Issues: Group III Written Notice (falsifying records) and Demotion; Hearing Date: 07/28/08; Decision Issued: 09/30/08; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 8881; Outcome: No Relief – Agency Upheld in Full; **Administrative Review: AHO Reconsideration Request received 10/24/08; Reconsideration Decision issued 10/27/08; Outcome: Request Untimely – Original decision affirmed.**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8881

Hearing Date: July 22, 2008
Decision Issued: September 30, 2008

PROCEDURAL HISTORY

On March 17, 2008, Grievant was issued a Group III Written Notice of disciplinary action with removal for falsifying the records. During the Second Step the Agency upheld the Group III Written Notice but demoted Grievant from a Regional Ombudsman to an Institutional Ombudsman in lieu of removal.

On April 16, 2008, 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 June 9, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 22, 2008, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Representative
Witnesses

ISSUES

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?

5. Whether the Agency retaliated against Grievant?

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. The burden of proof to show retaliation is upon Grievant. 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 Corrections employed Grievant as a Regional Ombudsman. The purpose of her position was:

> Ensuring that all levels of management in the [Location] are provided statistical data/information regarding compliance issues relative to the inmate grievance process and standards of care. Provide administrators with operational data to assist in the identification and assessment of potential problem areas, recommending corrective action when necessary.

One of Grievant's obligations was to:

> Ensure timekeeping/leave is recorded in accordance with Department policies and Ombudsman Manager's directions.***[1]

[1] Agency Exhibit 13.

Grievant had been employed by the Agency for approximately 12 years. Grievant was removed from employment pursuant to a Group III Written Notice effective March 18, 2008. She was reinstated by the Second Step Respondent as an Institutional Ombudsman.

The Supervisor has a calendar and keeps records of the number of hours and days employees are absent from work. When an employee calls the Supervisor to indicate he or she will be absent from work, the Supervisor records that information on a calendar. Employees are obligated to submit leave slips reflecting the amount of time they are absent from work. Leave slips are used to reduce an employee's leave balances. Employees are expected to use no more than the leave authorized by the Agency. At the end of the form is a statement indicating that the employee's signature is to "certify that the information on this form is accurate and complete."[2]

Grievant developed a pattern of being absent from work and then filling out leave slips reflecting incorrect amounts of times. The Supervisor noticed that Grievant was reporting inaccurate times on her leave slips. The Supervisor met with Grievant and informed Grievant of the errors. The Supervisor instructed Grievant to accurately report the number of hours when she was absent from work. The Supervisor reminded Grievant that continuing to inaccurately report her hours away from work could result in being removed from employment for lying. The Supervisor spoke with Grievant about her inaccurate leave reporting on September 19, 2007, February 5, 2008, February 6, 2008, February 7, 2008, February 11, 2008, February 19, 2008, and February 25, 2008.

On February 5, 2008, the Supervisor met with Grievant in response to the leave forms she had submitted. The Supervisor told Grievant that the Supervisor felt Grievant was being intentionally deceitful and lying about the leave time claimed. The Supervisor told Grievant that Grievant may be subject to removal based on her submission of leave forms. On February 6, 2008, the Supervisor reminded Grievant of the importance of submitting leave forms showing the correct time used.

In response to a request from the Human Resource staff and Internal Audit staff, the Supervisor instructed Grievant to submit her leave forms using a format that would show how much leave was taken each day. Prior to this, Grievant was reporting the total leave taken over a series of days. The Supervisor gave Grievant this instruction on February 25, 2008.

January 16, 2008 through January 25, 2008. On February 5, 2008, Grievant submitted a leave slip claiming 21 hours of sick leave for the period from January 16, 2008 through January 25, 2008. She was absent from work 41 hours during that time period. On February 6, 2008, Grievant resubmitted a leave slip for the period January 16 through January 21, 2008. Grievant claimed 17 hours of leave but in fact was only absent from work nine hours.[3] On February 26, 2008, Grievant submitted a leave form

[2] Grievant Exhibit 3.

[3] It appears Grievant included a holiday as leave.

showing one hour of leave taken on January 16, 2008, 8 hours of leave taken on January 17, 2008, and 32 hours taken from January 22, 2008 through January 25, 2008. These time periods totaled 41 hours.

January 28, 2008 through February 1, 2008. On February 5, 2008, Grievant submitted a leave form for the period January 28, 2008 through February 1, 2008. She claimed 10.5 hours of leave but was actually absent from work 18 hours in that time. The Supervisor directed Grievant to resubmit a corrective leave form. On February 6, 2008, Grievant resubmitted a leave form for the period January 28, 2008 through February 1, 2008. Grievant failed to make the corrections as directed by the Supervisor and resubmitted a leave form claiming only 10.5 hours instead of 18 hours of leave. Grievant was again directed by the Supervisor to submit a corrected leave form. On February 11, 2008, Grievant submitted a leave form for the period January 28, 2008 through February 1, 2008. None of the changes identified by the Supervisor had been corrected. The Supervisor told Grievant that incorrect forms were not going to be tolerated again and the next time Grievant would receive a written notice.

