

Issues: Group II Written Notice (falsifying timesheets), Group II Written Notice (failure to follow policy), Group II Written Notice (failure to follow policy), and Termination (due to accumulation); Hearing Date: 02/26/13; Decision Issued: 03/29/13; Agency: VCU; AHO: Carl Wilson Schmidt, Esq.; Case No. 10018; Outcome: No Relief.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10018

Hearing Date: February 26, 2013
Decision Issued: March 29, 2013

PROCEDURAL HISTORY

On December 19, 2012, Grievant was issued a Group II Written Notice of disciplinary action with removal for falsifying timesheets. On December 19, 2012, Grievant was issued a second Group II Written Notice with removal for failure to follow VCU Overload Jobs Policy and Fair Labor Standards Act. On December 19, 2012, Grievant was issued a third Group II Written Notice with removal for failure to follow policy by not adhering to her assigned full time 40 hour work week in her salaried position and for failing to submit leave slips for hours worked under 40 in her salaried position.

On January 9, 2013, Grievant timely filed a grievance to challenge the Agency's actions. The matter proceeded to hearing. On January 23, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 26, 2013, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency Advocate
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?

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:

Grievant worked a full time classified position within the VCU School of Nursing. Her full time position was non exempt under the Fair Labor Standards Act. Grievant also worked a part time non-classified position in Internal Medicine, Infectious Disease. If Grievant was at work in her full time position for 40 hours per week, she was entitled to receive overtime compensation for hours worked as part of her part time job.

Grievant previously worked as a timekeeper. She attended classes regarding timekeeping, she had knowledge of timekeeping practices and policies, and had knowledge of State and University timekeeping policies and procedures.

An Agency administrator questioned the amount of overtime paid to Grievant and an audit was requested. The Auditor reviewed Grievant's time sheets for the period of March 14, 2012 through July 21, 2012.¹ The Auditor did not receive two time sheets for review. The Auditor found many error and miscalculations of overtime pay, timesheet preparation, and leave management. For example, the Auditor concluded, in part:

- Eleven instances of the employee charging time to both jobs simultaneously.

¹ Grievant established that on some dates such as holidays the Auditor failed to accurately report her attendance. Despite these errors, the Auditor's report is persuasive as a description of Grievant's behavior.

- More than 40 instances in which the employee did not calculate her time accurately based on the arrival and departure times documented on the timesheets.²

Grievant submitted time sheets showing she was working at both positions as follows:

<u>Date</u>	<u>Hours</u>
March 4, 2012	3.00
March 14, 2012	0.50
April 6, 2012	1.00
April 26, 2012	0.25
April 27, 2012	2.00
June 8, 2012	2.00
June 20, 2012	0.50
June 25, 2012	3.00
July 10, 2012	0.50
July 11, 2012	4.50
July 12, 2012	2.00 ³

Grievant was expected to work at least eight hours per day in her full time position for a total of 40 hours per week. Grievant submitted several timesheets for her full time position showing she worked a total of eight hours during the day but the time in and time out she reported amounted to less than eight hours. For example, for the week beginning March 4, 2012, Grievant recorded:

Workweek	Time In	Time Out	Time In	Time Out	Hours Worked
March 4	11:00 a.m.	2:00 p.m.	3:00 p.m.	7:30 p.m.	8
March 5	10:30 a.m.	1:30 p.m.	2:30 p.m.	7:30 p.m.	8
March 6	10:30 a.m.	1:30 p.m.	2:30 p.m.	7:30 p.m.	8
March 7	Sick				
March 8	10:30 a.m.	12:30 p.m.	1:30 p.m.	6:00 p.m.	7.5
March 9	8:30 a.m.	10:30 [a].m.	2:30 p.m.	7:30 p.m.	6.5

On March 4, 2012, Grievant's total hours worked were 7.5 not 8 as she claimed. On March 8, 2012, Grievant's total hours worked were 6.5 not 7.5 as she claimed. On March 9, 2012, Grievant's total hours worked were 7 not 6.5 as she claimed.

² The Hearing Officer calculates approximately 34 times Grievant worked fewer hours than she claimed to have worked in her full time job.

³ Grievant established that the Auditor incorrectly calculated some of the days of "double booking." For example, in some instances the Auditor failed to account for holiday leave. Nevertheless, Grievant admits to eight instances of double booking.

Grievant incorrectly “over booked” her total hours worked in a day for over 34 days during the audit period. The amounts were typically a half hour or one hour. In some weeks, she over booked on three or four workdays.

Grievant signed and dated each time sheet and certified:

I certify that I worked the hours shown above – no more no less. I understand that any leave taken must be approved (pre-approved, when appropriate/required) and any overtime worked must have been pre-approved by my supervisor.

