Issue: Group I (failure to follow established procedure), Group II (failure to follow established procedure), and Group III with Termination (falsifying records); Hearing Date: 07/25/13; Decision Issued: 10/02/13; Agency: DSS; AHO: Carl Wilson Schmidt, Esq.; Case No.10057, 10101, 10102; Outcome: Partial Relief; **Administrative Review: EDR Ruling Request received 10/17/13; EDR Ruling No. 2014-3748 issued 11/21/13; Outcome: Remanded to AHO; Remand Decision issued 01/13/14; Outcome: Original decision affirmed; Administrative Review: EDR Ruling Request on Remand Decision received 01/23/14; EDR Ruling No. 2014-3802 issued 02/19/14; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request on Remand Decision received 01/23/14; DHRM Ruling issued 02/21/14; Outcome: AHO's decision affirmed; Judicial Review: Appealed to Henrico County Circuit Court; Outcome: Pending.**

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10057 / 10101 / 10102

Hearing Date: July 25, 2013
Decision Issued: October 2, 2013

PROCEDURAL HISTORY

On January 11, 2013, Grievant was issued a Group I Written Notice of disciplinary action for failure to follow established procedure. On January 24, 2013, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow established policy. On February 7, 2013, Grievant was issued a Group III Written Notice of disciplinary action with removal for falsification of a record.

Grievant timely filed grievances to challenge the Agency's actions. On May 17, 2013, the Office of Employment Dispute Resolution issued Ruling Number 2013-3586 consolidating the three grievances for a single hearing. On May 28, 2013, EDR assigned this appeal to the Hearing Officer. The Hearing was originally scheduled for July 8, 2013 but upon the Agency's request, the Hearing Officer found just cause to extend the time frame for issuing a decision in this case. On July 25, 2013, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
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:

The Department of Social Services employed Grievant as a Media Specialist IV. The purpose of her position was:

> This is a journeyman level professional position responsible for accessing needs and developing and delivering communications to support the effective delivery of training programs for local departments of social services and their community partners. This includes reviewing and editing training products and designing and developing video productions. The position reports to the Local Programs Training Manager.[1]

She began working for the Agency in March 2011.

Grievant requested documents from other Agency employees. As a result, Ms. C, an HR Manager instructed Grievant that she would have to obtain documents from the Agency pursuant to the Virginia Freedom of Information Act and that Grievant had to

[1] Agency Exhibit 5.

make her requests for documents to the HR Manager. Ms. C expected to force Grievant to pay for documents at a rate set by the Agency before receiving them. Ms. C was not in Grievant's chain of command.[2]

From October 1, 2012 through January 8, 2013, Grievant presented the HR Manager with approximately ten requests for documents. Grievant was provided with an estimate of the cost to produce the documents. In some cases, she would withdraw her request after being advised of the cost to produce the documents.

On October 25, 2012, Grievant attended a meeting with the Supervisor and Mr. H. Grievant was assigned responsibility to edit three videos. Grievant expected to work as part of a team with Mr. H.

Grievant and Mr. H finished working on three videos. When the Supervisor learned that only three videos had been edited, she accused Grievant of failing to comply with the Supervisor's instructions. The Supervisor told Grievant that the Supervisor said 78 videos should be edited not merely three videos. Grievant became concerned that the Supervisor may falsely accuse her of failing to perform the assignment given to Grievant. In the morning of January 8, 2013, Grievant sent Mr. H an email asking, "[c]ould I have a copy of your notes of the meeting described below. Contact me if you have any questions. Mr. H provided the requested notes.

On December 14, 2012, the Supervisor instructed Grievant to provide the Supervisor with a detailed work report every Friday by 5 p.m. The Supervisor told Grievant that "I would like all of your time accounted for" in the weekly report.[3]

On January 8, 2013 11:22 a.m. Grievant used her desktop computer to begin drafting a memorandum to the Office of Employment Dispute Resolution regarding the subject, "Request to Investigate Retaliation". Grievant saved and closed the document on January 8, 2013 at 12:19 p.m. She devoted approximately 57 minutes to drafting the three page document. She was working on or in front of her computer during that time period.

