

Issues: Group II Written Notice (falsifying records), and Termination (due to accumulation); Hearing Date 01/13/15; Decision Issued: 01/21/14; Agency: DOC; AHO: Thomas P. Walk, Esq.; Case No. 10372; Outcome: Full Relief; Administrative Review: EDR Ruling Request received 02/05/15; EDR Ruling No. 2015-4094 issued 02/23/15; Outcome: AHO's decision affirmed; Attorney's Fee Addendum issued 03/11/15 awarding \$4,920.30.

**IN THE COMMONWEALTH OF VIRGINIA,
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT,
OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

IN RE: CASE NO.: 10372

DECISION OF HEARING OFFICER

HEARING DATE: JANUARY 13, 2015

DECISION DATE: JANUARY 21, 2015

I. PROCEDURAL BACKGROUND

The agency issued to the grievant a Group II Written Notice on March 19, 2014. The grievant had an active Group III Written Notice. Because of the active notice, the grievant was terminated on March 19. He filed this grievance on April 17.

I was appointed as hearing officer on May 21, 2014. Because of scheduling issues, I was unable to conduct a prehearing conference call within a reasonable time after my appointment. After email exchanges with the agency's advocate and counsel for the grievant, I set the hearing for September 9. On September 8 the parties informed me that a settlement had been reached. When the settlement agreement was not executed, the agency requested that the matter be set for hearing. On December 5 I scheduled the hearing on January 13, 2015. The hearing was conducted on that date and lasted approximately four hours.

II. APPEARANCES

The agency was represented by a lay advocate. A designated representative for the agency was present throughout the hearing. Three witnesses testified for the agency. Eight exhibits were introduced on behalf of the agency.

The grievant was represented by legal counsel. The grievant and one other witness testified on his behalf. He introduced six exhibits.

III. ISSUE

Whether the agency properly issued the grievant a Group II Written Notice on March 19, 2014 and terminated him from employment?

IV. FINDINGS OF FACT

The agency employed the grievant at one of its facilities in February, 2014. He served in the Building and Grounds Department and worked primarily as a plumber. In February, 2014 he had been employed by the agency for approximately eleven years. On February 20 the Supervisor of the Department assigned the grievant certain work orders in a particular building at the facility. The grievant testified that he entered the building and performed the assigned tasks. Some of the work described by the grievant did not take place in areas shown by the Rapid Eye Security video maintained at the facility. The grievant recorded his time for each work order in an amount consistent with the normal or expected time to perform the needed repair.

On February 21 the Supervisor again assigned certain work orders to the grievant for plumbing work in the same building in which he had been working on the preceding day. As on February 20, the grievant performed certain repairs and recorded his time in the TMS System for amounts consistent with the needed repairs.

TMS is a timekeeping system used at the facility for employees to document the amount of time expended on each work order. The policy within the Buildings and Grounds Department as far as rounding-up the amount of time was unwritten and inconsistent from employee to

employee. The department also did not have a formal policy on when the time to be allocated to a work order commenced or ended. Preparation to begin the task was counted by the grievant as part of the time.

An inmate at the facility filed an emergency grievance on February 25, 2014 with regard to a complaint of hot water being out of order for two weeks. This issue was subject of one of the February 20 work orders. The work order reflects that it was originally entered on February 17. On the order the grievant noted the exact nature of the problem and the remedy he attempted.

The Written Notice dated March 19 cited the grievant for falsification of state records by incorrectly entering the amount of time spent on the repairs on February 20 and February 21. The discipline was based on the discrepancy between the amount of time recorded by the grievant and the Rapid Eye Security video.

Prior to his termination, the grievant had a work record with the agency marred only by the active Group III Written Notice from 2012. He consistently earned “contributor” ratings on his evaluations and compliments on his performance.

V. ANALYSIS

The Commonwealth of Virginia provides certain protections to employees in Chapter 30 of Title 2.2 of the Code of Virginia. Among these protections is the right to grieve formal disciplinary actions. The Department of Employment Dispute Resolution has developed a Grievance Procedural Manual (GPM). This manual sets forth the applicable standards for this type of proceeding. Section 5.8 of the GPM provides that in disciplinary grievances the agency has the burden of going forward with the evidence.

It has the burden of proving, by a preponderance of the evidence, that its actions were warranted and appropriate. The GPM is supplemented by a separate set of standards promulgated by the Department of Employment Dispute Resolutions, Rules for Conducting Grievances. These Rules state that in a disciplinary grievance (such as this matter) a hearing officer shall review facts de novo and determine:

I. Whether the employee engaged in the behavior described in the Written Notice;

II. Whether the behavior constituted misconduct;

III. Whether the discipline was consistent with law and policy;
and

IV. Whether there were mitigating circumstances justifying the reduction or removal of the disciplinary action, and, if so, whether aggravating circumstances existed that would overcome the mitigating circumstances.

