



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11642

Hearing Date: March 18, 2021
Decision Issued: April 12, 2021

PROCEDURAL HISTORY

On November 20, 2020, Grievant was issued a Group III Written Notice of disciplinary action with removal for instructing subordinates to falsify hours worked.

On December 17, 2020, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On January 4, 2021, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 18, 2021, a hearing was held by remote conference.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's 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?

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. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. 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 Juvenile Justice employed Grievant as a Probation Supervisor at one of its facilities. He had been employed with the Agency for approximately 28 years and five months. His overall work performance was satisfactory to the Agency. He often earned a "Major Contributor" rating on his annual performance evaluations. Grievant had prior active disciplinary action. On June 26, 2020, Grievant received a Group II Written Notice with a five workday suspension for failure to follow instructions.

Grievant supervised three Intake Officers, Ms. G, Ms. W, and Mr. Wa. Grievant reported to the Unit Director.

In July 2019, Grievant filed a grievance against the Unit Director because she was constantly belittling him in front of others. He withdrew the grievance.

The Agency used 28 day cycle sheets to account for employee work hours. The Agency used the Time Attendance and Leave (TAL) system to allow employees to request leave and have those requests approved by supervisors. When Ms. G, Ms. W, and Mr. Wa submitted timesheets to Grievant, Grievant was supposed to review and approve the timesheets.

On November 25, 2019, the Unit Director sent an email to staff stating, in part:

This is a reminder that you must get Supervisor approval (not Intake) to be in the building after 5 p.m. and if you are working it must go on your timesheet (TAL). *** DJJ frowns on overtime pay and I will follow the DJJ policy. Please see your Employee Handbook for the consequences of falsifying records. I will no longer approve after hours time in the office. Your Supervisor must let me know that you are will be in the building after 5:00 p.m.¹

Intake Officers were required to have on-call duties. When an Intake Officer was on-call, that Intake Officer had to remain available to respond to requests for assistance after normal business hours. This meant the Intake Officer could not go on vacation or take any action that might limit the Intake Officer's ability to respond timely to a request for assistance. When an Intake Officer was on-call, the Intake Officer had to be able to report to the office within 30 minutes notice. Intake Officers took turns being on-call.

Prior to January 2020, four employees were performing on-call duties as Intake Officers. Each employee assumed on-call duties one week per month. In January 2020, one employee stopped working and took medical leave which was scheduled to end in April 2020. Rather than having one employee assume an additional week of on-call duties, the absent Intake Officer's week was divided into days and the days were allocated to the three remaining employees. This placed an extra burden on existing staff that Grievant and the Intake Officers believed was unfair.

The Intake Officer was not supposed to be paid while in on-call statues except for the actual time the Intake Officer devoted to responding to a request for services. If an Intake Officer was called to work, the Intake Officer was entitled to claim overtime or compensatory time earned for actual time worked and not for the entire on-call shift.

In January 2020 and February 2020, an Intake Officer was absent from work. This meant the absent Intake Officer could not be on-call for one week each month. Instead of assigning an entire week to one of the remaining three Intake Officers, the days of the week were divided among the three other Intake Officers.

Ms. W was on-call on January 25, 2020 and January 26, 2020. She was filling in for the absent Intake Officer. Ms. W submitted a timesheet claiming eight hours of overtime work on Saturday January 25, 2020 and eight hours of overtime work on Sunday January 26, 2020. She told the Agency's Investigator that she claimed eight hours of overtime each day because Grievant instructed her to do so. She told the Investigator she questioned Grievant about claiming overtime and Grievant told her it was approved.

Ms. W was on-call on February 18, 2020 and February 20, 2020 and submitted timesheets for these days. On February 19, 2020, Ms. W reported working eight hours

¹ Agency Exhibit p. 84.

and she claimed 16 hours of compensatory time earned. On February 20, 2020, Ms. W reported working four hours and one and a half hours for Emergency Closing/Delayed Opening. She also claimed 16 hours of compensatory time earned.

Ms. W told the Investigator that Grievant told her she could no longer use overtime but could claim compensatory time earned instead. Ms. W told the Investigator Grievant told her to put 16 hours of compensatory time earned to compensate her for extra on-call days. Ms. W did not work during the 16 hours claimed on two days. Ms. W testified she completed her timesheets as instructed by Grievant.

Mr. Wa was on-call on January 20, 2020, January 21, 2020, February 21, 2020, February 22, 2020, and February 23, 2020. Mr. Wa submitted a timesheet for Monday January 20, 2020 in which he claimed holiday leave of eight hours and compensatory time earned of eight hours. He reported eight hours of work and claimed eight hours of compensatory time earned on Tuesday January 21, 2020. Mr. Wa submitted a timesheet for Friday February 21, 2020 claiming eight hours of compensatory time earned. He claimed eight hours of compensatory time earned for Saturday February 22, 2020. He claimed eight hours of compensatory time earned for Sunday February 23, 2020. Mr. Wa was covering for another Intake Officer on these dates. Mr. Wa claimed compensatory time earned on his timesheet because he was following Grievant's instruction. Mr. Wa only worked three of these 40 hours he claimed on his timesheet.

Ms. G was on-call on January 22, 2020, January 23, 2020, January 24, 2020, February 16, 2020, and February 17, 2020. She was covering for the absent Intake Officer. Ms. G submitted a timesheet for the dates of January 22, 2020, January 23, 2020, and January 24, 2020. Her timesheet showed she worked 16 hours on two days and 17 hours on the third day for a total of 49 hours. Ms. G submitted a timesheet for February 16, 2020 and February 17, 2020. On February 16, 2020, Ms. G claimed 16 hours of compensatory time earned. On February 17, 2020, Ms. G claimed eight hours of holiday time, 4.5 hours of work time, and 16 hours of compensatory time earned for a total of 28.5 hours in a 24 hour day. Ms. G claimed overtime and compensatory time earned because Grievant directed her to do so. She did not perform any work that would have justified the time she claimed.