On February 25, 2008, the Supervisor instructed Grievant to resubmit leave forms with specific time identified for each day that leave was taken. On February 26, 2008, Grievant submitted a leave request showing nine hours taken from the period January 28, 2008 to February 1, 2008. Grievant claimed 3 hours on January 28, 2008, 1.5 hours on January 29, 2008, 1.5 hours on January 30, 2008, 1.5 hours on January 31, 2008, and 1.5 hours on February 1, 2008. She had been absent from work 18 hours during that time period instead of the nine hours she claimed.

February 5, 2008 through February 8, 2008. On February 5, 2008, Grievant submitted a leave form claiming eight hours of leave for the time period February 5, 2008 through February 8, 2008. Grievant was absent from work 15.5 hours during that time period. The Supervisor informed Grievant of the errors she had made and instructed Grievant to resubmit the form. On February 6, 2008, Grievant resubmitted the leave form without making any changes. On February 7, 2008, the Supervisor informed Grievant that her resubmitted leave slip was inaccurate because it underreported the amount of leave she had taken. The Supervisor instructed Grievant to resubmit another leave form. On February 11, 2008, Grievant submitted a leave form showing eight hours of leave on February 5, 2008. This leave form was correct. Grievant also submitted a leave form for the period February 6, 2008 through February 8, 2008. She claimed seven hours of leave but in fact had taken 7.5 hours. The Supervisor instructed Grievant to resubmit her leave form showing the amount of leave taken per day. On February 26, 2008, Grievant submitted a leave form with a total of 9 hours for the period February 5, 2008 through February 8, 2008. Grievant claimed 1.5 hours of leave on February 5, 2008, 3 hours on February 6, 2008, 3 hours on February 7, 2008, and 1.5 hours on February 8, 2008. She actually took 15.5 hours of leave during that period of time.

February 15, 2008. On February 11, 2008, Grievant requested approval to take three hours of leave on February 15, 2008. On February 15, 2008, Grievant was away from the office for approximately 6 hours. On February 19, 2008, Grievant submitted a leave form claiming 2.5 hours of leave instead of the six hours she actually took. The Supervisor informed Grievant of the error and instructed her to resubmit another leave form. On February 19, 2008, Grievant submitted a leave form claiming 4.5 hours of leave taken on February 15, 2008. The Supervisor again instructed Grievant to submit a valid leave form. On February 25, 2008, Grievant submitted a leave form claiming three hours of leave on February 15, 2008. The Supervisor instructed Grievant to re-submit a correct leave form. On February 26, 2008, Grievant submitted a leave form indicating she had taken six hours of leave on February 15, 2008. This leave form was correct.

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."[4] 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." Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal."

Falsification of Leave 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. "Falsifying" is not defined by DHRM § 1.60, 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.*

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

Leave Activity Reporting Forms are official State documents used by the Agency to determine how much paid time off an employee should receive within available leave balances. Grievant was absent from work over a timeframe of several days, yet on several occasions she under reported the number of hours she was absent from work. She falsely represented to the Agency that she was at work when in fact she was not at work. Each time Grievant submitted an inaccurate leave form, the Supervisor notified Grievant the form was inaccurate and instructed Grievant to submit an accurate form. Grievant's repeated disregard of her obligation to submit accurate time records was reckless and sufficient to demonstrate an intent to submit leave forms without regard to their accuracy. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for falsifying time records.[5]

Mitigation

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…."[6] Under the *Rules for Conducting Grievance Hearings,* "[a] hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes 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 among similarly situated employees, and (3) the disciplinary action was free of improper motive.

Grievant contends the disciplinary action should be mitigated because a side effect of her illness[7] is memory loss.[8] Grievant was in an automobile accident on January 16, 2008. She went to a hospital emergency room and stayed there for two hours. She was treated for injury to her right hand and a sprained neck. She returned to work on January 28, 2008.

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[5] The Americans with Disabilities Act is not of significance in this decision because employees may be disciplined for behavior that may later justify a reasonable accommodation by an Agency. Grievant had not sought an accommodation. The Family Medical Leave Act is not of significance in this decision because the availability of leave is not an issue. It is the accuracy of reporting that leave that is at issue.

[6] *Va. Code § 2.2-3005.*

[7] The Agency first learned of the nature of Grievant's illness at the Second Step meeting.

[8] Grievant presented a note dated April 3, 2008 from a medical provider stating, in part:

> When she was seen for her physical, she was noted to have some forgetfulness, and she was referred for neuropsychiatric testing. Dementia has been ruled out by Neurology.

Grievant's assertion that her memory loss contributed to their failure to properly complete leave records lacks credibility for several reasons. First, Grievant's problems with her leave forms began prior to the automobile accident. The Supervisor spoke to Grievant about submitting accurate leave forms on September 17, 2007. Second, Grievant was able to perform her daily work duties without concern of the Agency prior to and after the automobile accident. Grievant had to rely upon her memory in order to complete her daily job duties. If Grievant had had memory problems affecting her ability to submit leave records, those problems would have affected her work performance in general. Third, Grievant established a pattern of substantially under reporting the amount of time she was absent from work. If Grievant's memory had affected her ability to report leave, Grievant could have established a pattern of over reporting the amount of leave claimed.[9] At a minimum, Grievant would have established a pattern of both over reporting leave some of the times and under reporting leave other times. Instead, Grievant established a pattern of under reporting leave -- a pattern that was favorable to her.

