Issue: Group III Written Notice with Termination (falsifying documents); Hearing Date: 02/04/16; Decision Issued: 02/11/16; Agency: DBHDS; AHO: William S. Davidson, Esq.; Case No. 10741; Outcome: Full Relief; **Administrative Review: EDR Ruling Request received 02/25/16; EDR Ruling No. 2016-4311 issued 03/17/16; Outcome: Remanded to AHO depending on DHRM ruling; Administrative Review: DHRM Ruling Request received 02/25/16; DHRM Ruling issued 04/06/16; Outcome: Remanded to AHO; Reconsideration Decision issued 04/21/16; Outcome: Original decision affirmed.**

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 10741

Hearing Date: February 4, 2016
Decision Issued: February 11, 2016

PROCEDURAL HISTORY

On November 3, 2015, the Grievant was issued a Group III Written Notice for:

> Violation of DHRM Policy 1.60, Standards of Conduct: Specifically, on or around October 23, 2015, you falsified a leave slip and Time Clock Adjustment form. [1]

Pursuant to this Written Notice, the Grievant was terminated on November 3, 2015. [2] On November 24, 2015, the Grievant timely filed a grievance to challenge the Agency's actions. [3] On December 15, 2015, this appeal was assigned to a Hearing Officer. The hearing was originally calendared on January 25, 2016, and was continued to February 4, 2016, due to inclement weather. On February 4, 2016, a hearing was held at the Agency's location.

APPEARANCES

Advocate for Agency
Grievant
Witnesses

ISSUES

1. Did the Grievant violate DHRM Policy 1.60, by falsifying a leave slip and Time Clock Adjustment form?

2. Can the Agency terminate an employee who no longer worked for the Agency at the time of termination?

AUTHORITY OF HEARING OFFICER

Code Section 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code Section 2.2-

[1] Agency Exhibit 1, Tab 2, Page 1
[2] Agency Exhibit 1, Tab 2, Page 1
[3] Agency Exhibit 1, Tab 1, Page 1

3005.1 provides that the Hearing Officer may order appropriate remedies including alteration of the Agency's disciplinary action. By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government. [4] Implicit in the Hearing Officer's statutory authority is the ability to independently determine whether the employee's alleged conduct, if otherwise properly before the Hearing Officer, justified termination. The Court of Appeals of Virginia in *Tatum v. VA Dept of Agriculture & Consumer Servs,* 41VA. App. 110, 123, 582 S.E. 2d 452, 458 (2003) held in part as follows:

> While the Hearing Officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy...the Hearing Officer reviews the facts de novo...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action. Thus the Hearing Officer may make a decision as to the appropriate sanction, independent of the Agency's decision.

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 proof for establishing any affirmative defenses to discipline such as retaliation, discrimination, hostile work environment and others, and any evidence of mitigating circumstances related to discipline. A preponderance of the evidence is sometimes characterized as requiring that facts to be established more probably than not occurred, or that they were more likely than not to have happened. 5 However, proof must go beyond conjecture. 6 In other words, there must be more than a possibility or a mere speculation. 7

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of the witness, I make the following findings of fact:

The Agency provided me with a notebook containing eight tabs, and entered into evidence, during the course of the hearing, DHRM Policy 4.57. That Policy was placed in the front of the Agency's notebook. That notebook was accepted in its entirety as Agency Exhibit 1, without objection.

The Grievant provided me with a notebook containing nine tabs (A-I), and entered into evidence, during the course of the hearing, various medical records and documentation from the

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[4] *See* Va. Code § 2.2-3004(B)
[5] *Ross Laboratories v. Barbour*, 13 Va. App. 373, 377, 412 S.E. 2d 205, 208 1991
[6] *Southall, Adm'r v. Reams, Inc.*, 198 Va. 545, 95 S.E. 2d 145 (1956)
[7] *Humphries v. N.N.S.B., Etc., Co.*, 183 Va. 466, 32 S.E. 2d 689 (1945)

Reed Group. That additional evidence was placed in the Grievant's notebook at Tab J. That notebook was accepted in its entirety as Grievant Exhibit 1, without objection.

I heard from four witnesses in this matter, three of whom were joint witnesses and the fourth was the Grievant. In addition to the Grievant, I heard from the Grievant's immediate supervisor, ("IS"). I also heard from the person to whom IS reported, ("AA"), and I heard from ("HM"), a Human Resource Manager for the Agency.