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.”⁴ 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 For Falsification of Timesheets

“[F]alsification of records” constitutes a Group III offense.⁵ “Falsification” is not defined by DHRM Policy 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*.

“[F]alsification of records” constitutes a Group III offense.⁶ DHRM § 2.10 states:

⁴ The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

⁵ See, Attachment A, DHRM Policy 1.60.

⁶ See, Attachment A, DHRM Policy 1.60.

Before an applicant is eligible for employment with the Commonwealth, several records must be reviewed or verified. This information is considered part of the application process and, as with information contained on the application form, if it is later discovered that an applicant falsified any information related to his or her employment, the employee may be terminated.

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to alter with intent to defraud, *to falsify accounts* || to misrepresent, *to falsify an issue* || to pervert, *to falsify the course of justice*.

On at least eight dates, Grievant improperly reported that she worked hours for both her full time and her part time job. It is reasonable to assume that on at least one of those dates, Grievant was working at her part time job but submitted a time sheet showing that she had worked hours at her full time job. Grievant had expertise in timekeeping and knew or should have known that submitting a timesheet showing she worked at her full time job when she was actually working at her part time job would constitute a falsification of a record. The Agency elected to issue Grievant a Group II Written Notice instead of a Group III Written Notice. The Agency has presented sufficient evidence to support the issuance of the Group II Written Notice.

Grievant argued that she simply made errors. Grievant possessed experience as a timekeeper and should have recognized the importance of keeping accurate time. The number of instances where she double booked is sufficient to establish her intent to falsify time records.

Group II Written Notice for Overload Jobs Policy

DHRM Policy 1.60 provides:

Application: All positions covered by the Virginia Personnel Act, including non-probationary full-time and part-time classified and restricted employees. Agencies may use this policy as a guide for evaluating the workplace conduct of employees who are not covered by the Virginia Personnel Act, such as wage employees, probationary employees and

employees expressly excluded from the Act's coverage. (Official Written Notice forms may not be issued to these employees.)

The Agency issued a Group II Written Notice for failing to follow the VCU Overload Jobs policy and Fair Labor Standards Act by recording OT2 and not OT1 when the hours worked totaled under 40 hours. The Agency's allegation is that Grievant received too much compensation because she received overtime compensation through her part time job without being entitled to receive the additional compensation. Grievant's claim of overtime compensation was done in her capacity as a part time employee, not in her capacity as a full time classified employee. The Agency may not discipline Grievant under the Standards of Conduct for her behavior relating to her part time non-classified position. Accordingly, the Group II Written Notice must be reversed.

Group II Written Notice for Failure to Hours of Work Policy

DHRM Policy 1.25 governs Hours of Work. This policy provides that full time salaried employees "work the equivalent of 40 hour per week for 12 months per year."

Failure to follow policy is a Group II offense.⁷ Grievant worked fewer than 40 hours per week at her full time job but reported having worked 40 hours per week (after accounting for leave). She was expected to work 8 hours per day or account for her absences with leave. On approximately 34 dates, she reported having worked more hours in a day than she actually worked. The effect of Grievant's behavior was that she worked fewer hours than necessary to establish a 40 hour work week. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow policy.

Grievant argued that she simply made mistakes and was working as required by the Agency and State Policy. This argument fails. Grievant served as a timekeeper and had extensive training regarding timekeeping. In many respects, she had greater training and knowledge than would a typical employee. Grievant established a pattern of claiming to work more hours in a day than she reported as time she worked in a day. This pattern is sufficient to establish that Grievant did not work as scheduled contrary to DHRM Policy 1.25.

Accumulation of discipline

Grievant has accumulated two Group II Written Notices. Upon the issuance of two Group II Written Notices, an agency may remove an employee. Grievant's removal must be upheld.

Mitigation

⁷ See, Attachment A, DHRM Policy 1.60.

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

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group II Written Notice of disciplinary action for falsification of records is **upheld**. The Agency’s issuance to the Grievant of a Group II Written Notice of disciplinary action for failure to follow the VCU Overload Jobs Policy and FLSA is **reversed**. The Agency’s issuance to the Grievant of a Group II Written Notice of disciplinary action for failure to comply with the Hours of Work policy is **upheld**. Grievant’s removal is **upheld** based on the accumulation of disciplinary action.

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. Please address your request to:

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

or, send by fax to (804) 371-7401, or e-mail.

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

⁸ Va. Code § 2.2-3005.

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. 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 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 provide a copy of all of your appeals 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 requests for administrative 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.⁹

[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

⁹ Agencies must request and receive prior approval from EDR before filing a notice of appeal.