

Issue: Group III Written Notice with termination (falsification of records); Hearing Date: 08/16/05; Decision Issued: 09/12/05; Agency: DJJ; AHO: Carl Wilson Schmidt, Esq.; Case No. 7998; Administrative Review: EDR Ruling Request received 09/26/05; Outcome: pending



***COMMONWEALTH of VIRGINIA***  
***Department of Employment Dispute Resolution***

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 7998**

Hearing Date: August 16, 2005  
Decision Issued: September 12, 2005

**PROCEDURAL HISTORY**

On November 23, 2004, Grievant was issued a Group III Written Notice of disciplinary action with removal for:

*Falsification of time records for the period beginning 6/28/04 through 10/15/04. The hours reported on official time records were inconsistent with the hours documented on assigned in and out log. During this there were twenty five instances of failure to accurately report times of arrival at work; five instances of failure to accurately report the time of your departure and three instances of using the one hour lunch break to offset work hours. Also there were seven weeks in which you failed to work 40 hours.*

On December 2, 2004, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On July 12, 2005, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 16, 2005, a hearing was held at the Agency's regional office.

## **APPEARANCES**

Grievant  
Grievant's Counsel  
Agency Party Designee  
Agency Advocate  
Witnesses

## **ISSUE**

Whether Grievant's actions warrant disciplinary action under the Standards of Conduct? If so, what is the appropriate level of disciplinary action?

## **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 Juvenile Justice employed Grievant as a Counselor Supervisor until his removal effective November 23, 2004. He began working for the Agency in 1996. Part of his duties included supervising three Counselors. Grievant was an exempt employee under the Fair Labor Standards Act. The Agency did not have to pay Grievant for time worked over 40 hours per week. His customary workweek began on Monday and ended on Friday. After the end of a work week, Grievant and employees at his Facility were required to submit time sheets showing the number of hours worked and leave taken. The total hour worked and leave taken was supposed to be at least 40 hours per week.

On January 7, 2004, Grievant received a Group II Written Notice for misuse of state equipment.<sup>1</sup>

On June 4, 2003, Grievant received a memorandum from the Treatment Program Supervisor providing, in part:

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<sup>1</sup> Agency Exhibit 6.

This correspondence is documentation of the meeting with you on June 3, 2003 regarding your work schedule and the established time recording policies and procedures. You informed at that time that all employees within your job classification and the [Facility] are expected to adhere to a nine hour daily work schedule. The schedule is reflective of eight hours of work and a one hour lunch. The lunch period shall not be included in the total required hours of work. \*\*\* I am requesting that you submit a 40 hour weekly work schedule which includes a late night that is a minimum of 9 hours in duration. \*\*\* Please be advised that further noncompliance of the work week schedule or time sheet documentation policy may result in the application of the Standards of Conduct.<sup>2</sup>

On June 30, 2004, Grievant received a memorandum from his supervisor regarding time sheets. This memorandum states, in part:

This serves to document our conversation of Monday, June 28, 2004, in which your time sheets dating back to January of 2004 were discussed. As you were informed, an audit was conducted by personnel of all supervisors' time sheets dating back to January 2004. Your time sheets reflected that you have not consistently worked a 40 hour week and that, on several occasions, the lunch hour was used as work time. All supervisors are required to work a minimum of 40 hours per week and, if necessary may work over that limit to perform necessary tasks as your position is classified as exempt by the Department. After six consecutive work hours, you [are] required to take a lunch break. The organizational unit head (Superintendent) has determined that lunch breaks will be for a one hour period and that only counselors may count their lunch hour as work time on their late nights only if they eat with wards on their caseload. This does not apply to administrators. The Standard Work Schedule and Overtime Policy (05-004.08) clearly states that lunch and break times may not be used towards the total required hours of work per day. Lunch and break times also may not be used to extend breaks, offset arrival or departure time or to cover time for any other purposes. I have attached a copy of this policy for your review (see section B-Standard Work Week and section D-Prescribed Breaks). I also attach copies of the time sheets reviewed by [Ms. W]. It is expected that all future time sheets will reflect a 40 hour minimum work week, not inclusive of lunch breaks.

Also discussed was the fact that supervisors need to fairly review all time sheets of counselors under their supervision to ensure that counseling staff is adhering to the 40 hour workweek as well.

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<sup>2</sup> Agency Exhibit 5.

Failure to adhere to the above in the future may result in disciplinary action under the Standards of Conduct.<sup>3</sup>

Sometime in the latter part of 2004, the Agency became concerned that Grievant was not accurately reporting his time worked. On November 18, 2004, the Superintendent met with Grievant. She provided Grievant with his original weekly time sheets and also copies of a log book showing the dates and times he signed into and out of the Facility. Grievant spent at least two hours reviewing his time sheets and the log book. For each time sheet, Grievant took the original time sheet and marked on it to correct for the time he actually worked at the Facility. If this corrected time and leave (originally claimed) did not amount to 40 hours, Grievant requested additional leave to cover the shortfall. For example, on November 18, 2004, Grievant claimed additional leave of 7.6 hours for the week of June 26, 2004 to July 2, 2004. For the week of July 10, 2004 to July 16, 2004, Grievant claimed additional leave of 1.7 hours. For the week of July 17, 2004 to July 23, 2004, Grievant claimed additional leave of approximately 1 hour. For the week of July 24, 2004 to July 30, 2004, Grievant claimed additional leave of one half hour. For the week of July 31, 2004 to August 6, 2004, Grievant claimed additional leave of approximately 1.9 hours. For the week of August 7, 2004 to August 13, 2004, Grievant claimed additional leave of approximately 3.3 hours.<sup>4</sup> For the week of August 21, 2004 to August 27, 2004, Grievant claimed additional leave of .8 hours.

### **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.” Department of Corrections Procedure Manual “(DOCPM)” § 5-10.15. 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.” DOCPM § 5-10.16. Group III offenses “include acts and behavior of such a serious nature that a first occurrence should normally warrant removal.” DOCPM § 5-10.17.

“Failure to follow a supervisor’s instructions, perform assigned work, or otherwise comply with established written policy” is a Group II offense.<sup>5</sup> Grievant was repeatedly instructed to make sure that he submitted a work week time sheet accounting for 40 hours per week. Grievant’s original time sheets, after being corrected to account for his actual time worked (but without considering the additional leave he claimed on November 18, 2004), show that Grievant’s original time sheets did not always add to a 40 hour work week. On November 18, 2004, Grievant had to request additional leave to

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<sup>3</sup> Agency Exhibit 5.

<sup>4</sup> The timesheets are unclear. Grievant claimed additional leave of several hours. The number of hours is likely 3.3 hours.

<sup>5</sup> DHRM § 1.60(V)(B)(2)(a).

make up for the shortfall for seven weeks. This means he did not comply with a supervisor's instructions for those seven weeks. Accordingly, the Agency has presented sufficient evidence to support its issuance of a Group II Written Notice. Grievant has a prior active Group II Written Notice. Based on the accumulation of disciplinary action, two active Group II Written Notices provide a sufficient basis under the Standards of Conduct to support the Agency's conclusion that Grievant should be removed from his employment.<sup>6</sup>

The Agency contends Grievant falsified his time records thereby justifying the issuance of a Group III Written Notice. "[F]alsifying any records, including but are not limited to, vouchers, reports, insurance claims, time records, leave records, or other official state documents" constitutes a Group III offense.<sup>7</sup> "Falsifying" is not defined by the DOC Standards of Conduct, 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 (6<sup>th</sup> 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 did not complete his time sheet at the same time he logged in and out. Thus, his time sheet reflects his estimate of the times he logged in and out. The Agency has established that Grievant poorly estimated his time, but the Agency has not established that at the time Grievant was filling out his original time sheets that he intentionally wrote inaccurate times in order to overstate the number of hours he appeared to work. The evidence showed that at the time Grievant filled out his original time sheets, he believed he was being accurate in his entries based on his estimate of the time he arrived and departed the Facility.<sup>8</sup>

Grievant argues his supervisor instructed him to write down his scheduled hours of work regardless of the time of his arrival. Grievant's supervisor denied giving this

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<sup>6</sup> No credible evidence was presented to justify mitigation of the disciplinary action in accordance with the *Rules for Conducting Grievance Hearings*.

<sup>7</sup> DOCPM § 5-10.17(B)(2).

<sup>8</sup> Grievant had been advised that his practice of reporting his work time was unacceptable and that he needed to report accurate information. He continued his practice of estimating time and several of his estimates were significantly inaccurate.

instruction, but even if true, Grievant was clearly advised in the June 30, 2004 memorandum that “supervisors are required to work in minimum of 40 hours per week.” Regardless of what beginning and ending times Grievant wrote on his original time sheets, he was expected actually to work a sufficient number of hours to account for a 40 hour work week. Grievant did not do so.

Grievant argues other employees inaccurately completed the sign in and out log. Grievant is not being disciplined for incorrectly completing the sign in and out log. Whether other employees are inaccurately completing that log is not relevant.

## **DECISION**

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group III Written Notice of disciplinary action is **reduced** to a Group II Written Notice. Grievant’s removal from employment is **upheld** based on the accumulation of disciplinary action.

## **APPEAL RIGHTS**

You may file an administrative review request within **15 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. Please address your request to:

Director  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

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. Please address your request to:

Director  
Department of Employment Dispute Resolution  
830 East Main St. STE 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 15 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 15-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.<sup>9</sup>

[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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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>9</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.