Issue: Group III Written Notice with termination (falsifying leave records); Hearing Date: 03/24/04; Decision Issued: 03/25/04; Agency: TAX; AHO: David J. Latham, Esq.; Case No. 603

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 603

Hearing Date: March 24, 2004
Decision Issued: March 25, 2004

PROCEDURAL ISSUES

Grievant requested as part of the relief he seeks that: the Contact Center be investigated; the third revisions of his monthly evaluations be discarded; and, he be given a letter of apology. Hearing officers may provide certain types of relief including reduction or rescission of the disciplinary action.[1] However, hearing officers do not have authority to direct an agency to conduct an investigation, discard evaluations or, issue a letter of apology.[2] Such decisions are internal management decisions made by each agency, pursuant to Va. Code § 2.2-3004.B, which states in pertinent part, "Management reserves the exclusive right to manage the affairs and operations of state government."

APPEARANCES

Grievant
Attorney for Grievant

[1] § 5.9(a)2. Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001.
[2] § 5.9(b)4, 5, 6 & 7. *Ibid.*

Tax Executive Assistant (Office Manager)
Representative for Agency
Observer for EDR

ISSUES

Was the grievant's conduct such as to warrant disciplinary action under the 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 grievance from a Group III Written Notice issued for falsifying leave records.[3] Grievant was removed from employment on December 2, 2003 as part of the disciplinary action. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.[4]

The Virginia Department of Taxation (Hereinafter referred to as "agency") has employed grievant as a Customer Service Representative[5] for three years. Grievant has two prior active disciplinary actions – a Group I Written Notice for unsatisfactory attendance and excessive tardiness[6] and, a Group II Written Notice for failure to follow a supervisor's instructions or otherwise comply with established written policy (issued for continued unsatisfactory attendance and excessive tardiness).[7] Grievant's regularly scheduled work hours are from 8:15 a.m. to 5:00 p.m., with one 15-minute break in the morning, 45 minutes for lunch and, one 15-minute break in the afternoon.

Grievant had filed a previous grievance on October 14, 2003 contending that the Office Manager was unfair and had harassed him. On November 14, 2003, the grievance was resolved in grievant's favor at the second resolution step.[8] On November 19, 2003, the Office Manager ordered a computer printout of certain management reports so that grievant's attendance and tardiness could be cross-checked against leave activity reporting forms he had submitted. On December 2, 2003, the Office Manager issued the Group II Written Notice (see preceding paragraph) to grievant. On December 11, 2003, she issued the Group III Written Notice to grievant and removed him from employment because he had understated leave taken on leave activity reporting forms on five occasions during the preceding six months.

[3] Exhibit 4. Group III Written Notice, issued December 11, 2003.
[4] Exhibit 1. Grievance Form A, filed January 6, 2004.
[5] Exhibit 3. Grievant's Employee Work Profile, November 1, 2002.
[6] Exhibit 6. Group I Written Notice, issued May 27, 2003.
[7] Exhibit 7. Group II Written Notice, issued December 2, 2003.
[8] Exhibit 1. Grievance Form A and attachments, filed October 14, 2003.

Employees fill out and electronically sign for their leave activity using an electronic form (e-form). They forward the e-form to their supervisor who approves it and forwards it to a timekeeper. Grievant's supervisor does not verify whether the time recorded as leave is accurate; in effect, he rubber-stamps his approval without any type of verification and forwards the form to the timekeeper, who sends it to the office manager. Grievant's supervisor had told him that, when arriving at work at the time of a break or lunch, grievant could factor that time into his leave reporting.[9] For example, if grievant arrived at work at 11:00 a.m., he could record 2.5 hours of leave (8:15 a.m.-10:45 a.m.) because the 15-minute morning break would have occurred during that time period.

When employees arrive at the worksite, they must enter through a locked door controlled by an access card. As an employee swipes his card past the reader, a computer log records the time of arrival. When multiple employees arrive at the same time, it is common practice for the first employee to hold the door open so that other employees can follow without swiping their cards. Although policy requires that all employees should swipe their cards, many employees ignore the policy. The agency has not disciplined any employees for failing to swipe access cards when entering the work area. The restroom is located outside the access door; when one goes to the restroom, it would be necessary to again swipe the access card to regain entrance to the work area (unless one immediately follows a coworker through the door).

The agency alleges that grievant understated his leave on five occasions, each of which is addressed separately below:

1. May 1, 2003. Grievant submitted a leave form on April 28, 2003 indicating that he would take annual leave on May 1, 2003 from 8:15 a.m. to 12:15 p.m. Grievant actually utilized six hours of leave on May 1, 2003, arriving at work just before 3:00 p.m. Grievant acknowledges that he should have submitted a supplemental leave form for the additional two hours of leave but did not remember to do so. Grievant's supervisor did not tell grievant to submit a supplemental leave form at any time prior to grievant's removal from employment.

