, or otherwise comply with established written policy. Grievant also received a Group III Written Notice with removal for "Falsifying any records or other official documents. Time sheets."

Grievant timely filed grievances to challenge the Agency's actions. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On April 10, 2003, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 8, 2003, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Counsel
Nine witnesses

ISSUES

1. Whether Grievant should receive a Group II Written Notice of disciplinary action for failure to follow a supervisor's instructions, perform assigned work or otherwise comply with established written policy.
2. Whether Grievant should receive a Group III Written Notice of disciplinary action with removal for falsification of official State documents, namely timesheets.

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary actions against the Grievant are 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 University of Virginia employed Grievant to manage the mail order department within its bookstore until her removal effective January 28, 2003. No evidence of prior disciplinary action against Grievant was introduced.

The costs of operating the University's bookstore are paid from the revenues generated by the bookstore. Bookstore revenues can be adversely affected by poor customer service offered by bookstore staff. Bookstore managers believe good customer service is important to increase revenues and protect the reputation of the University.

Customers who wish to purchase items containing the University's logo can purchase them at the bookstore or can order those products by telephone or through the bookstore's website. The bookstore's business is seasonal. One of the busy seasons lasts from November 15 to December 15 of each year. During that time, bookstore staff process approximately 150 to 175 orders per day.

On June 7, 2001, the Supervisor presented Grievant with a memorandum discussing Grievant's inadequate work performance. The memorandum states, in part:

As per previous conversations, YOU MUST, submit a request for time off prior to the date you wish to take off. The only exceptions are: 1. An emergency, 2. Illness.

Because of the demand of your department, you cannot just take time off during your scheduled hours, without authorization, and/or, someone to cover your department. Proper planning will take care of this.

On August 10, 2001, the Supervisor presented Grievant with a memorandum stating, in part:

Please consider this a formal warning. I will no longer be able to tolerate your un-authorized absences during the normal workday.

As we have previously discussed, it is necessary for you to make me aware of any and all absences, and/or, early departures, during your scheduled workday. As all other Department Managers, it is necessary to put any appointments, and/or, dates that will take you away from your responsibilities, on the community calendar, located in my office.

If you leave, and cannot return, it is your responsibility to notify me. If I am not in the store, I always have my cell phone with me. The number is [number].

On April 10, 2002, the Supervisor presented Grievant with a memorandum stating, in part:

As you, [Director] and I discussed on Monday, April 8, there are things that you need to focus, and/or, work on. Those things are:

- Professional behavior
- Honest and forthright communication with [Director], me and other General Merchandise Managers
- Following the Operational Guidelines and Procedures
- Customer Service and Customer Satisfaction
- Accurate, timely and efficient performance of your responsibilities
- Follow up on promises/commitments made to Customers, and/or, Co-workers
- Assisting others when called upon to do so
- Proper handling of time off requests, coming in late, leaving early, and time sheets

On June 10, 2002, the Supervisor presented Grievant with a memorandum stating, in part:

Your hours are from 9 a.m. to 6:00 p.m.

You should be at your workstation by 9:00 a.m.

You should NOT leave before 6:00 p.m. (unless you have my approval)

As we have discussed previously, you cannot leave when I am not here, without my approval. This seems to happen each time I am scheduled to be out.

You CANNOT come and go as you please, as we must look out for the best interest of your Department.

My cell # is [number], if I am not in the office, I can ALWAYS be reached.

If you need time off, you MUST fill out a leave request, and obtain permission, PRIOR to the date and time you need off.

A slip must be filled out each time you are out, and, submitted to me.

A slip must be filled out each time you work over, and, submitted to me.

You CAN NOT miss time one day and make it up on another day, there are to be no exceptions.

Leave Requests, and Overtime Sheets are attached.

In an undated memorandum, the Supervisor informed Grievant that:

All Managers are required to work an additional five (5) hour per week, before Comp time is allowed. You will be required to work these additional five hours, weekly, until after Mail Order season is over. In the event that order processing/shipping is not current, you will be required to work overtime. ***

Due to safety issues, as well as productivity issues, the UVA General Counsel has stated, children are not to be in the work place. It will be necessary for you to make sure that you have adequate childcare, as your attendance is not only required, it is critical. ***

The bookstore experienced many problems during the 2001 Christmas season. In order to avoid repeating those problems during the 2002 season, bookstore managers decided to locate Grievant in the warehouse with two other employees and let them focus on shipping mail orders. From November 15, 2002, to December 18, 2002, Grievant worked exclusively in the warehouse rather than from her office in the retail store.

Bookstore staff use the PRISM system to process orders. Products are listed on the bookstore's website. Orders taken from the website must first go through WebPRISM before the data is transferred to the PRISM system. In December 2002, the bookstore experienced problems with its order processing system. Data was not being properly recorded for certain orders on several occasions. The website also had some items incorrectly labeled.

The bookstore received several complaints from customers who had not received their products on a timely basis, or who had been double billed or under billed for products they received.

To request leave from work, an employee must fill out a "Application for Leave of Absence" form printed on pink paper.¹ The employee must write his or her name, indicate the number of hours of leave and dates of leave and the reason for the leave (e.g. annual, compensatory, sick, and overtime leave). If the leave is approved, the employee's supervisor signs the leave form and the employee may then take the leave.

Employees may not work overtime hours unless first approved by the employee's supervisor and by the Director. Employees must fill out a request form detailing the dates and hours of the overtime. The form is printed on green paper.