On or about September 24, 2015, the Grievant received from HM a letter which stated the following:

> Your position has been identified for abolishment, effective October 25, 2015, due to the "rightsizing" of [Agency] as we move toward closure and you will be placed on Leave Without Pay - Layoff effective October 25, 2015... [8]

Accordingly, as of 12:01 a.m., October 25, 2015, the Grievant's position was abolished. The Grievant's last day of work was Friday, October 23, 2015. On October 23, 2015, the Grievant executed an [Agency] Checkout Form ("Checkout Form"), wherein he returned certain Agency items to the Agency and he either signed forms or had information presented to him. [9] The Checkout Form indicated that the date of separation was October 24, 2015. It does not state whether that means at the beginning of October 24, 2015, or at midnight of October 24, 2015.

The testimony presented before me by all four witnesses was that the Grievant clocked out of work at approximately 2:32 p.m., on October 23, 2015, and that everyone recognized that was the Grievant's last day of employment with the Agency. There was some testimony as to an accounting reason for why the letter of September 24, 2015, indicated that the abolishment would be effective October 25, 2015.

During the course of the day of October 23, 2015, the Grievant presented to AA a Leave Request and Call Out Form. [10] All witnesses before me testified that there was no falsification contained in this form. The form indicated that the Grievant was requesting two hours of leave time commencing at 2:30 on October 23, 2015. The Grievant testified that he was turning in this form in order to commence an application for short-term disability. The Grievant originally presented this form to AA who indicated to the Grievant that he did not know how to process this form and the Grievant was advised to see IS. IS apparently looked at this form, found it correct, and signed it. This all took place on October 23, 2015, the date the Written Notice, in Section I, states is the "Offense Date." In Section II of the Written Notice, the verbiage used is, "on or around October 23, 2015." I was given no definition, legal or otherwise of "around."

The Grievant, having completed the checkout process with the Agency, left the Agency pursuant to the abolishment of the position the Grievant occupied. This was not a position created solely for the Grievant. It was a generic position and the Grievant was the current occupant.

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[8] Agency Exhibit 1, Tab 5, Page 1
[9] Agency Exhibit 1, Tab 5, Page 17
[10] Agency Exhibit 1, Tab 6, Page 5

The uncontradicted testimony from the Grievant was that sometime during the late afternoon or evening of October 23, 2015, he spoke to a representative of the Reed Group, the third party administrator of the short-term disability policy of the Agency. He testified that he was told by this representative that, in order to qualify for such disability, he needed to have taken at least one full day of leave. Accordingly, sometime during the day of October 24, 2015, the Grievant deposited under the office door of AA an envelope containing the documents found at Agency Exhibit 1, Tab 6, Pages 1, 3 and 7. One of these documents was a New Leave Request. It indicated that the Grievant was on sick leave for the entirety of October 23, 2015. [11] This clearly was not factually accurate. The second document was a Time Clock Adjustment Form. This form states as follows:

> ...No work performed 8:00AM to 2:30PM (time clock not correct). Sick leave/disability applies full day... [12]

While the statement that the time clock was not correct is a factually inaccurate statement, the statement regarding "no work performed" may in fact be reasonably accurate as the evidence before me is that most of the employees whose jobs had been abolished due to rightsizing performed little or no work on their last day of employment. Their day was consumed with parties, lunch and the final act of signing out with the Agency for the last time.

The envelope containing these documents was not found by AA until he reported to work on October 26, 2015. This was after the Grievant had been terminated pursuant to the abolishment of his position. He took these documents to HM and she, in conjunction with others, determined that there had been a falsification which warranted termination. However, when I questioned HM as to what she would have done had the Grievant come to her personally on the morning of October 26, 2015, with these documents, she quite clearly and honestly stated that she would have told him that he could not do that and would have returned the documents to him and the matter would have ended there. Of course, the Grievant, no longer being an employee of the Agency, had no standing to take the documents to HM.

