

Issues: Group III Written Notice (falsification of document), Group III Written Notice (forgery), and Termination; Hearing Date: 08/20/08; Decision Issued: 08/22/08; Agency: DMHMRSAS; AHO: Carl Wilson Schmidt, Esq.; Case No. 8917; Outcome: Partial Relief.



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8917**

Hearing Date: August 20, 2008  
Decision Issued: August 22, 2008

**PROCEDURAL HISTORY**

On May 21, 2008, Grievant was issued a Group III Written Notice of disciplinary action with removal for falsification of records. On May 21, 2008, Grievant was issued a second Group III Written Notice of disciplinary action with removal for forgery of a government document.

On May 23, 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 July 21, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 20, 2008, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
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?

### **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 Mental Health Mental Retardation and Substance Abuse Services employed Grievant as a Health Care Technician at one of its Facilities. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

On April 3, 2008, Grievant left the Facility at noon to take her son to the doctor. On April 4, 2008, Grievant returned to the Facility to deliver a doctor's note to the Supervisor. The note stated that Grievant's son had been under the doctor's care from Thursday, April 3, 2008 to Monday, April 7, 2008 and that the son may return to school on April 7, 2008 if he felt better. Grievant brought the doctor's note to work and presented it to the Supervisor so that Grievant could support her request for family sick leave. The Supervisor made a copy of the doctor's note and placed it in the Supervisor's file. Grievant briefly visited with several of her coworkers. She showed them the doctor's note and a list of five medications that the doctor had prescribed for her son. Grievant left the facility.

On April 7, 2008, Grievant returned to work. She met with the Supervisor and the Manager. The Supervisor told Grievant that she was on "lost time", meaning that Grievant did not have any available leave to cover her absences on April 3rd and April 4th. Grievant responded, "Well, I'll just be in lost time." The Manager responded, "You don't want to go into lost time. It'll cause your pay to be short and you won't earn any leave. You have some community service leave available, we can use that." Grievant

responded "okay." The Supervisor obtained a Leave Accrual/Request form and entered the leave code of "AT" for annual leave taken on April 3, 2008. Although Grievant left in the afternoon of April 3, 2008, the Supervisor wrote that Grievant was absent in the morning from 8 a.m. until noon. The Supervisor wrote the leave code of "CS" for community service leave of eight hours taken on April 4, 2008. The Supervisor wrote the date of April 7, 2008 next to two of the signature blocks. Grievant signed the first signature block. The Supervisor signed the second signature block. The Manager signed the third signature block and wrote the date "April 7, 2008" to the right of her signature.

On April 8, 2008, the Fiscal Director of the Facility sent Grievant an email stating:

Hi, my name is [Fiscal Director]. I am the Fiscal Director here at [Facility]. In carrying out my various job responsibilities I have been reviewing processed leave requests.

During that review process it was noted to follow up on the leave item below. It warrants further back up paperwork detail.

I question the Community Service leave for April 4, 2008.

Please provide written verification from an official of the service organization you volunteered with, on proper agency letterhead on April 4, 2008. This request is within policy.

I will reserve right of judgment until the required documentation is provided.<sup>1</sup>

The Fiscal Director sent a copy of his email to the Supervisor and to the Manager.

On April 14, 2008, Grievant was called in to the Manager's office and informed that they needed to document the use of community service leave. Grievant told the Manager that she did not have any documentation because she was home caring for her sick child. The Manager said that that would not qualify for community service leave. Grievant asked that she be allowed to go into "lost time" status. The Manager said "no, no, just get someone to write you a letter." The Manager mentioned another employee who operated a group home as a possible source or that Grievant's boyfriend had a club and he could write a letter. Grievant understood the Manager's comments to be an instruction to produce a letter justifying Grievant's community service. Grievant felt pressured to cover up the Supervisor's and Manager's plan to justify community service leave. Grievant left work, went home, and found the letterhead of a County Inspection Department in another state. She typed the following letter:

April 14, 2008

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<sup>1</sup> Agency Exhibit 5.

To Whom It Many Concern:

Due to her experience, I contacted [Grievant] through her mother to see if she could volunteer some of her time to work for our new "Youth Program". This is a letter to verify that on April 4, [Grievant] work from 8 a.m. to 4 p.m. with our special needs youth.

Cordially;  
[signature]  
[fictitious name]  
Inspection Supervisor

The community service letter was sent to the Fiscal Director.<sup>2</sup> The Fiscal Director contacted the company shown on the letterhead and attempted to verify that Grievant had performed community service with that company. The company had no knowledge of Grievant or any community service program. On May 9, 2008, the Fiscal Director notified the Manager of his findings. The Manager met with Grievant and provided Grievant with a written counseling advising Grievant that such actions should not occur again. Grievant was informed by the Manager that a Group III Written Notice would be issued to Grievant if she repeated her behavior. The Manager wrote, "Therefore, the [Manager] is satisfied with the verbal warning and believes [Grievant] will not repeat this action."<sup>3</sup>

On April 22, 2008, the Supervisor typed the Infirmity Schedule for the month. She typed that Grievant had requested "SF" family sick leave for April 3, 2008 and April 4, 2008.<sup>4</sup>

When the Agency was in the process of determining what level discipline the issue to Grievant, the Manager sought to reduce the discipline from removal to a Group III Written Notice with suspension of 30 days.

