

Issue: Group III Written Notice with termination (falsifying records); Hearing Date: 08/23/10; Decision Issued: 09/07/10; Agency: VPI&SU; AHO: Carl Wilson Schmidt, Esq.; Case No. 9377; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9377

Hearing Date: August 23, 2010
Decision Issued: September 7, 2010

PROCEDURAL HISTORY

On June 3, 2010, Grievant was issued a Group III Written Notice of disciplinary action with removal for falsification of records and claiming to be working when she was not working.

On June 15, 2010, 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 19, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The Hearing Officer found just cause to extend the time frame to issue a decision in this case due to the unavailability of the parties. On August 23, 2010, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency Counsel
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. 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:

Virginia Tech employed Grievant as a Housekeeping Worker. No evidence of prior act of disciplinary action against Grievant was introduced during the hearing.

Grievant's work shift for most days began at 4 p.m. and ended at 1 a.m. Her lunch break was typically from 8 p.m. to 9 p.m. Grievant was not responsible for cleaning Building O but she would go there to begin her shift and take breaks during the shift.

Grievant was expected to complete a Work Assignment Log during her shift. The Log was a preprinted form listing the names of various buildings on the campus. It listed the duties that the employee was to perform with respect to that building. For example, for the mailroom in Building P, the duties were "Dust windowsills and ledges. Remove trash and replace liner. Sweep and mop floors (vacuum when necessary)." The Log provided blank spaces for employees to write the "started time", "completed time", and "comments". At the bottom of each page of the Log appeared the following sentence:

All Log Entries MUST be accurate and provide detailed information.

At the end of each Log, Grievant would sign her name and write the date.

The Agency maintained a card access system. When an employee used an identification card to gain access to a building, the card access system would make a record showing the date and the time along with identity of the employee accessing the building.

On April 6, April 8, April 9, April 13, April 15, and April 23, 2010, Grievant was observed for all or a portion of her work shifts by the Manager and Assistant Manager. On April 23, 2010, Grievant was also observed by the Assistant Director. Grievant completed Logs for each of those shifts. Grievant repeatedly and consistently failed to accurately report the time she began and completed tasks and the buildings in which she was located at various times during her shift. Grievant also reported that she had completed tasks that she had not completed. On several occasions, Grievant took longer lunch breaks than she was permitted.

On April 6, 2010 at approximately 4:50 p.m., the Manager and the Assistant Manager entered Building O and observed Grievant's Log for her shift. Grievant had made entries in the Log showing the hours she worked and tasks she performed for the entire shift. She had already made entries for times that had not yet occurred.

Grievant wrote in her Log that she was in Building P sweeping steps from 4:46 p.m. to 5:30 p.m. At 5:15 p.m., the Manager walked into Building P to observe the work completed by Grievant. Grievant had not swept, mopped, cleaned, or dusted in the stairs area of Building P. Photos were taken of the unclean areas.

Grievant wrote in her Log that she was in Building P from 7:23 p.m. to 8 p.m. sweeping rugs in the entranceway lobby. Grievant was observed, however, entering Building O at 7:18 p.m. She remained there until 9:10 p.m. Grievant was permitted one hour to take a lunch break but she took an extra 52 minute break.

On April 8, 2010, Grievant wrote in the Log that she was at Building P from 4:34 p.m. to 4:49 p.m. picking up and compacting trash. At 4:35 p.m. the Manager and the Assistant Manager were looking for Grievant at Building P. Grievant was not there. Grievant's absence in Building P is consistent with the access card system which showed that Grievant entered Building PY at 4:25 p.m.

Grievant wrote in the Log that she was sweeping the steps in Building P from 6:15 to 6:45 p.m. Grievant was not observed entering Building P during that time. The access card system showed that she entered Building O at 6:15 p.m.

On April 9, 2010, Grievant wrote in the Log that she was in Building P in the mailroom from 6:30 p.m. to 8 p.m. performing duties related to trash, dusting, and sweeping. Grievant was observed entering Building O at 7:24 p.m. She remained there

until 9:10 p.m. and was not in Building P as she claimed. She exceeded the amount of time allotted for her lunch break by 46 minutes.