Accordingly, the timeline in this matter is vital. In summary, it is as follows:

-September 24, 2015 - Letter notifying Grievant that his position is abolished effective October 25, 2015;

-October 23, 2015 - Grievant's first Leave Request (approved by IS and which all agree is not a falsification);

-October 23, 2015 - Grievant worked his last day and as of 2:30 p.m., is no longer employed by the Agency;

-October 23, 2015 - Grievant completes his checkout process with the Agency;

-October 24, 2015 - Grievant completes Time Clock Adjustment Form and Second Leave Request Form and deposits them under AA's office door;

[11] Agency Exhibit 1, Tab 6, Page 7
[12] Agency Exhibit 1, Tab 6, Page 3

-October 26, 2015 - AA delivers those documents to HM;

-November 3, 2015 - Agency issues a Group III Written Notice to the Grievant; and

-November 3, 2015 - Agency terminates, with an effective date of November 3, 2015, an employee whose position was terminated at midnight on October 24, 2015, and whose last date of employment was October 23, 2015.

In an Access Ruling of Director, the Director of EDR stated in part as follows:

> ...Because the Group III was issued after the grievant's termination by the agency, and before any reinstatement, it did not result in her termination or involuntary separation. Moreover, we have been advised by the Department of Human Resource Management (DHRM), the agency charged with developing and interpreting policies affecting state employees, that DHRM Policy 1.60, "Standards of Conduct," does not apply to former employees and therefore a Written Notice should not be issued to an individual no longer employed by the state. As a result, it would appear that the Group III was null and void upon its issuance and had no effect on the grievant's status...[13]

On November 3, 2015, when the Group III Written Notice was issued, the Grievant was not employed by the Agency. Not only was he not employed as of October 23, 2015, but the position he had worked had been abolished as of midnight on October 24, 2015. I find the issuance of this Group III Written Notice to be null and void. An "effective termination" date of November 3, 2015, implies that the Agency felt the Grievant was still employed as of November 3, 2015.

To the extent that the Agency or DHRM should find otherwise, I find that the Agency is bound by the testimony of HM when she testified that, had the Grievant been able to present the documents to her personally, she would have said he could not do that, returned the documents to him, and the matter would have ended. There is no difference in AA giving HM the documents or the Grievant giving the documents to her. There is no justification for the disparity of result.

> Finally, Policy 1.60 defines a Group III offense as those that "severely impact agency operations." [14] I find it difficult to envision how any piece of this matter severely impacted the operation of this Agency.

MITIGATION

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the Agency disciplinary action." Under the Rules for Conducting Grievance Hearings, "a Hearing Officer must give deference to the Agency's

[13] Access Ruling of Director, Ruling No. 2007-1401, dated August 2, 2006

[14] Agency Exhibit 1, Tab 8, Page 23

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, (3) the disciplinary action was free of improper motive, (4) the length of time that the Grievant has been employed by the Agency, and (5) whether or not the Grievant has been a valued employee during the time of his/her employment at the Agency.

DECISION

For reasons stated herein, I find that the Agency has not bourne its burden of proof in this matter. I order that the Agency rescind the Written Notice and all records regarding termination and return to Grievant all benefits he was entitled to pursuant to his position being "rightsized."

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 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. You may fax your request to 804-371-7401, or address your request to:

Director of the Department of Human Resource Management
101 North 14th Street, 12th Floor
Richmond, VA 23219

or, send by email to EDR@dhrm.virginia.gov.

2. If you believe that the hearing decision does not comply with the grievance procedure, or if you have new evidence that could not have been discovered before the hearing, you may request that EDR review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. You may fax your request to 804-786-1606, or address your request to:

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

or, send by email to EDR@dhrm.virginia.gov.

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. A copy of all requests for administrative review must be provided to the other party, EDR and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for a review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.[15] 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.[16]

[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]

_____

William S. Davidson
Hearing Officer

[15] An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. Virginia Department of State *Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

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

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
DIVISION OF HEARINGS
RECONSIDERATION DECISION OF HEARING OFFICER
In Re: Case No: 10741

Hearing Date: February 4, 2016
Decision Issued: February 11, 2016
EDR Request for Reconsideration Received: March 17, 2016
DHRM Request for Reconsideration Received: April 11, 2016
Response to Request: April 22, 2016

APPLICABLE LAW

A Hearing Officer's original decision is subject to administrative review by both the Department of Human Resource Management ("DHRM") and the Office of Employee Dispute Resolution ("EDR"). A request for review must be made in writing, and received by the administrative reviewer, within 15 calendar days of the date of the original hearing decision. A copy of all requests must be provided to the other party and to the DHRM Director. I have received an Administrative Review Ruling from the Director of EDR requesting that I reconsider my original Decision, provided that DHRM determines that my determination regarding the Grievant's employment status was not consistent with the policy.

