Issue: Group III Written Notice with termination (falsifying records); Hearing Date: 08/24/10; Decision Issued: 09/08/10; Agency: VPI&SU; AHO: Carl Wilson Schmidt, Esq.; Case No. 9378; Outcome: No Relief – Agency Upheld.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9378

Hearing Date: August 24, 2010
Decision Issued: September 8, 2010

PROCEDURAL HISTORY

On June 3, 2010, Grievant was issued a Group III Written Notice of disciplinary action with removal for falsification of documents.

On June 6, 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 a party. On August 24, 2010, a hearing was held at the Agency's regional 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 Supervisor prior to her removal effective June 3, 2010. Grievant supervised several Housekeeping Workers. Grievant had been employed by the Agency for approximately 26 years. She consistently received satisfactory performance evaluations.

Grievant's work shift began at 7:30 p.m. and ended at 4:30 a.m. Her lunch break was supposed to be from 11:30 p.m. to 12:30 a.m.

Grievant was responsible for completing a Supervisor's Log to record her activities during her shift.[1] The Supervisor's Log was a preprinted form with blank spaces where Grievant was expected to write the "Day", "Time Start", "Completed Time", "Location", and "Duties Perform". Grievant was also expected to go to the buildings that her employees were assigned to clean and inspect the buildings to ensure that they were properly cleaned. Grievant was to mark on a Work Assignment Log whether the cleaning was satisfactory or unsatisfactory. At the bottom of each page of the Work Assignment Log appeared the following sentence:

[1] Grievant's subordinates were also expected to keep work logs. One of Grievant's duties was to ensure that her employees properly completed log entries.

All Log Entries MUST be accurate and provide detailed information.

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 15, 16, 17, and 23, 2010, Grievant and another employee were observed for a portion or all of their shifts by the Manager and Assistant Manager. On April 23, 2010, Grievant was also observed by the Assistant Director. The observations of these supervisors were consistent with the records generated by the access card system.

Grievant wrote in her Supervisor's Log that on April 15, 2010 she was inspecting an employee's work in Building P from 10:30 p.m. to 11:30 p.m. The access card system showed that Grievant entered Building H at 10:31 p.m. Grievant then entered Building O at 10:38 p.m. There is no reason for the Hearing Officer to believe that Grievant entered Building P from 10:30 p.m. to 11:30 p.m.

Grievant wrote in her Supervisor's Log that on April 16, 2010 she was in Building H from 12:30 a.m. until 12:55 a.m. inspecting an employee's work. The access card system showed that Grievant entered Building O at 12:26 a.m. There is no reason for the Hearing Officer to believe that Grievant entered Building H from 12:30 a.m. to 12:55 a.m.

Grievant wrote in her Supervisor's Log that on April 16, 2010 she was in Building AJ and Building C from 2 a.m. until 2:20 a.m. inspecting an employee's work. The access card system showed that Grievant entered Building O at 2 a.m. There is no reason for the Hearing Officer to believe that Grievant entered Building AJ or Building C from 2 a.m. until 2:20 a.m.

Grievant wrote in her Supervisor's Log that on April 17, 2010 she was in Building AJ inspecting an employee's work from 2:32 a.m. until 2:56 a.m. the access card system showed that Grievant entered Building O at 2:37 a.m. There is no reason for the Hearing Officer to believe that Grievant entered Building AJ from 2:32 a.m. until 2:56 a.m.

On April 23, 2010, Grievant permitted an employee to take a longer lunch break than the one hour set for the employee from 8 p.m. until 9 p.m. Grievant was with the employee in Building O from 7:40 p.m. until 9:43 p.m. The employee did not have any work duties in Building O.

Grievant wrote in her Supervisor's Log that on April 23, 2010 she was in Building Ow looking for mops and in Building P inspecting an employee's work from 10 p.m. until 10:40 p.m. Grievant was observed at Building Ow from 9:45 p.m. until 10:03 p.m. when

she left to go to Building V. Grievant then entered Building O at 10:13 p.m. Grievant entered Building NHW at 10:24 p.m. Grievant entered Building O at 10:36 p.m. There is no reason for the Hearing Officer to believe that Grievant entered Building P to inspect an employee's work during the period 10 p.m. until 10:40 p.m.

Grievant wrote in her Supervisor's Log that on April 23, 2010 she was in Building H from 10:50 p.m. until 11:14 p.m. inspecting an employee's work. The access card system showed the Grievant entered Building O at 10:51 p.m. There is no reason for the Hearing Officer to believe that Grievant entered Building H from 10:50 p.m. until 11:14 p.m.

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."[2] 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.[3] "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. ***

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 Supervisor's Log entries were to be accurate and provide detailed information. Grievant's Work Assignment Log stated at the bottom of each page the expectation that Grievant enter accurate and detailed information. Grievant knew that she was expected to provide detailed

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

[3] See, Attachment A, DHRM Policy 1.60.

information because she would often write specific start and stop times for each task. Grievant demonstrated a pattern of failing to accurately report her work locations and work duties at specific times of her shift. That pattern is sufficient for the Hearing Officer to conclude that Grievant intended to falsify her Supervisor's Logs. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for falsification of records. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

Grievant argued that her supervisors "stalked" her. Monitoring the behavior of subordinate employees is consistent with the responsibilities of a supervisor when a supervisor believes the subordinate may be engaging in behavior contrary to the Agency's expectations.

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…."[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.

Grievant argued that she was not given a sufficient opportunity to learn of the Agency's evidence against her and present her defenses 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.

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

[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

materially adverse action[6]; 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 successfully challenged a Group I Written Notice given to her on December 16, 2009. 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 as part of its investigation of one of Grievant's subordinates. Agency managers investigated that employee 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.

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

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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).

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.