On January 8, 2013 at 1:43 p.m., Grievant sent the HR Manager an email stating:

> I am dropping off some materials to EDR and leaving and 5 minutes and will return to work accordingly. I am request[ing] a copy of the agency's protocol for the use of civil & administrative leave for grievance purposes. I have been asked by my supervisor to track time used for grievance

[2] In a Notice of Intent memorandum dated January 8, 2013, the Supervisor told Grievant that she could not circumvent the FOIA procedures to acquire records for her "personal use."

[3] Agency Exhibit 3.

purposes. I will email you upon my return and have copied my supervisor on this request.[4]

On January 8, 2013 at 1:44 p.m., the HR Manager sent Grievant an email stating:

> I advise you to seek approval from your supervisor to leave your work site. Otherwise, you could be subject to corrective action.[5]

On January 8, 2013 at 2:21 p.m., the HR Manager sent Grievant an email stating, in part:

> You can also find information about using work time for limited grievance activities in the Grievance Procedure Manual.
>
> You should not take leave to deliver anything to EDR. You can mail, fax, or e-mail materials. The contact information is as follows:
>
> ***
>
> If it is your preference to hand-deliver something to EDR, I recommend that you do so before or after your scheduled work hours or during your unpaid lunch break. This guidance is in light of your supervisor's concern about the impact of your absenteeism on your successful accomplishment of your job.
>
> ***
>
> You will not find any agency procedure that specifically addresses tracking of time spent on your grievance during work hours. You will find in § 8.8 of the Grievance Procedure Manual the provision (emphasis added), "… in conjunction with a grievance, grievants and advocates who are state employees may make **reasonable use** of agency office equipment including computers, copiers, fax machines, and telephones." In order for your supervisor to determine if you are making reasonable use, and to prevent abuse of state time, your supervisor may require you to account for your time at work as she sees fit. That falls within management's exclusive right to determining methods, means, and personnel by which work activities are undertaken. I recommend that you follow the instructions your supervisor gave you.[6]

[4] Agency Exhibit 3.

[5] Agency Exhibit 3.

[6] Agency Exhibit 3.

On January 8, 2013 at 2:40 p.m., Grievant hand-delivered the memorandum to EDR. She then returned to her office.

On January 8, 2012 at 3:40 p.m., Grievant replied to the HR Manager:

> Thank you, [name]. I'll just use my lunchtime for this trip. Fortunately I had not taken it yet.[7]

Grievant worked in the Agency's Building in her office beginning at 10:11 p.m. on January 8, 2013 until she left at 4:47 a.m. on January 9, 2013. Grievant was working on her responses to the Agency's Notices of Intent to take disciplinary action.

On January 9, 2013, the Supervisor counseled Grievant because she had accessed the Agency's building during that time period. The Supervisor wrote:

> Of great concern to me is the fact that you did not/do not have authority to enter the workplace after hours. This is evidenced by the fact that you do not have a key to the office.[8]

On January 10, 2013, Grievant spoke with another employee, Ms. W, and asked for a copy of the LPT Workspace Key Log that Grievant had signed when she was issued a key to her office/suite, a key to her work office, and an access card.

On January 11, 2013, Grievant sent the Supervisor an email containing her detailed work report for the week of January 7 through January 11, 2013. Grievant did not list the time she devoted to drafting the memorandum to EDR or the time she spent delivering the memorandum to EDR.

On January 22, 2013 at 2:38 p.m., the Supervisor replied to Grievant's January 11, 2013 email and asked "What is your total time accounted for on this one?"[9]

On January 22, 2013 at 3:39 p.m., Grievant replied:

> Time accounted for the work week of Jan. 7 – 11, 2013 noted below is 31 hrs. and 1 min. (does not include breaks or time responding to emails and other minor staff needs throughout the week). It also does not include time spent on responding to your three (3) notices of intent that you gave me for that week.[10]

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[7] Agency Exhibit 3.