OPINION

The policy ruling of DHRM, dated April 6, 2016, provided in part, as follows:

> ...An employee who has been placed on Leave Without Pay - Layoff (LWOP-Layoff) status is retained on the payroll and in the Personnel Management Information System for the duration of the twelve month period unless and until (s)he is recalled to the original agency, resigns, retires, or obtains employment in another classified position. During this period, the employee is eligible for transitional severance benefits (severance payments, state contribution for health insurance, and state paid life insurance). **Such an employee may continue receiving disability benefits if the employee was in an approved disability status prior to his/her LWOP status.** The employee may choose to either be paid for leave balances when he is placed on LWOP or retain the balances until the end of the LWOP period. While the employee is in an "inactive" status, (s)he is still employed by the agency.
>
> An employee who has not been placed during the twelve month LWOP-Layoff period is officially separated at the end of the twelve months.
>
> Employees who have violated standards of conduct **prior to being placed on any type of LWOP** or paid leave are subject to disciplinary action. Such violations may not be discovered or fully investigated until after the

> employee has entered the LWOP status but should be addressed as timely as possible upon discovery. A LWOP status does not "protect" an employee from disciplinary action... [17] (Emphasis added)

In my original Decision, dated February 11, 2016, I stated in part as follows:

> ...On or about September 24, 2015, the Grievant received from HM a letter which stated the following:
>
> > Your position has been identified for abolishment, effective October 25, 2015, due to the "rightsizing" of [Agency] as we move toward closure and you will be placed on Leave Without Pay - Layoff effective October 25, 2015... [18]

Accordingly, the Grievant was in LWOP status on or about midnight of October 24, 2015.

I further stated in my original Decision, in part as follows:

> ...During the course of the day of October 23, 2015, the Grievant presented to AA a Leave Request and Call Out Form. [19] **All witnesses before me testified that there was no falsification contained in this form.** The form indicated that the Grievant was requesting two hours of leave time commencing at 2:30 on October 23, 2015. **The Grievant testified that he was turning in this form in order to commence an application for short-term disability. The Grievant originally presented this form to AA who indicated to the Grievant that he did not know how to process this form and the Grievant was advised to see IS. IS apparently looked at this form, found it correct, and signed it.** This all took place on October 23, 2015, the date the Written Notice, in Section I, states is the "Offense Date." In Section II of the Written Notice, the verbiage used is, "on or around October 23, 2015." I was given no definition, legal or otherwise of "around..."
>
> ...The uncontradicted testimony from the Grievant was that sometime during the late afternoon or evening of October 23, 2015, he spoke to a representative of the Reed Group, the third party administrator of the short-term disability policy of the Agency. He testified that he was told by this representative that, in order to qualify for such disability, he needed to have taken at least one full day of leave. Accordingly, sometime during the day of October 24, 2015, the Grievant deposited under the office door of AA an envelope containing the documents found at Agency Exhibit 1, Tab 6, Pages 1, 3 and 7. One of these documents was a New Leave Request. It indicated that the Grievant was on sick leave for the entirety of October 23, 2015. This clearly was not factually accurate. The second

[17] DHRM Administrative Policy Review Ruling, Case No.: 10741, dated April 6, 2016, Page 3

[18] Decision, Case No.: 10741, dated February 11, 2016, Page 3

[19] Agency Exhibit 1, Tab 6, Page 5

> document was a Time Clock Adjustment Form. This form states as follows:
>
> ...No work performed 8:00AM to 2:30PM (time clock not correct). Sick leave/disability applies full day...
>
> ...While the statement that the time clock was not correct is a factually inaccurate statement, the statement regarding "no work performed" may in fact be reasonably accurate as the evidence before me is that most of the employees whose jobs had been abolished due to rightsizing performed little or no work on their last day of employment. Their day was consumed with parties, lunch and the final act of signing out with the Agency for the last time.
>
> The envelope containing these documents was not found by AA until he reported to work on October 26, 2015... [20] (Emphasis added)

It is important to note in this matter that the Grievant was notified on September 24, 2015, that his position was being abolished and that his last day at work would be Friday, October 23, 2015. For accounting purposes, the Agency deemed that he would go on LWOP status effective October 25, 2015. Accordingly, Saturday, October 24, 2015, is one day after the day that the Grievant's position with the Agency was abolished and one and one day after he completed all documents that the Agency required in order to end his employment and go on LWOP status.

During the course of his last day at the Agency, the Grievant presented to AA a Leave Request and Call Out form. The Agency was on notice that the Grievant was attempting to commence an application for short-term disability, albeit having waited until his last day to accomplish this. As stated in my original Decision, nothing about these forms was found to be in error. The Grievant's day at work ends and he leaves the Agency premises.

Thereafter, the Grievant receives a phone call from the third party administrator of the Agency's short-term disability program. That administrator told the Grievant that he needed to have been off at least one full day in order to preliminarily qualify for short-term disability. The Grievant then re-wrote the appropriate forms to reflect this. Generally falsified forms are those in which an employee claims to have worked more hours than they actually worked. Here, ironically, the Grievant re-wrote the forms to indicate that he had not worked hours that he had actually worked, to the extent that any work was actually accomplished on his last day at the Agency. The Agency presented no evidence to me that the Grievant attempted to collect any form of double-payment for the hours that he actually worked.

With that as a background for this matter, the first question before me is whether or not the Grievant violated the Standards of Conduct prior to being placed on LWOP. The governing question here is one of timing. In his Administrative Review of March 17, 2016, the Director of EDR, stated in part as follows:

[20] Decision, Case No.: 10741, dated February 11, 2016, Page 4

> ...The agency disputes the Hearing Officer's finding that the grievant no longer had "standing" to take documentation personally to HM after October 23. The agency argues that the grievant's layoff status "would not have prevented him from presenting benefits paperwork personally and requesting guidance from HM." EDR is unclear what weight this determination had on the hearing officer's analysis of the case, so perhaps it will be elucidated if a remand becomes necessary. However, in response to questioning about whether HM would have spoken to the grievant about the documentation at issue, **HM testified that the grievant would not have been "available" to her directly due to his layoff,** which could tend to support the hearing officer's conclusion that "the Grievant...had no standing to take the documents to HM," if the agency also felt that access to the grievant was not "available" for the agency either... [21] (Emphasis added)

If, as the Agency alleges, the Grievant could have taken documents directly to HM, then the Grievant would have presented them to her on Monday, October 26, 2015, clearly after he was on LWOP status. On the other hand, if as HM testified, the Grievant would not have been available to her because of his LWOP status, then AA merely becomes a messenger to deliver the documents. Again, the delivered documents did not reach the hands of HM until Monday, October 26, 2015, after the Grievant was on LWOP status.

The Agency apparently argues in its Request for Reconsideration, in a manner that was directly contradictory to the testimony before me of HM, an Agency witness. If, as HM testified before me, the Grievant could not deliver documents to her on Monday, October 26, 2015, then he had no choice other than to place the documents under AA's door or perhaps mail them at a later date. Merely filling out a form, in absence of delivery, does not rise to the level of a Group III Written Notice for falsification, or for any Written Notice. The falsification can only take place when such a form is actually uttered to the Agency. In this matter, it is crystal clear that the form was not delivered to the Agency until Monday, October 26, 2015, a day after the Grievant went on LWOP status. Based on the Ruling of DHRM as to how to apply the appropriate policy herein, this would not be a violation prior to being placed on any type of LWOP.

To the extent that there was any falsification in this matter, I find, based on the evidence presented before me that the falsification, or as the DHRM Director stated, "employees who have violated standards of conduct prior to being placed on any type of LWOP," did not take place until after this Grievant was on LWOP status. Accordingly, the Grievant did not violate policy.

While it appears that the Grievant was still considered an employee, albeit his position had been abolished, I specifically find that, pursuant to the evidence presented before me, no falsification took place prior to the Grievant going on LWOP status. Accordingly, I do not have to reach any of the issues raised by the Director of EDR.

While no evidence was presented before me by the Agency, I must conclude that as of approximately 2:30 p.m., on Friday, October 23, 2015, the moment after the evidence indicates

[21] EDR Administrative Review, Ruling Number 2016-4311, dated March 17, 2016, Page 8

that the Grievant had signed all forms that he needed to sign in order to go on LWOP status, the Agency had fully funded all aspects of all benefits that the Grievant would have received on LWOP. I can find nothing in the record that indicates that any action of the Grievant caused the Agency to incur any damage or injury regarding any benefits that the Grievant was entitled to in his LWOP status.

