Issue: Group III Written Notice with Termination (falsification of records, tardiness, leaving worksite without permission, failure to follow policy); Hearing Date: 04/13/10; Decision Issued: 04/16/10; Agency: VCCS; AHO: Carl Wilson Schmidt, Esq.; Case No. 9298; **Administrative Review: AHO Reconsideration Request received 04/28/10; Reconsideration Decision issued 05/26/10; Outcome: Original decision affirmed; Administrative Review: EDR Ruling Request received 04/28/10; EDR Ruling #2010-2630 issued 06/16/10; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 04/28/10; DHRM Ruling issued 06/17/10; Outcome: Declined to review.**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9298

Hearing Date: April 13 2010
Decision Issued: April 16 2010

PROCEDURAL HISTORY

On November 11, 2009, Grievant was issued a Group III Written Notice of disciplinary action with removal for failure to report without notice, failure to follow instructions, late arrival to work, leaving work early without permission, and falsification of records.

On December 10, 2009, 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 March 15, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 13, 2010, 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?

5. Whether the Agency retaliation 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. 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 Community College System employed Grievant as a Network Security Analyst at one of its Facilities. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

On October 22, 2009, Grievant sent the Supervisor an email indicating that she would be returning to work on Friday, October 23, 2009. On October 23, 2009, Grievant failed to report to work and she also failed to notify the Supervisor regarding her inability to work that day. On October 26, 2009, Grievant did not report to work as scheduled. She did not notify the Supervisor that she would be absent that day. Grievant was unable to contact the Agency to inform them of her absence due to a medical condition.

On June 29, 2009, the Vice President sent staff including Grievant an email stating, in part:

> As a reminder, it is the policy of the Information Technology Division that employees do not bring children to work during work hours for long periods of time. While there is not a formal [Facility] policy that specifically prohibits children on the campus, [Facility] Policy 12.6, Children on Campus, does speak to the liabilities that the college will not assume if a

> child is injured. I love children as much as anyone; however, the workplace is really not the place for children other than for a brief visit (less than 1 hour).

On October 28, 2009, Grievant left the office in the afternoon to take one of her children to a doctor's appointment. Grievant received the Supervisor's approval to do so. Grievant returned to the office with both of her children. At approximately 3:15 p.m. another employee observed that Grievant's children were in her office. At 4:20 p.m., Grievant's children were again observed in Grievant's office

Grievant's normal work shift was from 8 a.m. until 5 p.m. On November 6, 2009, Grievant reported to work at approximately 10 a.m. She left work that day at approximately 3:30 p.m. prior to the end of her shift. Grievant did not notify her Supervisor or receive permission from the Supervisor to arrive late to work or to leave work early.

On November 10, 2009, Grievant submitted a Non-Exempt Employee Attendance and Leave Record. The purpose of this form was to enable employees to identify the hours they worked and leave taken. The form had a place for the employee to sign and for the supervisor to signify his or her approval. Grievant wrote on the form that she had worked eight hours on November 6, 2009. She signed the form to certify that, "[t]he information on this form is accurate and complete."

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action."[1] Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

The Agency combined several separate offenses in to one Written Notice. Each set of facts will be addressed.

The Agency alleged that Grievant failed to report to work as required on October 23 and October 26, 2009. Grievant testified that she was unable to call due to a medical condition. Grievant's inability to contact the Agency because of a medical condition is a mitigating circumstance that excuses her failure to call and report to work on October 23 and October 26, 2009. Grievant presented an excuse from a medical provider excusing her absence from work from October 21, 2009 through October 27, 2009. There is no basis to discipline Grievant for her absence on those dates.

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

Failure to follow a supervisor's instruction is a Group II offense.[2] Grievant was instructed by the Vice President, a supervisor, not to have her children in the office for more than one hour. On October 28, 2009, Grievant brought her children to the office and the children remained with her for over an hour.

Tardiness is a Group I offense.[3] Leaving work without permission is a Group II offense.[4] On November 6, 2009, Grievant was tardy to work in the morning and she left the workplace early without permission in the afternoon.