On April 13, 2010, Grievant wrote in the Log that she was cleaning various locations in Building P from 6:15 p.m. until 8 p.m. Grievant was observed entering Building O at 6:41 p.m. She remained there until 8:54 p.m. Grievant exceeded the amount of time allotted for her lunch break by one hour and 13 minutes.

On April 15, 2010, Grievant wrote in the Log that she was cleaning in Building P from 6:15 p.m. until 7:45 p.m. Grievant was observed entering Building O at 6:56 p.m. and remained there until 9:01 p.m. Grievant exceeded the time allotted for her lunch break by one hour and five minutes.

On April 23, 2010, Grievant wrote in the Log that she was sweeping in Building P from 7 p.m. to 8 p.m. She wrote that she was cleaning bathrooms in Building P from 9 p.m. until 10 p.m. The access card system showed the Grievant was in Building H from 5:57 p.m. until 7:32 p.m. Grievant entered Building O at 7:40 p.m. and remained there until 9:43 p.m. Grievant exceeded the time allotted for her lunch break by one hour and three minutes.

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."

"[F]alsification of records" is a Group III offense.² "Falsification" 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. ***

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

² See, Attachment A, DHRM Policy 1.60.

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*.

Grievant knew or should have known that all of her Log entries were to be accurate and provide detailed information. The Log stated this obligation at the bottom of each page. Grievant knew that she was expected to provide detailed information because she would often write specific start and stop times for each task. For example, on April 6, 2010, Grievant wrote that she picked up and compacted trash at Building A beginning at 4:18 p.m. and ending at 4:33 p.m. Grievant repeatedly wrote in her Log that she was performing work duties when in fact she was taking an extended lunch break in Building O. Grievant could not have confused taking a lunch break with performing work duties. The Agency has presented sufficient evidence to show that Grievant intentionally misrepresented her work on the Logs she maintained on April 6, 8th, 9th, 13th, 15th, and 23rd, 2010. The evidence is sufficient to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant's removal from employment must be upheld.

Grievant argues that the Assistant Manager had instructed her to "spread out" her time on the Log. The Assistant Manager denied giving such an instruction.³ Even if the Hearing Officer were to assume for the sake of argument that such an instruction was given, it does not change the outcome of this case. The allegation by Grievant was that she was instructed to "spread out" her time with respect to emergency calls. Grievant falsified her Log with respect to the amount of time she took for lunch breaks. Taking a lunch break would have nothing to do with accounting for time devoted to an emergency call.

Grievant argued that the Agency failed to comply with policy because she was not afforded sufficient opportunity to present her case to the Agency prior to her removal. The Agency contends it provided Grievant was sufficient notice of the allegations against her prior to her removal. If the Hearing Officer assumes for the sake of argument that the Agency failed to provide Grievant was sufficient notice of the charges against her, that failure does not change the outcome of this case. To the extent that Grievant could have offered to the Agency defenses to the disciplinary action, Grievant was able to present those defenses during the hearing. The grievance hearing served to cure any defects in the procedural due process afforded Grievant by the Agency.

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

³ The Assistant Manager testified that she instructed Grievant and other employees to write the correct times and work duties performed as they occurred.

“in accordance with rules established by the Department of Employment Dispute Resolution....”⁴ 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 the disciplinary action.

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;⁵ (2) suffered a materially adverse action⁶; 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 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.⁷

Grievant engaged in protected activity when she complained about other employees in her chain of command. Grievant suffered a materially adverse action because she received disciplinary action. Grievant has not established a causal link between her protected activity and the materially adverse action she suffered. The Agency’s issuance of disciplinary action arose from a complaint made about Grievant by a coworker. Agency managers investigated the complaint and realized that Grievant was falsifying records. Grievant was discipline in accordance with the Standards of Conduct. The disciplinary action was not a pretext or excuse for retaliation.

⁴ Va. Code § 2.2-3005.

⁵ 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.

⁶ 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.

⁷ 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).

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal 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
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.⁸

[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

⁸ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.