

Issue: Group III Written Notice with removal (falsifying time records); Hearing Date: 03/07/12; Decision Issued: 03/08/12; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 9772; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9772

Hearing Date: March 7, 2012
Decision Issued: March 8, 2012

PROCEDURAL HISTORY

On November 7, 2011, Grievant was issued a Group III Written Notice of disciplinary action with removal for falsification of time clock adjustment forms.

On November 14, 2011, 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 he requested a hearing. On February 13, 2012, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 7, 2012, a hearing was held at the Agency's 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?

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 Department of Behavioral Health and Developmental Services employed Grievant as a Unit Manager until his removal effective November 7, 2011. He had been employed by the Agency for approximately eight years. Grievant had prior active disciplinary action. He received a Group II Written Notice on August 31, 2011.

The Agency's practice was to require employees to keep accurate records of their attendance and leave. When an employee failed to "punch in" or "punch out" to record attendance, the employee was expected to initiate the process necessary to update the Facility's time records. For example, if an employee entered or left the Facility without "punching" the time clock, the employee was expected to complete a time clock adjustment form. The employee would indicate on the form the reason the employee needed to submit an adjustment and the relevant dates of the adjustment. The employee would then sign the form. Since the form was electronic and not on paper, the employee would type his or her name on the form as his or her signature. The employee would email the form to a supervisor who would then review the form and sign the form by typing his or her name. The supervisor would then email the form to the timekeeper for entry into the Facility's time accounting database.

On October 11, 2011, Grievant emailed a time clock adjustment form directly to the timekeeper. The form indicated he "forgot to punch" and asked the timekeeper to "add punch" showing he was "in at 11 p.m. on 10/6/2011 and out at 7:30 a.m. on 10/7/2011". Grievant signed his name below the line on the form stating, "By submitting this form, we certify that the above information is accurate and complete." Grievant

signed the Supervisor's name by typing the Supervisor's first initial and last name. Grievant wrote the date of 10/11/2011 next to his name and the Supervisor's name. Grievant emailed a copy of the form to his own email address but did not send a copy to the Supervisor's email address.

On October 27, 2011, Grievant emailed a time clock adjustment form directly to the timekeeper. The form indicated he "forgot to punch" and asked the timekeeper to "add punch" showing he was "in at 11 p.m. on 10/20/2011 and out at 7:30 a.m. on 10/21/2011".¹ Grievant signed his name below the line on the form stating, "By submitting this form, we certify that the above information is accurate and complete." Grievant signed the Supervisor's name by typing the Supervisor's first initial and last name. Grievant wrote the date of 10/27/2011 next to his name and the Supervisor's name. Grievant emailed a copy of the form to his own email address but did not send a copy to the Supervisor's email address.

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" constitutes 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*.

¹ Grievant and the Supervisor typically began their shifts at 11 p.m. and ended them at 7:30 a.m.

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.

The Agency has presented sufficient evidence to show that Grievant falsified the two time clock adjustment forms by signing the Supervisor's name on the form. The Supervisor had not approved Grievant's time record adjustment because he was unaware of Grievant's request. By signing the Supervisor's name, Grievant falsely represented that the Supervisor had reviewed and approved his time record adjustment. The Agency has presented sufficient evidence 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, the Agency's decision to remove Grievant from employment must be upheld.

Grievant argued that the practice at the Facility was that in order to timely report leave, he was authorized by the Supervisor to sign the Supervisor's name when the Supervisor was not working and then notify the Supervisor at a later date of his action. This argument fails. The Supervisor testified that he had not authorized Grievant to sign his name on the time clock adjustment form. The Supervisor was working when Grievant submitted the documents and, thus, it would have been unnecessary for Grievant to omit the step of emailing the forms to the Supervisor. In addition, Grievant did not comply with the process as he defined it. Grievant did not notify the Supervisor of his action at later date.

Grievant argued that he did not know he was falsifying a document. He believed he had the authority to submit time and to write the Supervisor's name on the form. This argument fails. An employee's intent to falsify can be established by showing that the employee knew or should have known that the information he or she provided was false. If the Hearing Officer assumes for the sake of argument that Grievant did not realize he was falsifying a document, the evidence showed that Grievant should have known he was providing false information. The form required Grievant and the Supervisor to certify at the time of submission that the information was correct. Grievant knew that the Supervisor had not reviewed the accuracy of the information on the form but falsely affirmed the certification on the form.

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

⁴ Va. Code § 2.2-3005.

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.

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.⁵

[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

⁵ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.