2. July 3, 2003. Grievant submitted a leave form on July 3, 2003 stating that he had taken annual leave from 8:15 a.m. to 10:45 a.m. The door access computer log and grievant's computer log-in report reflect that grievant arrived and logged in at 11:02 a.m. The agency contends that grievant understated his leave by .4 of an hour. Grievant maintains that he followed his supervisor's instructions by factoring in his break time to the

[9] The supervisor's instruction appears to be contrary to established written policy. Section III.C.2.b, Department of Human Resource Management (DHRM) Policy 1.25, *Hours of Work*, effective September 16, 1993, provides that rest breaks shall be included in the required hours of work per day. Section III.C.3.b (revised 12/94) further provides that neither a lunch period nor breaks may normally be used to compensate for an employee's late arrival or early departure.

recorded leave. The supervisor and timekeeper both approved the leave form.

3. September 12, 2003. Grievant submitted a leave form for this date indicating two hours of leave without pay. The door access log and grievant's computer log both show that grievant arrived and logged in at 10:36 a.m. The agency contends that grievant understated his leave by .4 of an hour; grievant factored in his 15-minute break time (8:15 a.m. – 10:15 a.m. + 15 minutes break) and arrived at 10:30 a.m.[10] Grievant's supervisor and the timekeeper both approved the leave form.

4. September 17, 2003. Grievant submitted a leave form for 2.5 hours of leave without pay from 8:15 a.m. to 10:45 a.m. Grievant maintains that he arrived at 11:00 a.m. on this date, and that he began taking telephone calls shortly after arrival. The door access log recorded 2:19 p.m. as the first time grievant swiped his card on September 17, 2003. He logged into the STARS account system at 2:20 p.m. and received his first incoming call at 2:23 p.m. The Rockwell log reflects that grievant had not logged out of his computer the preceding day; therefore, there is no log-in time recorded for September 17, 2003.

5. November 25, 2003. Grievant submitted a leave form claiming one hour of annual leave from 8:15 a.m. to 9:15 a.m. Grievant first swiped his door access card at 11:10 a.m. He logged into the STARS account system at 11:12 a.m. and received his first incoming telephone call at 11:13 a.m. Grievant avers that he arrived at work at 9:30 a.m. and worked on correspondence until he logged into his computer shortly after 11:00 a.m. Grievant's supervisor conducted a training class on the morning of November 25, 2003 and, therefore, did not observe grievant's arrival at work. A coworker was asked by the supervisor to note grievant's arrival time; she reported that he arrived between 11:15 a.m. and 11:30 a.m.[11]

The agency also charged that on August 12, 2003, grievant failed to swipe his access card when entering the work area. Grievant does not dispute this charge but relies on the fact that this is the common practice of many employees. There is no evidence that anyone has been disciplined for this policy violation.

The agency had found in the past that three other employees had inconsistencies between their leave forms and the door access computer reports and telephone logs. All acknowledged the inconsistencies and satisfied the agency that the inconsistencies resulted from incorrect but unintentional reporting. Two of the employees were counseled; one was disciplined.

[10] No written policy was offered to show how many minutes leeway are permitted before charging an employee with tardiness.
[11] Exhibit 1. Executive Commissioner's response to grievance, January 21, 2004.

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. In all other actions, such as claims of retaliation and discrimination, the employee must present her evidence first and must prove her claim by a preponderance of the evidence.[12]

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Va. Code § 2.2-1201, the Department of Human Resource Management 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,
and more serious actions of misconduct and to provide appropriate corrective action. Section V.B.3 of the Commonwealth of Virginia's *Department of Personnel and Training Manual* Standards of Conduct Policy No. 1.60 provides that Group III offenses include acts and beha

is one example of a Group III offense.[13]

t to distinguish between less serious t

[12] § 5.8, EDR *Grie ce Procedure Manual*, Effective July 1, 2001.
[13] Exhibit 2. Section V.B.3.b, DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

This decision does not address grievant's attendance and tardiness record. Grievant did not appeal the two disciplinary actions he received for unsatisfactory attendance and excessive tardiness. This decision focuses solely on the allegations in the Group III Written Notice.

Of the five instances cited by the agency, grievant has provided exculpatory explanations for three. Grievant acknowledges that he took six hours of leave on May 1, 2003. Because he had requested four hours in advance, he forgot to submit an additional leave form after the fact to account for the extra two hours he used. While this could be a self-serving story, the agency has no evidence to rebut grievant's explanation. If this were the sole infraction, grievant could now be required to charge the additional two hours to his annual leave balance.

Grievant's explanation of leave taken on July 3, 2003 and September 12, 2003 similarly overcomes the agency's allegation of deliberate falsification. Grievant has shown that his supervisor authorized him to factor in his morning break time when recording leave. The agency contends that the supervisor did not give such authorization but failed to offer the supervisor as a witness to rebut grievant's testimony.[14] As observed in footnote 9, state policy prohibits using a break to compensate for an employee's late arrival. However, if grievant had specific verbal permission to ignore the prohibition, it would be unfair to penalize grievant for the infractions. Thus, discounting the break time, on each of the two dates at issue, grievant was two minutes late in one case and six minutes late in the other. The agency has not produced any evidence regarding whether such minimal tardiness is considered as a chargeable tardy occurrence. These amounts of time are sufficiently *de minimus* in comparison to the punishment of removal from employment that, standing alone, they would not justify the discipline.

