

Issues: Group III Written Notice (falsifying records and leaving worksite without permission), and Termination); Hearing Date: 11/20/08; Decision Issued: 11/26/08; Agency: UVA; AHO: William S. Davidson, Esq.; Case No. 8975; Outcome: No Relief – Agency Upheld in Full; **Administrative Review**: **AHO Reconsideration Request received 12/11/08; Reconsideration Decision issued 12/23/08; Outcome: Original decision affirmed; Administrative Review: EDR Admin Review Request received 12/11/08; Outcome pending; Administrative Review: DHRM Admin Review Request received 12/11/08; Outcome pending.**

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 8975

Hearing Date: November 20, 2008
Decision Issued: November 26, 2008

PROCEDURAL HISTORY

The Grievant received a Group III Written Notice on July 15, 2008 for:

Falsifying records and Leaving work without permission. Grievant is permitted to use paid work time to attend an English as a Second Language class. On June 24, 2008, he left his worksite at the usual time to attend the class but he did not attend the class, inform his supervisor of his whereabouts or adjust his time sheets to reflect his absence. In investigating his absence it was discovered that he failed to attend class, inform his supervisor of his whereabouts, or adjust his time sheets on five separate occasions: 1/17/2008, 2/5/2008, 5/1/2008, 5/8/2008 and 6/24/2008. On 1/17/2008, class was canceled due to severe weather but instead of reporting back to his department, he left. He was later called back to work as an essential personnel to help with snow removal and received overtime. Facilities Management sponsors and pays for the class for employees to attend during working hours. Grievant was paid for the five occasions when he claimed to be at the class but was not. His absences were confirmed by his failure to sign in on the class sign in sheets and verified with the class instructor.

Pursuant to the Group III Written Notice, the Grievant was terminated on July 15, 2008. On August 6, 2008, the Grievant timely filed a grievance to challenge the Agency's actions. On October 23, 2008, the Department of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. On November 20, 2008, a hearing was held at the Agency's location.

APPEARANCES

Agency Representative
Counsel for Agency
Grievant
Counsel for Grievant
Witnesses

ISSUE

1. Did the Grievant falsify a state record and/or leave work without permission on those occasions when he did not attend his ESL class and did not adjust his time sheets to reflect his failure to attend class.

AUTHORITY OF HEARING OFFICER

Code Section 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code Section 2.2-3005.1 provides that the Hearing Officer may order appropriate remedies including alteration of the Agency's disciplinary action. Implicit in the Hearing Officer's statutory authority is the ability to independently determine whether the employee's alleged conduct, if otherwise properly before the Hearing Officer, justified termination. The Court of Appeals of Virginia in *Tatum v. VA Dept of Agriculture & Consumer Servs.*, 41VA. App. 110, 123, 582 S.E. 2d 452, 458 (2003) held in part as follows:

While the Hearing Officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy...the Hearing Officer reviews the facts de novo...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action. Thus the Hearing Officer may make a decision as to the appropriate sanction, independent of the Agency's decision.

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 Agency provided the Hearing Officer with a notebook containing nine (9) tabbed sections and that notebook was accepted in its entirety as Agency Exhibit 1.

The Grievant provided the Hearing Officer with a notebook containing twelve (12) tabbed sections and that notebook was accepted in its entirety as Grievant Exhibit 1.

The Agency provides educational training for its employees. For those employees whose lack of fluency in English is detrimental to their work performance, the Agency provides, at the Agency's cost, an ESL class that its employees can attend. The Grievant approached his immediate supervisor and requested the ability to attend an ESL course. The class was from 2:00 p.m. until 3:30 p.m. every Tuesday and Thursday. The Grievant's work shift commenced at 7:00 a.m. and concluded at 3:30 p.m. every day. Accordingly, the Grievant would spend the last 1 ½ hours of his work shift on Tuesdays and Thursdays attending the ESL class. The Agency would pay for the cost of the class and the Grievant was paid his normal hourly rate for the 1 ½ hours that he was attending the class. The Grievant and his Supervisor entered into a written agreement regarding the ESL class and the expectations that the Agency had for the Grievant.¹

For the class that met from January 8, 2008 to July 1, 2008, the Agency alleges that the Grievant was absent January 17th, February 5th, May 1st, May 8th and June 24th of 2008. These absences are documented on the course Instructor's attendance sheets.² They are also shown on the ESL roster sign-in sheet that is signed by each of the class attendees on each class date.³

On January 17, 2008, an inclement weather event was declared by the Agency. The Grievant and at least two (2) other class participants went to the class location at the appropriate time and waited for a minimum of thirty (30) minutes before one (1) of them called to find out why the Instructor was not present. At that point, they were told that class had been canceled. The Grievant testified, and his testimony was unrebutted, that on class days, he would leave his employment site, take a bus to where his car was parked, and then drive his car to where the class would take place. This was done so that when class ended, his car would be available for him to immediately go home, as his workday had ended. That process generally would consume thirty (30) minutes. Accordingly, by the time it was discovered that class had been canceled, it would be beyond his workday before he could return to work.