If the Hearing Officer assumes for the sake of argument that Grievant's memory loss is a mitigating factor, there is an aggravating factor as well. The Supervisor began advising Grievant of the importance of submitted correct leave records prior to January 16, 2008. The Supervisor advised Grievant to record her leave in a calendar or notebook so that she would not have to rely upon her memory when completing her time records. Grievant claimed she began using the calendar January 28, 2008 yet she continued to submit incorrect time slips. If Grievant had fully complied with the Supervisor's instruction, it would have been unnecessary for Grievant to rely upon her memory to properly complete her timesheets.

In light of the standard set forth in the *Rules*, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

Retaliation

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;[10] (2) suffered a materially adverse action[11]; and (3) a causal link exists between the adverse action and

[9] On one time slip, Grievant included a holiday as leave taken. Her original submission did not make the error of claiming the holiday as leave. This error is not sufficient to establish a pattern.

[10] *See* Va. Code § 2.2-3004(A)(v) and (vi). The following activities are protected activities under the grievance procedure: participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

[11] On July 19, 2006, in Ruling Nos., 2005-1064, 2006-1169, and 2006-1283, the EDR Director adopted the "materially adverse" standard for qualification decisions based on retaliation. A materially adverse action is an action which well might have dissuaded a reasonable worker from engaging in a protected activity.

the protected activity; in other words, management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, retaliation is not established unless the Grievant's evidence shows by a preponderance of the evidence that the Agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual.[12]

Grievant engaged in a protected activity by seeking workers compensation benefits, a right protected by law. Grievant suffered a materially adverse action because she received disciplinary action. Grievant has not established a connection between her protected activity and the materially adverse action. No credible evidence was presented to show that the Agency retaliated against Grievant.

Qualifying Issue Before the Hearing Officer

The Hearing Officer may only address issues qualified by the Agency Head, the EDR Director or the Circuit Court.[13] In this case, the Agency Head qualified the matter for hearing pursuant to the Grievance Form A and it was referred to the Hearing Officer by the EDR Director. The Agency initially issued Grievant a Group III Written Notice with removal. The Second Step Respondent reduced the disciplinary action penalty from removal to a demotion. The Second Step Respondent stated:

> After having reviewed all leave slips provided to me by both [Grievant] and [the Supervisor], and other documents provided by [Grievant] including therapy visit logs and letters from [medical providers]. I have decided to uphold the issuance of the Group III Written Notice for falsifying records, however I have decided to reduce the disciplinary action by promoting [Grievant] from a Regional Ombudsman to an Institutional Ombudsman. Relief requested is denied.

Nothing in the Second Step Response or in the Agency Head's qualification indicates that the Agency's action to demote Grievant was contingent upon Grievant ending her grievance. When the matter was qualified for hearing, Grievant's status was that of an employee who had received a Group III Written Notice with demotion. There is no basis for the Hearing Officer to order Grievant's reinstatement or award back pay with attorney's fees because she was not separated from the Agency's employment. The Hearing Officer will, however, affirm the Agency's issuance of a Group III Written Notice with demotion.

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[12] This framework is established by the EDR Director. See, EDR Ruling No. 2007-1530, Page 5, (Feb. 2, 2007) and EDR Ruling No. 2007-1561 and 1587, Page 5, (June 25, 2007).

[13] For supporting analysis, see EDR Ruling #2005-1015.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with demotion is **upheld**.

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.[14]

[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

[14] 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: 8881-R

Reconsideration Decision Issued: October 27, 2008

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.

Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the hearing ended. However, the fact that a party discovered the evidence after the hearing does not necessarily make it "newly discovered." Rather, the party must show that:

> (1) the evidence is newly discovered since the date of the Hearing Decision; (2) due diligence on the part of the party seeking reconsideration to discover the new evidence has been exercised; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the Hearing Decision to be amended.

As part of the original hearing decision, the Hearing Officer held:

> When the matter was qualified for hearing, Grievant's status was that of an employee who had received a Group III Written Notice with demotion. There is no basis for the Hearing Officer to order Grievant's reinstatement or award back pay with attorney's fees because she was not separated from the Agency's employment.

In other words, Grievant was reinstated by the Agency at the second step and remained an employee of the Agency from that time forward. Grievant is currently employed by the Agency.

The Agency now seeks "clarification" to "emphasize that [Grievant] is no longer an employee of the Department." The Agency's request for "clarification" is actually a request for reconsideration. Requests for Reconsideration must be filed within 15 days of the date the original hearing decision was issued. The original hearing decision was issued September 30, 2008. The Agency's letter is dated October 21, 2008 and received after that date. Accordingly, the Agency's request for reconsideration is **denied** because it was untimely filed.

APPEAL RIGHTS

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 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.

S/Carl Wilson Schmidt

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Carl Wilson Schmidt, Esq.
Hearing Officer