[8] Agency Exhibit 2.

[9] Agency Exhibit 3.

[10] Agency Exhibit 3.

On January 22, 2013 at 3:43 p.m., the Supervisor sent Grievant an email stating:

> [Grievant's first name] I am confused. I have asked you to track the time you spend on all HR issues and report these to me on your weekly work report. You consistently tell me that you only use breaks and lunches for those responses you are creating. Now, you are telling me that the only time that you did not track was the time I asked you to track? Please explain this.[11]

On January 22 at 4:06 p.m., Grievant sent the Supervisor an email stating:

> The following time spent on responding to Notices of Intent for disciplinary action when forbidden to use work time is as follows:
>
> Time spent on responding to two Notices of Intent given during meeting with you from 4:30 – 5 p.m. on January 8, 2013 that was due on January 9, 2013 by 4 p.m. = 6 hrs. & 36 min. (from 10:11 p.m. on Jan. 8 – 4:47 a.m. on January 9, 2013).
>
> Time spent on responding to one Notice of Intent that you gave me on December 12, 2012 which was due on December 13, 2013 by 4 p.m. = 7 hrs. and 47 min (from 11:58 p.m. Dec. 12 -- 7:45 a.m. on Dec. 13, 2012).
>
> Tomorrow, I will provide the week and time that I spent regarding the Notice of Intent given by you on January 11, 2013 during our meeting from 3:45 – 4:45 p.m. and was due on Monday, January 14, 2013 by 4 p.m.[12]

On January 23, 2013 11:02 a.m., the Supervisor sent Grievant an email stating:

> We have discussed many times that I have asked you to record your time re: HR issues. I had never forbidden you from working on the network. This is again another communications challenge you are having. My request below was for work time spent. You do not need to report to me time spent outside your normal working hours. Thanks.[13]

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

[11] Agency Exhibit 3.

[12] Agency Exhibit 3.

[13] Agency Exhibit 3.

disciplinary action."[14] 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."

In EDR Ruling 2008-1964, 2008-1970, the Director addressed the following allegation:

> The grievant asserts that she asked her supervisor to reconsider her annual performance evaluation. When her supervisor refused to do so, the grievant asked her supervisor's supervisor (the reviewer) to reassess her evaluation. The grievant asserts that shortly after the reviewer modified her evaluation, her supervisor screamed at her on a number of occasions, called her a liar, and threatened to "write her up" (issue formal discipline).

Virginia Code § 2.2-3000(A) states:

> It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints. To that end, employees shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management. To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes that may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

The EDR director concluded:

> Under Virginia Code § 2.2-3000, "[i]t shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints. To that end, employees shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management." Thus, bringing a concern about an annual performance evaluation to a reviewer would appear to be an act "otherwise protected by law."

The EDR Director has broadly interpreted Virginia Code § 2.2.-3000 to define as protected activities (otherwise protected by law) attempts by employees to freely discuss their concerns with Agency management.

<u>Group I for Failure to Follow Instructions/Insubordination</u>

[14] The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

Grievant requested notes from Mr. H in order to refute the Supervisor's allegation that Grievant had not completed the tasks the Supervisor assigned to Grievant. Grievant's actions were directed at resolving a conflict with the Supervisor so as to avoid possible corrective or disciplinary action. Grievant's request for documents from Mr. H was protected under Va. Code § 2.2-3000(A) from retaliation. The Agency's Group I Written Notice must be reversed as it is contrary to the policy to encourage the resolution of employee problems and complaints.