Regarding the absences on February 5th, May 1st, and May 8th, the Grievant testified, and his testimony was unrebutted, that he left his employment to go to class, became ill, did not attend class and went home. However, he called fellow class attendees and had them notify his Instructor of his absence.

Regarding the June 24th absence, the Grievant testified, and his testimony was unrebutted, that he left work and went for an interview for a different job with a professor who is employed by the Agency.

¹ Agency Exhibit 1, Tab 5, Page 1

² Agency Exhibit 1, Tab 7

³ Agency Exhibit 1, Tab 8

The Agency has accused the Grievant of falsifying a state record. There have been several prior Hearing Officer Decisions which have dealt with the issue of falsification of state records.⁴

In those prior Decisions, the Hearing Officers have looked at various definitions of the word "falsify." Black's Law Dictionary defines "falsify" as:

To counterfeit or forge; to make something false; to give a false appearance to anything.

The word falsify may be used to mean being intentionally or knowingly untrue, made with intent to defraud. Washer v. Bank of America Nat. Trust & Savings Ass'n 21 Cal 2d 822, 136 p.2d 297, 301.

The New Webster's Dictionary and Thesaurus defines falsify as:

To alter with intent to defraud, to falsify accounts, to misrepresent, to falsify an issue, to falsify the course of justice.⁵

Accordingly, the issue before the Hearing Officer is whether or not the Grievant did in fact falsify a state record and, if so, did the Grievant have the intent to defraud the Agency.

It is clear that the Agency felt that the Grievant's skill with the English language was such that it would be beneficial to both the Agency and to the Grievant for him to attend an ESL class. The Agency introduced into evidence Directive #125G.⁶ At page 2 of Directive 125G the Agency pointed out to the Hearing Officer a definition of "Work Time." The definition of Work Time is as follows:

Work time is time employees spend in the direct performance of their job assignments exclusive of "breaks." Employees are expected to apply themselves productively to assigned duties during the full schedule for which they are compensated, except for reasonable time for personal needs and authorized breaks. Employees should avoid conduct that is or may appear to be non-productive. Any situation which prevents effective performance must be reported to supervision. Employees are personally accountable for their work performance.

⁴ See case numbers 5737, 7919, 7893, and 8950

⁵ See case number 8950

⁶ Agency Exhibit 1, Tab 3

Further, in Directive #125G, the Agency relies on the definition of “Leave Use and Approval” found at paragraph 7 on page 3. Leave Use and Approval is defined as follows:

Planned time off must be approved by the Supervisor in advance. Supervisors may require employees to take compensatory leave when the workload permits (period when workload is down). Unexpected absences must be reported as promptly as possible by the employee to his/her supervisor; except in abnormal circumstances this must occur within one hour of the beginning of the employee’s normal work schedule.

It is clear that the Grievant was being compensated for the time that he was to be in class. What is not clear is what the Grievant was supposed to do if, on the way to class, he became sick and then continued home. The definition of Work Time would seem to imply that the Grievant should apply himself productively to what was taking place in the classroom. However, it does not address the issue of what happens if you become sick and need to leave the class or not attend the class. Leave Use and Approval clearly sets forth that planned time off must be approved by a Supervisor in advance. However, attendance to the ESL class was in fact already approved. Again, there is nothing in the Leave Use and Approval definition to indicate what the Grievant should have done when he left with the intent to go to class and became sick.

Further, it is intriguing that the Agency would expect someone whose English language skills are such that they need to attend an ESL class to be able to read and comprehend Directive #125G.

Numbered paragraph 1 of the Education/Training Benefits Agreement Form entered into between the Grievant and his Supervisor provides as follows:

I agree to attend the classes in which I am enrolled, understanding that there are attendance requirements I must meet in order to successfully complete course requirements. Attendance is monitored and reports will be sent from Charlottesville Adult Education to the office of Human Resources and Training.⁷

This document clearly sets forth that there are attendance requirements, but in no place does it address what those requirements are. The Grievant attended most of his classes but clearly missed some. His Instructor was completely aware of the classes that were missed as the attendance sheet was not signed and as the Grievant telephoned a fellow classmate, indeed several fellow classmates, and had them notify the Instructor that he was sick. In theory, the attendance sheets were sent to the Office of Human Resources and Training and were available to the Grievant’s Supervisor at any time. The Grievant’s Supervisor testified that he did not review these for the months of January, February, March, April or May. It is entirely logical for the Grievant to have believed that his Supervisor was aware of his absences inasmuch as the

⁷ Agency Exhibit 1, Tab 5, Page 1

Absence Report was being filed with another arm of the Agency and the Grievant clearly could rely on the fact that his Supervisor had the ability to determine whether or not he was absent. Again, this document provides no instruction as to what should be done if you leave for a class and become sick or if, while in the class, become sick.

