

Issue: Group III Written Notice with Termination (falsifying records); Hearing Date: 01/20/15; Decision Issued: 02/19/15; Agency: DSS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10505; Outcome: Full Relief; **Attorney's Fee Addendum issued 04/14/15 awarding \$1,516.80.**



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10505

Hearing Date: January 20, 2015
Decision Issued: February 19, 2015

PROCEDURAL HISTORY

On October 6, 2014, Grievant was issued a Group III Written Notice of disciplinary action with removal for falsifying records, failure to follow policy, and abuse of time.

On October 27, 2014, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On November 17, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 20, 2015, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's Representative
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. 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 Social Services employed Grievant as a Support Enforcement Specialist Senior at one of its locations. He had been employed by the Agency for approximately 12 years without prior active disciplinary action.

Grievant was non-exempt under the Fair Labor Standards Act. Grievant's employee work profile specified:

I agree to the following conditions required by the Federal Fair Labor Standards act (FSLA):

- As a Non-Exempt employee, I will not work: Overtime (for example beyond 40 hours in a workweek); Prior to the start of my daily work schedule; After ending my daily work schedule; or Through lunch periods unless I receive specific instructions/permission from my supervisor.¹

On March 18, 2013, Grievant signed a Flex-Time Work Schedule Agreement providing, in part:

Employees at the [District Office] have been given the opportunity and privilege to work a flexible 8-hours a day work schedule. *** This schedule

¹ Agency Exhibit 3.

also requires that the lunch schedule be strictly observed; either a half hour or one full hour for lunch, based on the work hours chosen. Lunches will be taken between the hours of 11:30 and 2:00 p.m. *** I have read, understood and agree to the above regarding my flex-time schedule and agree to work from 9:00 a.m. until 6:00 p.m. with 1 hour for lunch.²

Grievant suffered from chronic pancreatitis. He had difficulty eating because of his illness. He spoke with his Supervisor and she permitted him to work through lunch and adjust his schedule accordingly. He sometimes worked past 6 p.m.

Ms. B was an Agency manager who worked in Grievant's office building. She disliked Grievant and had complained several times to Agency executives about Grievant's late arrival and early departure times. Ms. B had the ability to view cameras recording activity at the entrances and exits of the Facility building where Grievant worked. Ms. B looked at video recordings showing when Grievant entered and exited the Facility. Ms. B developed a spreadsheet to show the times Grievant arrived at work and when he left. Recordings from the cameras were erased every 23 days when an old recording was "recorded over" by a new recording. The Agency did not save any of the video recordings upon which it relied to discipline Grievant.

Grievant was required to complete a time sheet to record his hours work and leave taken on a daily basis. Since he was not permitted to receive overtime compensation, he knew he was not supposed to report more than 8 hours of work and leave in a day. He was expected to account for 40 hours per week, every week. Under the Agency's policy:

Non-exempt employees may not physically work in excess of forty hours in any workweek without prior authorization.³

Grievant's time sheets were approved by the Supervisor. The Supervisor testified that she believed Grievant worked eight hours as he claimed.

CONCLUSIONS OF POLICY

The Agency alleged that Grievant falsified his time sheets by recording more hours of work than he actually worked on several occasions. The Agency's evidence is not sufficient to support this allegation because it depends largely on the credibility of Ms. B who monitored Grievant's arrival and departure times.

Ms. B did not testify during the hearing. She disliked Grievant and had complained about him in the past. No evidence was presented showing that Ms. B was

² Agency Exhibit 4.

³ Agency Exhibit 6.

monitoring the entry and exits of all staff. It appears she focused solely on Grievant. It is unknown whether her personal bias influenced her method of recording Grievant's entry and exit from the building.⁴ Ms. B was removed by the Agency for falsifying documents. This is consistent with Grievant's assertion that Ms. B did not accurately record his entry and exit times.