### **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

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<sup>2</sup> The Fiscal Director testified that he received the letter by April 14, 2008. The letter was sent through the Facility's inter-office mail service. The Manager testified that she sent the document to the Fiscal Manager several days after April 16, 2008. The Fiscal Director's testimony was more credible than the Manager's testimony.

<sup>3</sup> Hearing Officer Exhibit 1.

<sup>4</sup> Grievant Exhibit 3.

force.”<sup>5</sup> 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.”

“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 Policy 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 (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*.

The Agency contends Grievant falsified the April 7, 2008 leave request in order to obtain community service leave. The evidence is insufficient to support this allegation. When Grievant signed the leave request, her intent was to comply with the Manager's objective of justifying Grievant's absence on April 4, 2008 with community service leave. Grievant assumed that the Manager and the Supervisor had greater expertise than she had with respect to the application of the community service leave policy. The idea to take community service leave did not originate with Grievant. It arose with the Manager and the Supervisor. Grievant's primary objective was to comply with her supervisors' decision that she should take community service leave for April 4, 2008. The Agency has not established the Grievant had sufficient intent to falsify the April 7, 2008 leave request in order to obtain community service leave. The issuance of a Group III Written Notice cannot be substantiated.

The Agency contends Grievant submitted a falsified document dated April 14, 2008 in order to justify community service leave.<sup>6</sup> The idea to draft the letter came from the Manager. Grievant knew that the Manager was asking Grievant to draft a letter justifying community service that the Manager knew had not occurred. Grievant reasonably construed this as an instruction from a supervisor to draft the letter. When

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<sup>5</sup> The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

<sup>6</sup> Once the letter was submitted to the Agency, the letter became an official State document.

Grievant drafted the letter, her primary motivation was not to obtain community service leave for herself; her primary objective was to protect the Manager and the Supervisor in accordance with the Manager's instruction. The Agency has not established the Grievant had sufficient intent to falsify the April 14, 2008 letter in order to justify the issuance of a Group III Written Notice.

Grievant knew that she had not taken community service leave on April 4, 2008. She knew it was wrong for her to sign a leave slip indicating she had taken community service leave and drafting a note to substantiate that leave. Although Grievant's actions were influenced primarily by the expectations of her two supervisors, Grievant failed to express any objection to or a raise any doubts about the appropriateness of what the Supervisor and Manager planned. Employees are not obligated to comply with the unethical or unlawful instructions of their supervisors. Grievant did not express any disapproval to the Supervisor or the Manager. By failing to express some resistance to the actions of the Supervisor and the Manager, Grievant's work performance was unsatisfactory to the Agency. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice regarding the leave request and a Group I Written Notice regarding the community service letter.

This case revolves around the credibility of witnesses. The events as described by the Supervisor and Manager and the events as described by Grievant cannot both be correct. The Agency and its witnesses denied Grievant's version of events. The Hearing Officer paid close attention to the testimony of the Supervisor, Manager, and Grievant. The Supervisor's demeanor was defensive and evasive. She sometimes expressed confusion and uncertainty. The Manager's demeanor suggested she sometimes was not fully forthcoming. Grievant's demeanor, however, reflected truthfulness throughout. Grievant was the most credible witness.

Several factors corroborate the Hearing Officer's assessment of the witnesses' demeanor. First, when the Fiscal Director asked the Manager for documentation of Grievant's community service leave, the Manager challenged the Fiscal Director's authority to make such a request.<sup>7</sup> This suggests the Manager feared that her improper approval of community service leave would be discovered. Second, the Manager attempted to minimize the punishment for Grievant to a written counseling.<sup>8</sup> This is consistent with the Manager's knowledge that Grievant did not make the initial decision to claim community service leave. Once the Agency decided to take disciplinary action against Grievant, the Manager again attempted to reduce the discipline to a Group III Written Notice with 30 workday suspension in lieu of termination. Third, it is not logical the Grievant would present a doctor's excuse for her son's illness to the Supervisor and also display it to her coworkers on April 4, 2008 and then suggest to the Supervisor that she was actually engaged community service on April 4, 2008. If Grievant had intended

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<sup>7</sup> The Fiscal Director construed the Manager's comments to him as conveying the message that it was none of his business and he should not be questioning her management style.

<sup>8</sup> It is difficult for the Hearing Officer to believe that a competent manager would believe it to be appropriate to merely counsel an employee who attempted to steal leave from an agency.

to mislead the Agency, she would not have presented the doctor's excuse to the Agency at all. She would have kept it hidden.

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...."<sup>9</sup> 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. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce further the disciplinary action.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action for falsification of records is **reduced** to a Group I Written Notice. The Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action for forgery of a government document is **reduced** to a Group I Written Notice. The Agency is ordered to **reinstate** Grievant to Grievant's former position, or if occupied, to an objectively similar position. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal and credit for leave and seniority that the employee did not otherwise accrue.

## 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

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<sup>9</sup> Va. Code § 2.2-3005.



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 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.<sup>10</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].

*S/Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>10</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.