This case is based on circumstantial evidence. Circumstantial evidence is entitled to the same weight as direct evidence and its weight is determined by the finder of fact. No witness by the agency testified that the grievant did not perform the assigned tasks within the time recorded by him in TMS or that he was seen taking significantly less time to do so.

The key witness for the agency was the Supervisor of the grievant. He testified that he reviewed the Rapid Eye footage and that it showed the grievant being in the relevant locations a significantly smaller amount of time than the TMS time entered by the grievant. The testimony of the Supervisor did not contradict that of the grievant with regard to the type of work and location of the necessary work required for certain of the work orders. The Supervisor's

testimony was based on his review of the Rapid Eye footage. His notes from his review were introduced as exhibits by the agency. The notes show a review of time on February 20 beginning at 12:04 p.m. and ending at 1:21 p.m. For February 21 the notes began at 11:44 a.m. and conclude at 12:30 p.m. The copy of the footage introduced in that exhibit covers only those periods of time. Curiously, the supervisor testified as to the activities shown by Rapid Eye to the exact second. The exhibits of the agency were not that precise, not showing a breakdown of less than full minutes.

This creates a significant hole in the agency's case. The TMS time was for the entire work order as performed on a specific day. The agency failed to present time records showing what time the grievant began work on each of the relevant days and what time he ended his shift. The agency also failed to show what additional work orders, if any, the grievant may have been assigned on those dates. The failure to introduce the Rapid Eye footage for the entire days of February 20 and February 21 is troubling. The grievant has argued that an adverse inference should be drawn based on the entire footage not being produced. Under Section VI (B) of the Rules, I am permitted to do so. I find that such is proper in this case.

Viewing the evidence as a whole, I cannot find that the agency has met its burden of proving that the grievant submitted false time records on those dates. I make this determination even in the absence of the adverse inference. Its application merely buttresses the finding of insufficient evidence covering the activities of the grievant during those entire days at all locations within the facility.

VI. DECISION

1. The Group II Written Notice of March 19, 2014 is hereby rescinded.

2. The grievant shall be reinstated to his former position at the facility. If that position is no longer available, he shall be placed in a substantially equivalent position.

3. The grievant shall be awarded back pay from March 19, 2014 to January 21, 2015, with the exception of a period of 30 work days. I am imposing this limitation based on the hearing in this matter being postponed indefinitely through the action of the grievant. At no time after the matter was originally scheduled for hearing did he request a prompt hearing. The agency shall be entitled to offset this back pay with the interim earnings of the grievant.

4. The agency shall restore to the grievant any back benefits, including seniority.

5. Counsel for the grievant may file a petition for attorney's fees within 15 calendar days of the date of this decision as set forth in the Rules.

VII. 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 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 this final.

ORDERED this January 21, 2015.

/s/Thomas P. Walk
Thomas P. Walk, Hearing Officer

VIRGINIA: IN THE DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION

IN RE: CASE NO. 10372

RULING UPON REQUEST FOR ATTORNEY'S FEES

Counsel for the grievant has submitted a petition seeking an award of attorney's fees pursuant to Section 7.2 of the Grievance Procedure Manual. The agency has declined to submit any objections or arguments with regard to the petition. Upon my review of the billing statement, I find that the request should be reduced.

The billing report shows that for each activity counsel is requesting compensation for a minimum of 12 minutes. This request includes matters as simple as reviewing an e-mail. I reviewed the e-mails sent by me to counsel for which he is seeking payment. At least two of those were short straight-forward requests from me for information or confirmation of information. I do not find that those e-mails would have taken twelve minutes to review and process.

The time report also shows that counsel is claiming payment for reviews of the grievance procedure on March 21, 2014 and July 31, 2014. Each of those reviews is billed at 1.30 hours. An entry for March 25, 2014 is for 1.0 hour for a review of the Rules for Grievance Hearings. Because the grievance procedure and implementing rules are written in a manner designed to be understandable by employees advocating for themselves or lay representatives, I do not find the total time claimed to be reasonable.

A charge is shown for August 17, 2014 for 24 minutes for reviewing my Prehearing Order. Because of the simplicity of the information found in that Order, I am discounting the claimed fee for that time.

Entries are also found for September 4, 2014 (“review videos and agency’s exhibits”) and for January 6, 2015 (“prepare for hearing, review videos”). The September 4 charge is for 3.0 hours. The January 6 charge is for 3.30 hours. I am discounting the time for the later date.

For these reasons, the claim of the grievant for the award of attorney’s fees pursuant to Section 7.2 is reduced to the amount of \$4,920.30. An award is hereby made for that amount. No award is made for postage as that item is not recoverable under Section 7.2.

RENDERED this March 11, 2015.

/s/ Thomas P. Walk, Hearing Officer