Admittedly, at a very late date in the process, the Grievant attempted to secure short-term disability. The Agency presented no evidence before me that this was not a benefit offered to the Grievant and/or that it was not available to the Grievant. Based on the testimony of the third party administrator of this benefit and based on a total paucity of evidence from the Agency regarding this benefit, I assume that it was appropriate for the Grievant to rely on what he was told by the third party administrator as to what would be the first step as a requirement to qualify. The Grievant executed a form attempting to meet this first requirement, that is, being off at least one full day before entering his LWOP status. To do this, the Grievant had to uniquely state that he did not work when in fact he had worked. Of course, as it turned out, the Grievant would not have qualified for short-term disability for other reasons.

The Agency presented no evidence before me that it was able to counsel the Grievant regarding what he needed to do at this late date to qualify for short-term disability. Indeed, AA testified that he did not know what to do and IS signed the original documents to which AA testified to the fact that he had no knowledge.

Other than the simple statement of "severe harm was done to the Agency," with no factual support, I find no evidence that the Agency was harmed. The Grievant did not claim extra hours for which he should be paid. Indeed, the Grievant seemed to deny hours that he had actually worked. There was no evidence before me that the third party administrator paid short-term disability to the Grievant. The Agency, theoretically, had previously funded all LWOP benefits for the Grievant. There simply was no evidence presented before me as to how anything the Grievant did in this matter harmed this Agency, particularly, when considering that the only possible action of the Grievant of any consequence was after he had gone on LWOP status. The Agency is taking an extraordinary position regarding falsification in this matter. I note with some interest that this same Agency, in its Request for Reconsideration, apparently stated that the Hearing Officer questioned HM for "approximately an hour." Of course, as was pointed out in his Administrative Review, the Director of EDR found that such questioning took place for approximately thirteen minutes. [22] Perhaps in its zeal, the Agency was embellishing the time issue, perhaps it was hyperbole or perhaps it was just an accidental miscalculation of time.

Regardless of whether or not the Grievant was on LWOP status before the alleged falsification took place, I find that there was no intent to do harm to this Agency. Unless the Agency chooses to now take a position which it did not take at the hearing, short-term disability is a benefit provided to all employees. The Grievant was attempting to qualify for that benefit. The uncontradicted evidence before me is that the Grievant changed the appropriate forms in order to comply with what was represented to him by the third party administrator of the benefit itself. The uncontradicted evidence clearly shows that the Grievant's intent was to place himself in a position to start a process of qualification for a benefit provided by the Agency to all of its employees. In hindsight, clearly this process should have started earlier. However, the Agency

[22] EDR Administrative Review, Ruling Number 2016-4311, dated March 17, 2016, Page 5

presented no evidence to indicate an intent to harm the Agency and no evidence to indicate how the Agency was harmed. Accordingly, to the extent that either DHRM or EDR find that there was falsification and that it was prior to the Grievant's LWOP status, I find, from the evidence presented before me, that there was nothing in this record to indicate that the Agency was severely harmed. Indeed, there is nothing in this record to indicate that the Agency was harmed at all and this is not a Group III offense and therefore termination was not justified.

DECISION

I conclude that there is no reason to set aside my original Decision in this matter.

APPEAL RIGHTS

Both parties will have the opportunity to request an administrative review of the hearing officer's reconsidered decision on any other new matter addressed in the remanded decision (i.e., any matters not previously part of the original decision). [23] Any such requests must be **received** by the administrative reviewer **within 15 calendar days** of the date of the issuance of the remand decision. [24]

Pursuant to Section 7.2(d) of the Grievance Procedure Manual, the Hearing Officer's original Decision becomes a final hearing Decision once all timely requests for administrative review have been decided, and if ordered by an administrative reviewer, the Hearing Officer has issued his remanded Decision.

JUDICIAL REVIEW OF FINAL HEARING DECISION

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. [25] Any such appeal must be based on the assertion that the final hearing Decision is contradictory to law. [26]

William S. Davidson
Hearing Officer

[23] See, e.g., EDR Ruling Nos. 2008-2055, 2008-2056.

[24] See Grievance Procedure Manual Section 7.2.

[25] An appeal to circuit court may be made only on the basis that the decision was *contradictory to law*, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. Virginia Department of State Police v. Barton, 39 Va. App. 439, 573 S.E. 2d 319 (2002).

[26] Id.; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).