The Education/Training Benefit Agreement Form was drafted either by or on behalf of the Agency. Accordingly, it is strictly construed against the Agency. Paragraph 2 of that document reads as follows:

I agree to do homework and study hard so that I will meet learning goals. I understand that failing to make progress towards learning goals may result in educational benefits being denied in the future.⁸

The Hearing Officer asked the Grievant's Supervisor the following hypothetical question: If the Grievant had gone to class each and every day that class met and had simply gone to sleep, would this be a falsification of state records? The Grievant's Supervisor was nonplussed at this question and admitted that it would be up to the Instructor to determine if the Grievant was studying hard and was meeting learning goals. He concluded that it probably would not have been a falsification of a state record if the Grievant went to the class with the sincere intent to merely sleep and to not study and to not work hard. In point of fact, the Grievant did quite well in these classes as shown by his report cards. For the class that met from January 8, 2008 through July 1, 2008, his Instructor noted that Grievant's attendance was erratic but he certainly is at a place where he is learning English both in and out of class. The Instructor recommended that he continue in the class.⁹ Furthermore, that report card shows that the Grievant's test scores improved after he had attended the class.

The Education/Training Benefits Agreement Form at paragraph 4 states as follows:

I agree to maintain a positive work performance and attendance standards during my enrollment in these programs. I understand that failure to do this may result in forfeiture of educational benefits in the future.

Again, this does not in any way attempt to define what a "positive work performance" is nor does it address what "attendance standards" are. The Agency has created an Agreement Form that in large measure is meaningless.

The Grievant testified that he felt that by notifying his teacher that he was not going to be in class, was all that was required of him. From his cultural background, teachers were held with a distinctly higher level of respect than teachers are in this culture. The Grievant testified that he felt notification to the teacher was all that was required, particularly knowing that the teacher would notify the Agency that he was not present.

On June 24, 2008, the Grievant did not attend class and went on an interview for a new position with a different department with the Agency. Clearly on this date, and this date alone,

⁸ Agency Exhibit 1, Tab 5, Page 1

⁹ Agency Tab 6, Page 3

the Grievant was fully aware that when he signed out from work that he was not going to attend class. This falls into a different situation from the snow day or the three (3) dates where he left intending to go to class and became sick. The Grievant testified, and his testimony was uncontradicted and indeed supported by the Agency's evidence, that he had approached his Supervisor for a transfer from the department in which he worked. He felt that he was being taken advantage of and that many of the jobs that he was asked to do were simply unsafe. He was fearful that his Supervisor was doing all that he could to undermine his attempts to transfer to a different department in the Agency. Accordingly, he did not tell his Supervisor that he was going on an interview, he did not go to class as he indicated on his sign-out sheet, and went on the interview. The Manager of the department in which he worked testified that if the Grievant was not being paid for the time that he went to class then this would have justified a counseling session. It appears from that testimony that the Agency is not so much concerned with what the Grievant was doing during this 1 ½ hour time frame but that he was being paid for it. The Agency, in its Written Notice, alleged that the Grievant was paid for "five occasions when he claimed to be in class but was not."¹⁰ In point of fact, he was in class on the snow day, he called in sick on three (3) of the remaining four (4) days and only on the one (1) day was he not in class when he was being interviewed by a professor at the Agency.

The Hearing Officer finds that on only that one (1) occasion was the Grievant paid when he should have been in class. The question then is: Does that one (1) occurrence rise to a Group III offense and termination. While it may seem to be a harsh punishment to be terminated for this one (1) event, the Grievant had the opportunity to take personal leave or unpaid leave or schedule the interview for after work hours. He voluntarily chose not to do this. Accordingly, the Hearing Officer finds that he did have the requisite intent to falsify a state record. The Agency has chosen to exact the most severe punishment possible in this matter. However, the Hearing Officer finds that such punishment is permissible under the Standards of Conduct Policy 1.60.

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..."¹¹ 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, (3) the disciplinary action was free of improper motive, (4) the length of time that the Grievant has been employed by the Agency, and (5) whether or not the Grievant has been a valued employee during the time of his/her employment at the Agency.

¹⁰ Agency Exhibit 1, Tab 1, Page 5

¹¹ Va. Code § 2.2-3005

DECISION

For reasons stated herein, the Hearing Officer finds that the Grievant did falsify a state record and the Agency was justified in the issuance of the Group III Written Notice and termination of the Grievant.

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 Street, 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 Street, 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 15 calendar days of the date the decision was issued. You must give a copy of your appeal 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 a review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.¹² 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.¹³

[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]

William S. Davidson
Hearing Officer

¹²An 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).

¹³Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.