On February 4, 2020, Grievant sent an email to the Unit Director stating:

In an attempt to cover [Intake Officer M's] on-call schedule as she continues on medical leave, compensatory and or overtime was used this pay cycle.²

The Unit Director replied, "overtime is a matter that needs to be discussed and approved by the [Unit Director]."³

² Agency Exhibit p. 55.

³ Agency Exhibit p. 56.

On March 5, 2020, Ms. W sent an email to the HR Director stating in part:

To combat this extra work that came unexpectedly, our supervisor [Grievant] had us place an extra 8 hours per day that we covered for our co-worker on our timesheet. We were to place a comment with this timesheet stating why we placed the extra on-call hours there which we all did.⁴

On March 6, 2020, Grievant sent an email to the Unit Director stating in part:

The granting of overtime and compensation time temporarily at intake due to the present staffing issue is warranted in order to continue to boost staff morale, address the deficit in the work-life balance due to unexpected extra on-call shifts which disrupt schedules and plans of the remaining staff. Additionally, after almost two years of being short-staffed, the decision created an opportunity to show appreciation for staff's willingness to take on additional shifts.⁵

On October 7, 2020, Ms. W resigned her position with the Agency to take another position in another state.

Grievant was cooperative throughout the Agency's investigation.

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."⁶ 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."

DHRM Policy 3.10 governs Compensatory Leave. This policy provides:

Rate of Accrual:

Eligible employees earn compensatory leave on an hour-for-hour basis. Accordingly, an employee may earn one hour of compensatory leave for each hour that he or she is required to work for the reasons cited in section III (A) above.

⁴ Agency Exhibit p. 51.

⁵ Agency Exhibit p. 67.

⁶ The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

Meaning of "required to work":

1. The requirement to work additional hours must be specifically authorized by the agency head or his/her designee. General or blanket authorizations for an exempt employee to work beyond his or her regularly-scheduled hours shall not be the basis for earning compensatory leave.
2. Additional work hours are intended only to relieve specific peak workload needs and shall not be authorized to provide for continuous workload requirements.
3. Additional work hours do not include extra hours that an exempt employee independently determines is necessary to carry out his or her job responsibilities.

When the Intake Officers were in on-call status and not performing work tasks, they were not "required to work" and, thus, not entitled to earn compensatory time. When the Intake Officers claimed compensatory time earned on their timesheets, they were falsely claiming leave accrual for which they were not entitled. In other words, their timesheets were falsified.

[F]alsification of records is a Group III offense.⁷ By instructing the Intake Officers to claim compensatory time earned even though Grievant and the employees knew they had not actually worked during that time, Grievant falsified records. 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 must be upheld.

Grievant argued his action was a policy mistake and the Agency has not shown he had the necessary intent to falsify documents. Grievant denied instructing his subordinates to falsify their time records. As a supervisor with over 28 years of experience, however, Grievant knew or should have known that he was directing the Intake Officers to incorrectly fill out their timesheets. In addition, Grievant approved the timesheets submitted by the Intake Workers. He knew or should have known that the Intake Officers were claiming compensatory time earned without having actually worked all of the hours claimed. For example, Grievant should have realized he had employees claiming to have worked 24 hours in a day. Grievant was in a position to correct any policy mistake, but did not do so because his subordinates were following his directions.

Grievant argued the Agency's punishment was too harsh. Although the Agency could have issued Grievant lesser disciplinary action and still corrected his behavior, the Agency's action was consistent with and authorized by the Standards of Conduct. The Hearing Officer cannot reduce the disciplinary action unless it exceeds the limits of reasonableness. The Agency's level of discipline does not exceed that limit.

⁷ See, Attachment A, DHRM Policy 1.60.

Grievant argued that the Unit Director was retaliating against him. In June 2019, the Unit Director told a newly hired Intake Officer, Ms. Ma, that Grievant was an incompetent supervisor who did not know what he was doing. The Unit Director told Ms. Ma that she would not wait until Grievant's "time was up." Ms. W testified that the Unit Director displayed "micro-aggressions" towards Grievant. Grievant filed a grievance against the Unit Director because she was belittling him in front of other employees.

It was not appropriate for the Unit Director to criticize Grievant in front of other staff. Grievant took protected action by filing a grievance against her to stop her inappropriate behavior. Although the Unit Director may have viewed the disciplinary action as a way to get rid of Grievant, the Hearing Officer cannot conclude the Unit Director acted for an improper purpose. The disciplinary action was supported by the evidence and consistent with the Standards of Conduct.

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 Human Resource Management"⁸ 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.

Grievant's intent was not to reward himself but to reward his subordinates who were experiencing an additional burden. Although Grievant's objective to help his employees could be a legitimate mitigating factor for the Agency to consider, it does not make the Agency's disciplinary action excessive under the standard set forth in the Rules for Conducting Grievance Hearings. It was not necessary for the Agency to prove that Grievant benefited from his actions in order to support a falsification of records. In light of the standard set forth in the Rules, 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**.

⁸ Va. Code § 2.2-3005.

APPEAL RIGHTS

You may request an administrative review by EDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Employment Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

You must also provide a copy of your appeal to the other party and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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.^[1]

[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

^[1] Agencies must request and receive prior approval from EDR before filing a notice of appeal.