The Agency has other methods of proving Grievant's arrival and departure times but did not preserve or present the evidence. For example, the Agency could have saved and presented the video recordings for each day it claimed Grievant worked fewer than eight hours. At a minimum, the Agency could have presented "screen shots" of Grievant's arrival and departure times. The Agency, however, failed to save these video recordings. The Assistant Director testified at the hearing that she watched video recordings of Grievant's arrival and departure times. The Agency, however, did not present the video recordings or screen shots for those dates and the Agency did not take disciplinary action against Grievant for those dates. She testified she could not verify the accuracy of the times Ms. B wrote down.

Based on the evidence presented, the Agency has not met its burden of proof to show Grievant falsified his time sheets. The disciplinary action must be reversed.

The Virginia General Assembly enacted *Va. Code § 2.2-3005.1(A)* providing, "In grievances challenging discharge, if the hearing officer finds that the employee has substantially prevailed on the merits of the grievance, the employee shall be entitled to recover reasonable attorneys' fees, unless special circumstances would make an award unjust." Grievant has substantially prevailed on the merits of the grievance because he is to be reinstated. There are no special circumstances making an award of attorney's fees unjust. Accordingly, Grievant's attorney is advised to submit an attorneys' fee petition to the Hearing Officer within 15 days of this Decision. The petition should be in accordance with the EDR Director's *Rules for Conducting Grievance Hearings*.

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 **rescinded**. The Agency is ordered to **reinstate** Grievant to Grievant's same position prior to removal, or if the position is filled, to an equivalent position. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal and credit for leave and seniority that the employee did not otherwise accrue.

⁴ Grievant showed that Ms. B incorrectly recorded Grievant left work at 6 p.m. on August 28, 2014 yet Grievant was at work at 6:03 p.m. printing a document. Although the Agency offered possible explanations (that Grievant disputed), Ms. B's testimony would have been helpful to resolve the discrepancy.

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 final.⁵

⁵ Agencies must request and receive prior approval from EDR before filing a notice of appeal.

[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



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

ADDENDUM TO DECISION OF HEARING OFFICER

In re:

Case No: 10505-A

Addendum Issued: April 14, 2015

DISCUSSION

The grievance statute provides that for those issues qualified for a hearing, the Hearing Officer may order relief including reasonable attorneys' fees in grievances challenging discharge if the Hearing Officer finds that the employee "substantially prevailed" on the merits of the grievance, unless special circumstances would make an award unjust.⁶ For an employee to "substantially prevail" in a discharge grievance, the Hearing Officer's decision must contain an order that the agency reinstate the employee to his or her former (or an objectively similar) position.⁷

To determine whether attorney's fees are reasonable, the Hearing Officer considers the time and effort expended by the attorney, the nature of the services rendered, the complexity of the services, the value of the services to the client, the results obtained, whether the fees incurred were consistent with those generally charged for similar services, and whether the services were necessary and appropriate.

Grievant's attorney submitted a petition and affidavit showing he devoted 9.6 hours to representing Grievant. The hourly rate allowed by EDR is \$158.

AWARD

Grievant is awarded attorneys' fees in the amount \$1,516.80.

⁶ Va. Code § 2.2-3005.1(A).

⁷ § 7.2(e) Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004. § VI(D) *EDR Rules for Conducting Grievance Hearings*, effective August 30, 2004.

APPEAL RIGHTS

If neither party petitions the DHRM Director for a ruling on the propriety of the fees addendum within 10 calendar days of its issuance, the hearing decision and its fees addendum may be appealed to the Circuit Court as a final hearing decision. Once the DHRM Director issues a ruling on the propriety of the fees addendum, and if ordered by DHRM, the hearing officer has issued a revised fees addendum, the original hearing decision becomes “final” as described in §VII(B) of the *Rules* and may be appealed to the Circuit Court in accordance with §VII(C) of the *Rules* and §7.3(a) of the *Grievance Procedure Manual*. The fees addendum shall be considered part of the final decision. Final hearing decisions are not enforceable until the conclusion of any judicial appeals.

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer