Issue: Group III Written Notice with suspension (falsifying records); Hearing Date: 05/01/06; Decision Issued: 06/02/06; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 8328; Outcome: Employee granted partial relief

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8328

Hearing Date: May 1, 2006
Decision Issued: June 2, 2006

PROCEDURAL HISTORY

On January 24, 2006, Grievant was issued a Group III Written Notice of disciplinary action with suspension from January 25, 2006 through January 31, 2006 for falsifying time, attendance, and leave records.

On February 6, 2006, 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 she requested a hearing. On April 6, 2006, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 1, 2006, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
Witnesses

ISSUE

1. Whether Grievant engaged in the behavior described in the Written Notice?

2. Whether the behavior constituted misconduct?

3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?

4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

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 Virginia Department of Transportation employs Grievant as an Administrative Specialist II at one of the Agency's facilities. Part of her duties included traveling to office supply stores to purchase items for the Agency. No evidence of prior disciplinary action against Grievant was introduced during the hearing.

The Facility maintained a log near the entrance to the building. Employees usually signed the log when they entered or exited the building. On some occasions employees including Grievant did not sign in or out. Making entries into the logbook was an expected practice but not governed by written policy or closely monitored for employee compliance.

The Agency operates a computerized leave reporting system called FMS. The system is created so that it shows employees having worked 40 hours per week each week. Only if an employee initiates a leave request which is approved by a supervisor and entered into the FMS, would the FMS show the employee working fewer than 40 hours in the week.

When Grievant wanted to take leave, she would enter her leave request into FMS and that request would be queued in the Supervisor's workflow list. The Supervisor would then approve the leave request either before or after Grievant took the leave. By the end of the pay period, Grievant's leave balances would typically reflect approved leave she had taken.

Grievant's regular work schedule was from 8:30 a.m. until 5 p.m. with an hour for lunch. Grievant was to work Monday through Friday. Grievant and her Supervisor agreed that Grievant would have this schedule. Under this schedule, Grievant was expected to work 37.5 hours per week, rather than the 40 hours of work expected of all classified employees.

Grievant began working at the Facility on August 25, 2005. She transferred from another part of the Agency. Grievant began working for the Supervisor. The Supervisor began working for the Agency in July 2005 and was not familiar with State policies. Grievant and the Supervisor discussed what Grievant's work hours should be. They agreed Grievant should begin her workday at 8:30 a.m. and end it at 5 p.m. with a one hour lunch.

When Grievant requested to do so, the Supervisor would permit Grievant to work through her lunch period and leave work prior to 5 p.m. [1]

The Agency was investigating the time records for another employee when it decided to expand the investigation to include Grievant. An auditor reviewed the logbook and leave records to determine if Grievant was properly accounting for her time. On October 31, 2005, the Auditor watched to see when Grievant arrived at work. Grievant did not arrive at work until 10:24 a.m. The Auditor concluded Grievant failed to properly account for her time as follows:

Date	Time-In	Time-Out	Time-In	Time-Out	Recorded Time	Leave Taken	Time Short of 8-hour day
9/6/05	8:28	1:08	2:04	5:00	7 hrs 36 min	0	24 min
9/7/05	8:35	1:13	1:53	5:00	7 hrs 45 min	0	15 min
9/13/05	8:29	11:58	-	-	3 hrs 29 min	0	4 hrs 31 min
9/16/05	8:32	4:08	-	-	6 hrs 51 min	0	1 hr 9 min
9/20/05	10:20	3:37	-	-	5 hrs 17 min	2 hrs	43 min
9/26/05	8:23	1:00	1:55	5:00	7 hrs 42 min	0	18 min
9/27/05	9:00	1:15	2:16	5:00	6 hrs 59 min	0	1 hr 1 min
10/3/05	8:20	12:58	1:55	5:00	7 hrs 43 min	0	17 min
10/505	8:35	5:00	-	-	7 hrs 40 min	0	20 min
10/7/05	8:30	1:01	2:01	5:00	7 hrs 30 min	0	30 min
10/24/05	8:19	3:00	-	-	6 hrs 41 min	0	1 hr 19 min
10/31/05	10:24	5:00			5 hrs 51 min	0	1 hr

[1] For example, on October 24, 2005, Grievant sent the Supervisor an email stating, "I'd like to leave at 3PM today without lunch …." See Agency Exhibit 6.

For the dates September 16th and October 5th, the Auditor reduced the amount claimed as "Time Short" by subtracting 45 minutes for a standard lunch hour. For October 24, 2005, Grievant entered leave into the FMS system but the Auditor did not account for that hour in the "Time Short" column. On October 31, 2005, Grievant purchased office supplies for the Agency at a local office supply store. The Auditor allowed Grievant an hour to complete the task after determining the location of the store in relation to Grievant's home and workplace.

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).

"Full-time employees normally work a five-day, 40-hour schedule during a workweek."[3] Grievant set her schedule so as to work only 37.5 hours per week thereby acting contrary to State Policy. "Failure to … otherwise comply with established written policy" is a Group II offense.[4] The Agency has presented sufficient evidence to support the issuance to Grievant of a Group II Written Notice. An employee receiving a Group II Written Notice without prior active disciplinary action may be suspended for up to ten workdays. Since Grievant was suspended for fewer than ten workdays, the Agency's suspension must be upheld.[5]

Grievant argues she should not be disciplined for failing to work 40 hours because her work schedule was set by the Supervisor. Grievant is correct that the Supervisor played a role in setting Grievant's work hours. This fact, however, does not relieve Grievant of her responsibility to be aware of and comply with State policy requiring a 40 hour work week. The evidence did not show that the Supervisor had absolute or rigid control over how long Grievant took for lunch and when she began working. Grievant had some influence on the decision. To the extent the Supervisor set Grievant's beginning and ending work hours, Grievant should have recognized that she should only take a half hour lunch. Other employees working for the Supervisor

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

[3] DHRM Policy 1.60(II)(G).

[4] DHRM § 1.60(V)(B)(2)(a).

[5] See discussion regarding giving deference to the Agency's action.

took lunch periods of varying lengths depending on when they began and ended work and to ensure they worked a total of 40 hours per week. Grievant should have behaved similarly.

Falsifying Records

"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).

"Falsifying" is not defined by DHRM § 1.60(V)(B)(3)(b), 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 a Group III Written Notice. 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.*

The Agency contends Grievant falsified State leave records by claiming she worked 40 hours per week and failing to take leave when she was away from the office on personal business. Grievant worked approximately 7.5 hours per day on: September 6, 7, and 26; October 3, 5, and 7.

The Agency has not established that Grievant falsified her leave records by working only 37.5 hours per week. Although Grievant's actions were contrary to State policy which requires a 40 hour work week, Grievant believed her work schedule was appropriate because it had been approved by the Supervisor. Grievant did not doubt the Supervisor's authority to establish Grievant's work schedule. Grievant believed she was complying with the Agency's expectations by working the schedule approved by her Supervisor. Grievant did not have the intent to defraud the Agency.

The Agency contends Grievant falsified State leave records by being absent from work yet failing to take leave. With one exception, this argument is not supported by the facts. On September 13, 2005, the Supervisor authorized Grievant to leave work early to travel approximately 150 miles to another part of the State. The Agency has not established that Grievant took significantly more time than necessary to travel to the destination, check into a hotel, etc. or failed to perform work duties once she reached the destination. Grievant testified that on September 16, 2005 she worked through

lunch and left an hour early. On September 20, 2005 she also worked through lunch and took two hours of leave. Grievant testified that on September 27, 2005, Grievant arrived to work at 9 a.m. after she made keys made at a local store at the Supervisor's request. The Agency has not rebutted Grievant's testimony. Thus, for these days Grievant has explained her absences from work that exceeded the 30 minute absence due to incorrect start time of her schedule. On October 24, 2005, Grievant took one hour of leave. Thus, the amount of "Time Short" was 19 minutes and not 1 hour and 19 minutes. With respect to October 31, 2005, the Auditor was performing surveillance and observed Grievant arrive at work at 10:24 a.m. Grievant argued she came to work at 8:30 a.m., picked up items to be copied and took them to the office supply store. The Agency has presented sufficient evidence to support its assertion that Grievant did not arrive at work until 10:24 a.m. Since Grievant worked 5 hours and 51 minutes, her "Time short" would be 2 hours and 9 minutes. The Auditor gave her credit of one hour for a trip to the office supply store.[6] Thus, Grievant failed to work approximately one hour on October 31, 2005.