Grievant has not satisfactorily rebutted the evidence with regard to leave he took on September 17, 2003. While grievant maintains that he arrived at work at 11:00 a.m., three separate computer systems recorded his arrival at work as 2:19 p.m., log-on to the STARS system at 2:20 p.m. and, his first telephone call at 2:23 p.m. While grievant advances the plausible theory that his entry through the access door *could* have been earlier,[15] he has not offered any independent corroboration that he did arrive earlier. It appears more likely than not that grievant arrived at 2:19 p.m., signed on to the computer systems and, then received his first telephone call four minutes later.

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[14] The supervisor had been designated as a witness by the agency, but the agency elected not to call him to testify. When a party has a witness available who could have rebutted testimony of an opposing witness but fails to call that witness, it must be presumed that the witness's testimony would not have been favorable to the party. In this case, the agency did not offer the supervisor's testimony to rebut grievant's testimony about factoring in break time. Therefore, it is presumed that the supervisor would not have disputed grievant's testimony.

[15] If grievant had followed another employee through the access door without swiping his access card, it is possible that he *could* have arrived earlier.

Grievant's explanation of the leave discrepancy on November 25, 2003 is similarly unpersuasive. Once again, three separate computer systems recorded grievant's entry into the work area at 11:10 a.m., log-on to the computer systems at 11:12 a.m. and, receipt of first telephone call at 11:13 a.m. A coworker, who had been asked to note his arrival time, indicated that he arrived around or just after 11:15 a.m. Grievant's claim that he worked on correspondence or accounts between 9:30 a.m. and 11:10 a.m. is contradicted by the fact that he did not log-on to his computer systems until 11:12 a.m. Testimony by the Office Manager and the written statement of the Executive Commissioner[16] agree that one would have to log-on to both the Siebel and STARS systems to work on correspondence and perform account adjustments. Grievant had initially told the Executive Commissioner that he worked only on correspondence. However, when shown the computer logs reflecting that he had not logged on to the Siebel system, grievant said he was making account adjustments. Since grievant had not logged onto STARS until 11:12 a.m., his explanation is not credible.

In summary, the hearing officer would be willing to give grievant the benefit of doubt with regard to the first three dates cited by the agency. However, the preponderance of evidence regarding the September 17 and November 25, 2003 dates is sufficient to conclude that grievant did falsify his leave slips on those two dates.

Retaliation

In his written grievance, grievant alleged retaliation by his supervisor, the office manager and an assistant commissioner. Grievant contends that the revision of his monthly evaluation forms resulting in a reduction in his rating is evidence of retaliation.[17] Retaliation is defined as actions taken by management or condoned by management because an employee exercised a right protected by law or reported a violation of law to a proper authority.[18] To prove a claim of retaliation, grievant must prove that: (i) he engaged in a protected activity; (ii) he suffered an adverse employment action; and (iii) a nexus or causal link exists between the protected activity and the adverse employment action. Grievant meets the first two prongs of the test because he had previously filed a grievance and, subsequently received a lower evaluation and was removed from employment. In order to establish retaliation, grievant must show a nexus between the protected activity and, his lower evaluation and the removal from employment.

Grievant has not established any such connection between the lowered evaluation and his grievance. However, even if such a nexus could be found, the agency has established nonretaliatory reasons for reducing grievant's evaluation.

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[16] Exhibit 1. Executive Commissioner's response to grievance, January 21, 2004.
[17] Exhibits 9 & 10. Grievant's monthly evaluation reports, August 2003 & January 2003, respectively.
[18] EDR *Grievance Procedure Manual*, p.24

In fact, the agency offered unrebutted testimony that the performance evaluations of 20 other employees were similarly reduced because of errors uncovered by the Internal Audit division. For the reasons stated previously, grievant has not shown that the agency's reasons for reducing the evaluation were pretextual in nature.

The investigation of grievant's leave records was initiated only five days after grievant prevailed on his first grievance. The close proximity of these two events raises a question as to whether the investigation was retaliatory. However, proximity in time alone is insufficient to prove retaliation. Thus, while there is a very tenous connection between the grievance and the subsequent removal from employment, it is insufficient to satisfy the third prong of the test. Grievant has not offered any other direct or indirect evidence that would corroborate his theory. Moreover, the agency has established a nonretaliatory reason (falsification of leave records) for its disciplinary action. Grievant has not shown this reason to be pretextual.

DECISION

The disciplinary action of the agency is affirmed.

The Group III Written Notice issued on December 11, 2003 for falsification of leave records, and grievant's removal from employment are 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. Address your request to:

Director
Department of Human Resource Management
101 N 14th St, 12th floor

Richmond, VA 23219

3. If you believe 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. Address your request to:

Director
Department of Employment Dispute Resolution
830 E Main St, Suite 400
Richmond, VA 23219

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.[19] 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

[19] An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

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