Grievant argued that she was at work on time at 8 a.m. on November 6, 2009 and that she did not leave the Facility campus until the end of her shift at 5 p.m. At 8:15 a.m., the Vice President noticed that Grievant's vehicle was not in the parking lot. She continued to check the parking lot to see if Grievant's vehicle was there. At 9:40 a.m., the Vice President knocked on Grievant's office door and no one answered. Grievant did not logon to her computer until approximately 10 a.m. Grievant was first observed by the Administrative Assistant in the restroom at approximately 10:05 a.m. Grievant's car was observed in the parking lot. At approximately 3:20 p.m., the Vice President went to Grievant's office and knocked on the door. Grievant was not there. The Vice President went to the parking lot and noticed that Grievant's vehicle was no longer in the parking lot. At approximately 4:45 p.m., the Supervisor attempted to contact Grievant. Grievant was not in her office. The Vice President worked until 6 p.m. that night and did not see Grievant's vehicle return to the parking lot. The Agency has presented sufficient evidence to support its assertion that Grievant's reported to work late and left the workplace early.

Falsification of records as a Group III offense.[5] Grievant knew or should have known that she worked fewer than eight hours on November 6, 2009. Grievant drafted a leave record that she submitted to the Agency. In that record she asserted that she worked eight hours when in fact she had not worked eight hours on November 6, 2009. The definition of "Falsify" is 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. ***

Grievant knew that she had worked fewer than eight hours on November 6, 2009. She falsely wrote on her time record that she had worked eight hours. Grievant falsified the Non-Exempt Employee Attendance and Leave Record submitted to the

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[2] See Attachment A, DHRM Policy 1.60.

[3] See Attachment A, DHRM Policy 1.60.

[4] See Attachment A, DHRM Policy 1.60.

[5] See Attachment A, DHRM Policy 1.60.

Agency thereby justifying the issuance of a Group III Written Notice of disciplinary action.

Grievant contends that she did not falsify any records because she was at work on November 6, 2009 for her entire shift. The evidence showed that Grievant was not at work for eight hours on November 6, 2009. Four days later, Grievant submitted a leave record falsely claiming that she was present on November 6, 2009.

Upon the issuance of a Group III Written Notice, and employee may be removed from employment. Accordingly, the Agency's decision to remove Grievant from employment must be upheld.

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. With the exception of the allegation regarding Grievant's failure to report to work on October 23 and October 26, 2009, there are no other mitigating circumstances that would justify a reduction of the Group III Written Notice with removal.

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;[7] (2) suffered a materially adverse action[8]; and (3) a causal link exists between the adverse action and 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

[6] *Va. Code § 2.2-3005.*

[7] *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.

[8] 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.

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.[9]

Grievant engaged in protected activity because she filed a grievance against the Supervisor on June 17, 2009. Grievant suffered a materially adverse action because she received disciplinary action. Grievant has not established any causal link between the adverse action and the protected activity. Grievant did not present any testimony during the hearing that would support her claim of retaliation. Based on the evidence presented there is no reason for the Hearing Officer to conclude that the Agency retaliated against Grievant.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action 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:

[9] 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).

Director
Department of Employment Dispute Resolution
600 East Main St. STE 301
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]

[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

Carl Wilson Schmidt, Esq.
Hearing Officer

[10] 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: 9298-R

Reconsideration Decision Issued: May 26, 2010

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.

Grievant alleges that the original Hearing Decision states incorrect legal conclusions. She does not cite any statute or case law supporting her argument. The original Hearing Decision does not state any incorrect legal conclusions. Grievant restates many of the assertion of facts and arguments she made during the hearing. Grievant's evidence was not sufficient to refute the Agency's case.

Grievant presented an affidavit from Mr. R. Mr. R could have testified at the hearing but he did not do so. Mr. R's written statements reflect Grievant's statements

during the hearing. Grievant's statements were not credible. Mr. R’s affidavit does not afford the Hearing Officer an opportunity to assess his credibility. The affidavit is not new evidence.

The request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. For this reason, the request for reconsideration is **denied.**

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

Carl Wilson Schmidt, Esq.
Hearing Officer

June 17, 2010

RE: **Grievance of [Grievant] v. Thomas Community College**
Case No. 9298

Dear Grievant:

The agency head of the Department of Human Resource Management, Ms. Sara Redding Wilson, has asked that I respond to your request for an administrative review of the hearing officer's decision in the above referenced case. Please note that, pursuant to the Grievance Procedure Manual, §7.2(a), either party to the grievance may request an administrative review 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 (DHRM) to review the decision. You must refer to the specific policy and explain why you believe the decision is inconsistent with that policy.

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.

In each instance where a request is made to this Agency for an administrative review, the party making the request must identify with which human resource policy, either state or agency, the hearing decision is inconsistent. In our opinion, your request does not identify any such policy. Rather, it appears that you are disagreeing with how the hearing officer assessed the evidence and with the resulting decision. We must therefore we must respectfully decline to honor your request to conduct the review.

Sincerely,

Ernest G. Spratley