"Abuse of state time, including, for example, unauthorized time away from the work area, use of state time for personal business, and abuse of sick leave" is a Group I offense.[7] Grievant's time away from work on October 31, 2005 is best categorized as abuse of state time rather than falsification of leave records.

In conclusion, Grievant did not falsify records by setting her schedule to begin at 8:30 a.m. and end at 5 p.m. with an hour lunch. She believed what she was doing was correct and permitted by her Supervisor. Grievant did not falsify records by arriving to work late or leaving work early because she has explained how this happened with the exception of on October 31, 2005. Her one hour short fall on October 31, 2005 is best considered as abuse of State time, a Group I offense. The Agency has not presented sufficient evidence to uphold a Group III Written Notice.

Deference

Under the *Rules for Conducting Grievance Hearings*, the Hearing Officer must given deference to an Agency's selection of a suspension, if the Agency's action is consistent with law and policy. The Agency has not established that Grievant falsified State documents and, thus, the Agency's action is not consistent with DHRM Policy 1.60 with respect to the requirements of a Group III Written Notice. When the Agency suspended Grievant, it did so with the assumption that Grievant engaged in behavior rising to the level of a Group III offense. Now that a Group III Written Notice cannot be sustained, how does this affect the suspension? If the Hearing Officer must continue to

[6] Grievant argued she worked through lunch. This argument fails because Grievant did not leave work early which had been her practice in the past when working through lunch. Grievant's hour of working through lunch cannot be used to forgive a late arrival since she contends she arrived at 8:30 a.m. In other words, Grievant has taken inconsistent positions regarding working through her lunch hour on October 31, 2005. The Hearing Officer cannot conclude she worked through lunch on October 31, 2005.

[7] DHRM Policy 1.60(V)(B)(b).

give deference to the Agency, then the suspension must remain unaltered. If the Hearing Officer does not have to give deference to the Agency's decision-making, then the Hearing Officer may examine the facts of the case and determine what suspension, if any, is appropriate.

The *Rules* do not specifically address this situation. The *Rules*, however, cite with approval the case of *LaChance v. M.S.P.B*., 178 F.3d 1246; 1999 U.S. App. LEXIS 9711 (Fed. Cir. 1999). In *LaChance*, the Court concluded the adjudicatory body should not independently determine penalties. The Court held that the adjudicatory body may mitigate the agency's original penalty to the maximum reasonable penalty when it finds the agency's original penalty too severe. "When the [adjudicatory body] sustains fewer than all of the agency's charges, the [adjudicatory body] may mitigate to the maximum reasonable penalty so long as the agency has not indicated either in its final decision or during proceedings before the [adjudicatory body] that it desires that a lesser penalty be imposed on fewer charges." *Id.* at 1260. If the Hearing Officer applies the logic[8] found in *LaChance*, the five workday suspension issued to Grievant must be upheld because it is less than the ten workday suspension permitted upon the issuance of a Group II Written Notice and the Agency has not expressed a desire for a lesser penalty. The Hearing Officer believes EDR would interpret the *Rules* in a manner consistent with *LaChance.* Accordingly, the Hearing Officer will uphold the five workday suspension.

Mitigation as Defined in the *Rules*

Grievant contends the disciplinary action should be mitigated. *Va. Code § 2.2-3005.1* authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Employment Dispute Resolution…."[9] Under the EDR Director's *Rules for Conducting Grievance Hearings*, the Hearing Officer may mitigate based on considerations including whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action, and (3) the disciplinary action was free of improper motive. The *Rules* further require the Hearing Officer to "consider management's right to exercise its good faith business judgement in employee matters. The agency's right to manage its operations should be given due consideration when the contested management action is consistent with law and policy." In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action below the Group II Written Notice.

DECISION

[8] The Court in *LaChance* focused in the authority to mitigate. In this case, the Agency has not met its burden of proof to establish a Group III Written Notice. The Hearing Officer is not faced with mitigating the disciplinary action.

[9] *Va. Code § 2.2-3005.*

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with five workday suspension is **reduced** to a Group II Written Notice with five workday suspension.

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 14th St., 12th 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 all of your appeals to the other party and to the EDR Director. 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.[10]

[10] 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].

S/Carl Wilson Schmidt

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Carl Wilson Schmidt, Esq.
Hearing Officer