Issues: Group II Written Notice (failure to follow policy), Group III Written Notice (falsifying records) and Termination; Hearing Date: 11/18/10; Decision Issued: 11/23/10; Agency: VDACS; AHO: Carl Wilson Schmidt, Esq.; Case No. 9454, 9455; Outcome: No Relief – Agency Upheld.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9454 / 9455

Hearing Date: November 18, 2010
Decision Issued: November 23, 2010

PROCEDURAL HISTORY

On July 23, 2010, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow policy. On July 23, 2010, Grievant was issued a Group III Written Notice of disciplinary action with removal for leaving work without permission, failure to follow instructions and/or policy, and falsifying records.

On July 29, 2010, Grievant timely filed grievances to challenge the Agency's actions. The outcomes of the Third Resolution Steps were not satisfactory to the Grievant and she requested a hearing. On October 14, 2010, the EDR Director issued Ruling No. 2011-2793, 2011-2794 consolidating the two grievances for a single hearing. On November 1, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 18, 2010, a hearing was held at a State Agency's regional office. Grievant participated by telephone.

APPEARANCES

Grievant
Agency Representative
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notices?

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:

The Virginia Department of Agriculture and Consumer Services employed Grievant as an Agriculture Specialist until her removal effective July 23, 2010. She began working for the Agency in June 2008. Grievant had prior active disciplinary action. On December 2, 2009, Grievant received a Group I Written Notice.

Grievant reported to the Supervisor. Prior to becoming the Supervisor approximately a year earlier, the Supervisor worked as a law enforcement officer. He frequently encountered intoxicated individuals. He received training on an annual basis regarding the identification of intoxicated individuals.

On July 15, 2010, Grievant was scheduled to begin working at 3:30 p.m. She reported to work at 3:57 p.m. Upon her arrival, she encountered the Supervisor. The Supervisor suspected Grievant was impaired. Grievant's words were drawn and slurred. She had difficulty forming complete sentences, she was talking slowly and deliberately and the Supervisor could smell a high concentration of breath cleaner.[1]

[1] Two other employees also observed Grievant's behavior. They concluded that Grievant's behavior on July 15, 2010 was unusual.

The Supervisor asked Grievant if she was impaired and she said "do you want to take me somewhere". The Supervisor asked if she was willing to go to a center and get her blood tested. She agreed to go take a blood test but later refused and said that she was not impaired and had not been drinking. The Supervisor released Grievant from duty because he concluded she was not in an acceptable state to perform her duties or represent the Agency to the client as an inspector. As Grievant exited the property, she drove her vehicle over a parking bumper and sidewalk.

During the disciplinary due process meeting between the Supervisor and Grievant, Grievant stated that she was taking a muscle relaxer but did not take this medication on a routine basis and that it did not have side effects that would impair her but that it made her sleepy. She later stated that she was taking a pain medication and that she thought she was okay.

The Agency entered into a contract with the Company to provide inspection and other services to the Company at the Company's facility. Grievant worked at the Company's facility. She had an identification card. In order to gain access to or exit from the facility, Grievant had to swipe her identification card at the Company's gate. The Company maintained a database that recorded each time Grievant swiped her card at the gate.

On June 3, 2009, Grievant received a memorandum regarding "Expected Duties and Prohibited Acts" stating, in part:

YOU ARE PROHIBITED FROM:

1. Falsifying any work related documents.
2. Leaving your duty station during official work hours without previous approval of your supervisor.[2]

Grievant typically worked an eight hour shift. She was obligated to report her hours worked on an Agency timesheet. When Grievant signed a timesheet she certified that, "THE INFORMATION ON THIS FORM IS ACCURATE, COMPLETE, AND IN COMPLIANCE WITH THE FAIR LABOR STANDARDS ACT (FLSA)." Grievant consistently recorded working more hours on her timesheets than she was actually at the Company's work site:

Date	**Hours Reported Worked**	**Actual Time Work**
June 7, 2010	8	4 hours and 24 minutes
June 8, 2010	8	5 hours and 6 minutes
June 9, 2010	11.5	7 hours and 9 minutes
June 10, 2010	8	6 hours and 2 minutes
June 15, 2010	8	4 hours and 52 minutes

[2] Agency Exhibit 9.

July 9, 2010	8	7 hours and 27 minutes
July 11, 2010	4	2 hours and 4 minutes
July 12, 2010	8	7 hours and 16 minutes
July 14, 2010	8	6 hours and 14 minutes
July 15, 2010	4	1 hour and 27 minutes

In order to leave prior to the conclusion of her shift, Grievant had to obtain permission from her supervisor. Grievant did not obtain permission to leave prior to the end of her shift for any of the dates listed above.

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."[3] 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."

Group II Written Notice

"[D]isruptive behavior" is a Group I offense.[4] Grievant reported to work on July 15, 2010. She was impaired and unable to perform her duties. She disrupted the Agency's operations because she had to be sent home. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice for disruptive behavior.

The Agency argued that Grievant should receive a Group II Written Notice for violating DHRM Policy 1.05. DHRM Policy 1.05 governs Alcohol and Other Drugs. The policy states that prohibited acts by employees include:

> the impairment in the workplace from the use of alcohol or other drugs, (except for the use of drugs for legitimate medical purposes)

The Agency has established that Grievant was impaired in the workplace. What the Agency has not established is the reason why she was impaired. No evidence was presented that on July 15, 2010 that Grievant smelled of alcohol. Although her behavior was consistent with someone who was under the influence of alcohol, it could have been the case that she was under the influence of legal drugs such as a muscle relaxer or pain medication as Grievant claimed. DHRM Policy 1.05 presents an exception for

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

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

the use of drugs for legitimate medical purposes. Muscle relaxers and pain medication would be drugs used for legitimate medical purpose. Accordingly, there is no basis to elevate the disciplinary action from a Group I to a Group II Written Notice.

Group III Written Notice

"[F]alsification of records" is a Group III offense.[5] Falsification is not defined by the Standards of Conduct 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 submitted timesheets to the Agency to record her hours of work. Grievant knew that she was prohibited from falsifying any work-related documents and from leaving her duty station during official work hours without approval from her supervisor. Grievant left the Company's facility on several occasions prior to the conclusion of her shift. She did not have permission to leave the worksite. She completed and submitted timesheets overstating the number of hours she worked. Grievant's behavior constitutes the falsification of records thereby justifying the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Noticed, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

Grievant argued that it was common practice for employees to leave the Company's facility prior to the conclusion of their shift. No credible evidence was presented to support this assertion. The Agency investigated Grievant's allegation by speaking with Grievant's coworkers. None of Grievant's coworkers confirmed her allegation. The Hearing Officer has no reason to believe it was common practice for employees to leave their workstations and falsely report the number of hours they had work.

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

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

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. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

Retaliation

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 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 a protected activity because she had filed a grievance to challenge a prior disciplinary action. Grievant suffered a materially adverse action because she received disciplinary action and was removed from employment. Grievant has not established a causal link between the adverse action and the protected activity. No credible evidence was presented to suggest that the Agency took disciplinary action against her as a form of retaliation. No credible evidence was presented to establish that the Agency took disciplinary action against Grievant as a pretext for retaliation.

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[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.

[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).

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is **reduced** to a Group I Notice of disciplinary action for disruptive behavior. The Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action for falsification of records is **upheld**. Grievant's 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.[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

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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.