Issue: Eleven Group III Written Notices with Termination (falsifying timesheets); Hearing Date: 03/24/16; Decision Issued: 04/07/16; Agency: Virginia Department of Emergency Management; AHO: William S. Davidson, Esq.; Case No. 10757; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 10757

Hearing Date: March 24, 2016
Decision Issued: April 7, 2016

PROCEDURAL HISTORY

On December 9, 2015, the Grievant was issued eleven Group III Written Notices. The first Written Notice covered the time frame of May 10, 2015 through May 16, 2015, and stated in part as follows:

> As a result of an anonymous complaint made to the Office of Inspector General, an investigation report provided on November 5, 2015, by the OIG determined that timesheets presented by [Grievant] for compensation did not align with actual hours worked. As a result, [Agency] has concluded the following and takes the following action:
>
> For the workweek of May 10, 2015 through May 16, 2015, [Grievant] reported false arrival times on her timesheet... [1]

The remaining ten Written Notices were similar in character and content but covered different dates. [2]

Pursuant to these Written Notices, the Grievant was terminated on December 9, 2015. [3] The Grievant timely filed a grievance to challenge the Agency's actions. On January 11, 2016, this appeal was assigned to me. Due to medical reasons and calendar conflicts, I moved the hearing which was originally calendared for February 24, 2016, to March 24, 2016. Accordingly, on March 24, 2016, a hearing was held at the Agency's location.

APPEARANCES

Attorney for Agency
Agency Representative
Grievant
Witnesses

ISSUES

[1] Agency Exhibit 1, Tab 9, Page 2
[2] Agency Exhibit 1, Tabs 10-19, Page 2(at each Tab)
[3] Agency Exhibit 1, Tabs 9-15 and 17-19, Page 3(at each Tab); Tab 16, Page 2

Did the Grievant report false arrival times on her timesheet?

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 2.2-3005.1 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:

---

[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)

The Agency provided me with a notebook containing 20 tabs, and that notebook was accepted in its entirety as Agency Exhibit 1, without objection.

The Grievant provided me with a notebook containing tabs A-D, and that notebook was accepted in its entirety as Grievant Exhibit 1, without objection.

Pursuant to an anonymous complaint, the Office of the Inspector General commenced an investigation of this Agency to determine whether or not a non-exempt employee had been falsifying their timesheet. The formal investigation was given to the head of this Agency on or about November 5, 2015. [8]

Pursuant to that investigation, it was determined that [Grievant], in order to enter her workplace, had to go through an area that required her to produce an electronic record of her passage through a gate. A time analysis was created from this electronic record. [9]

For each of the Written Notices before me, the time analysis record was cross-referenced with the time and attendance record, which Grievant completed and signed. [10]

A summary document of discrepancies between the electronic log and the timesheet set forth the difference between these two documents. [11]

These documents and the uncontradicted evidence presented before me clearly indicate that the Grievant's signed timesheets and her actual log-in times varied by as much as four to six hours on numerous occasions. The Grievant testified that, on those dates when there were multiple hours of variance between the signed timesheet and the log-in time, she worked extra time at the end of her appropriate shift. In other words, if her shift was midnight to 8:00 a.m., and she signed in at 4:00 a.m., she testified that she would have continued to work until noon in order to work a full shift. The Grievant and others testified that they simply filled in their timesheets with the times that corresponded with their assigned shift. However, one of the Grievant's own witnesses testified that the actual time was supposed to be recorded on your timesheet, not the arrival and departure times on your scheduled shift.

I heard several witnesses testify that the Grievant was a superior worker and that she worked exceedingly long hours, however, not a single one of those witnesses could testify that, on any of the dates in any of the eleven Written Notices before me, the Grievant worked a specific set of extra hours on those days.

I heard testimony regarding a concept known as "flex time." While that may have been a policy of this Agency in the past, although that is significantly in doubt as to whether it was an official policy, flex time only offered two or four hours of relief per week. The Grievant has

---

[8] Agency Exhibit 1, Tab 6, Pages1-4
[9] Agency Exhibit 1, Tab 8, Pages 1-2
[10] Agency Exhibit 1, Tabs 9-19, Page 5(at each Tab)
[11] Agency Exhibit 1, Tab 9-19, Page 1(at each Tab)

significantly more than two or four hours of unaccounted time differentials. I find that the flex time issue has no bearing in this matter.

I have before me an unsigned Grievance Form A, that states in part as follows:

> ...Each of these situations not being properly handled or dealt with. Both very discriminative and unfairly issued and ignored any if all factors relevant to disgruntle [sic] employees not being dealt with when reported being insubordinate and causing malice within the workplace... [12]

No evidence was introduced before me to indicate that the Grievant was discriminated against or ignored. No evidence was introduced before me regarding disgruntled employees. Further, no evidence was introduced before me regarding malice in the workplace.

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 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.

I find no reason to mitigate the Written Notices before me.

DECISION

For reasons stated herein, I find that the Agency has bourne its burden of proof in this matter and that the issuance of the Group III Written Notices to the Grievant, with termination, were proper.

APPEAL RIGHTS

You may file an administrative review request if any of the following apply:

[12] Agency Exhibit 1, Tab 1, Page 1

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

2. 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. You may fax your request to 804-786-1606, or address your request to:

Office of Employment Dispute Resolution
101 North 14th Street, 12th Floor
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 of the original hearing decision. 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.[13] 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.[14]

_____

William S. Davidson
Hearing Officer

[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]

[13] 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).

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