On December 18, 2002, Grievant submitted her timesheet for the period December 10, 2002 to December 24, 2002. Because of the holiday schedule, all employees submitted their timesheets before the end of the pay period. On December 23, 2002, Grievant gave "a pile of orders" to the Retail Clerk and said she was leaving for the day. Grievant left the workplace at 4 p.m. without permission from the Supervisor to do so. She had reported previously that she would work 8 hours on December 23, 2002. Grievant left because her work had slowed.

On January 6, 2003, Grievant left work at 2:30 p.m. without permission. She did not complete her eight hour workday. She submitted a timesheet showing she worked eight hours on January 6, 2003.

CONCLUSIONS OF POLICY

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).² 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 II Written Notice

In December 2002, the University's order processing systems were not functioning error free. There were several times when the systems failed to properly record data. Some of the errors ascribed to Grievant by the University could have been explained by problems with the University's computer systems. When the number of

¹ Agency Exhibit 4.

² The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

errors is compared to the total number of orders processed per day (approximately 150 to 175), the processing problem does not appear so significant that it could not be explained by problems with the computer system. The Group II Written Notice issued to Grievant must be reversed.

The University contends Grievant failed to submit her timesheet to the Supervisor for approval. The evidence showed that Grievant knew she had to submit her timesheets on a timely basis and could not locate the Supervisor. Grievant knew that the employee who processed timesheets would refer the timesheet to the Supervisor for approval. Grievant did not intend to violate the University's practices.

Group III Written Notice

"Falsifying any records, including, but not limited to, vouchers, reports, insurance claims, time records, leave records, or other official state documents" constitutes a Group III offense. DHRM § 1.60(V)(B)(3)(b).³ "Falsifying" is not defined by DHRM § 1.60(V)(B)(3)(b) or DHRM § 2.10, 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*.

Grievant submitted a timesheet showing she would work eight hours on December 23, 2002. She left early without permission. She was paid for working more hours than she actually worked. She made no attempt to adjust her timesheet. On January 9, 2003, Grievant submitted a timesheet showing she had worked eight hours on January 6, 2003. She left work at 2:30 p.m. on January 6, 2003 without permission and did not work a full eight hours. She knew or should have known that three days earlier she had not worked a full eight hours. The Supervisor informed Grievant on numerous occasions that she was not to leave the worksite without permission. Grievant's actions amount to falsification of time records. The University has met its burden of proof to establish Grievant should be given a Group III Written Notice with removal.

³ The Hearing Officer construes this language to include the circumstances where an employee creates a false document and then submits it to an agency where that document becomes a record of the agency.

Grievant admits that she left work early on December 23, 2002, but justifies doing so because she had worked more than 40 hours in the prior week and had not asked for reimbursement for that time. By leaving early on December 23, 2002, she intended to account for some of the extra uncompensated hours she had worked previously with the net effect that the University would receive several hours of work from her for which the University had not paid. Grievant's justification fails. Given the number of times the Supervisor informed Grievant not to leave work early without the Supervisor's permission, Grievant knew or should have known that her attempt to adjust her work schedule would not be in accordance with the University's policies or practices.

Grievant contends she did not leave early on January 6, 2003, but instead left the retail store and worked in the warehouse until the end of her shift. This argument is inconsistent with the weight of the evidence showing she simply left the worksite early. Before going to the warehouse, employees were required to notify a supervisor. Grievant did not notify anyone she was going to the warehouse. She also had her child with her and children were not permitted in the warehouse. Grievant had been relocated to the retail store on December 18, 2002. There was no reason for her to go to the warehouse.

Grievant contends she suffered from food allergies affecting her performance. The evidence is insufficient for the Hearing Officer to determine the extent to which her food allergies affected her performance.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is **rescinded**. 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.⁴

[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

⁴ 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: 5708-R

Reconsideration Decision Issued: June 23, 2003

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 seeks reconsideration of the hearing decision issued on June 4, 2003 because (1) Grievant’s son was in school on January 6, 2003, and (2) Ms. EG was not at work on January 6, 2003.

Grievant attached an exhibit to her request for reconsideration showing the dates that her son was absent from school or tardy. Grievant argues this is proof that her son was in school on January 6, 2003 and could not have been with Grievant on January 6, 2003 as the agency witnesses testified. The University contends Grievant’s son’s elementary school was closed on January 6, 2003 and the school’s records would not show children to be absent on days the school is closed.

There is no basis to reopen the hearing decision based on the attendance document submitted by Grievant. The exhibit does not show that the child was in school, it only shows the dates he was not in school. Without some direct evidence showing that the child was in school in January 6, 2003, the University’s assertion that school was closed on January 6, 2003 is un rebutted.

Grievant presented documents showing that Ms. EG was taking annual leave on January 6, 2003 and could not have been at work as the University alleged. Whether Ms. EG was at work on January 6, 2003 is not essential to establishing that Grievant left early from work on January 6, 2003. Ms. EG testified that she was informed by another employee on January 6, 2003 that Grievant was not at work. Ms. EG did not testify that

she observed Grievant leave the worksite. Ms. DC, however, testified that she observed Grievant leave the worksite on January 6, 2003. Her testimony was credible. Grievant has presented no evidence suggesting Ms. DC was not working on January 6, 2003.

Although Grievant has questioned the University's evidence surrounding Grievant's absence on January 6, 2003, Grievant has not offered any new evidence to contest the University's assertion that Grievant left work early on December 23, 2002. Accordingly, without considering the events occurring on January 6, 2003, there remains a sufficient basis to conclude that Grievant falsified her time records thereby justifying issuance of a Group III Written Notice with removal.

Grievant's request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. 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