The application of Va. Code § 2.2-3000(A) is not without limitation. For example, an agency may impose reasonable limitations on an employee who makes repeated and excessive request for documents in a manner that serves to disrupt materially the agency's operations. In this case, the Agency alleged but did not prove that Grievant made an excessive number of requests that would justify treating her differently from other employees. Neither the Supervisor nor the HR Manager testified at the hearing. It is unclear how the Agency concluded that Grievant's prior requests were excessive and unreasonable or that they unreasonably interfered with the Agency's operations. In addition, the Agency's assertion that Grievant's requests to Mr. H and Ms. W were for her "personal business" and not Agency business is unsubstantiated. Just as grievances are official State business[15], so are attempts to resolve conflicts within the workplace. Grievant was not engaged in "personal business" when she sought to preempt or rebut corrective or disciplinary action against her.

Group II Written Notice - Failure to Follow Established Procedure

The Supervisor accused Grievant of not being authorized to have an office/suite key. The Supervisor expressed her "great concern" as part of a counseling of Grievant. Grievant was concerned that she was being counseled for improper behavior even though she believed she had done nothing wrong. Grievant asked Ms. W for a copy of the log showing that she was authorized to have a key to the office/suite. Grievant's objective was to resolve a dispute with the Supervisor. Her request for a copy of the log was reasonable, related to her employment with the Agency, and an appropriate attempt to resolve a problem with her Supervisor. Her request was not for "personal business" as alleged by the Agency. As discussed above, the Agency's Group II Written Notice must be reversed as it is contrary to the policy to encourage the resolution of employee problems and complaints.

Group III Written Notice – Falsification of Records

"[F]alsification of records" is a Group III offense.[16] Falsification is not defined by the Standards of Conduct 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

[15] See, Section 8.8, Grievant Procedure Manual.

[16] See, Attachment A, DHRM Policy 1.60.

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.*

Grievant drafted a memorandum to EDR on January 8, 2013 during work hours. The memorandum involved "HR issues" because it addressed alleged retaliation against Grievant by the Agency. On January 11, 2013, Grievant sent the Supervisor a report regarding her work duties and omitted time spent on HR issues including drafting the January 8, 2013 memorandum. On January 22, 2013, the Supervisor questioned the accuracy of Grievant's weekly report and specifically sought information about Grievant's HR issues. Grievant responded by identifying the time she spent responding to the Notice of Intent she received. Grievant failed to disclose that she had drafted the January 8, 2013 memorandum. Grievant knew when she responded to the Supervisor that her response omitted information about her time spent on HR issues. Grievant falsified her weekly report to the Supervisor thereby justifying the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, the Agency's decision to remove Grievant must be upheld.

Grievant argued that she did not spend 57 minutes drafting the January 8, 2013 memorandum to EDR. She contends she merely had the document open on her computer but was working on other activities. The Hearing Officer is persuaded by the testimony of the Agency's Chief Information Security Officer. He testified that Grievant was likely sitting in front of her computer from 11:22 a.m. through 12:19 p.m. because she had computer activity[17] at 11:40 a.m., 11:42 a.m., 11:44 a.m., 11:58 a.m., 12:09 p.m., 12:11 p.m., 12:14 p.m., 12:16 p.m. and 12:18 p.m. The Agency's assertion that Grievant was at her desk working on the memorandum is supported by the evidence. Grievant's assertion that she was away from her desk working with other employees is not believable.[18]

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

[17] Computer activity could include pressing a key on the keyboard or clicking a computer mouse.

[18] Grievant sent emails to Ms. H at 11:24 a.m. and 11:37 a.m. and, thus, was not working on drafting the January 8, 2013 memorandum for the entire 57 minutes. See, Grievant Exhibit 4.

"in accordance with rules established by the Department of Human Resource Management …."[19] 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 the disciplinary action.[20]

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action is **rescinded.** The Agency's issuance to the Grievant of a Group II Written Notice is rescinded. The Agency's issuance to the Grievant of a Group III Written Notice with removal is **upheld**.

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

[19] Va. Code § 2.2-3005.

[20] Grievant alleged retaliation but failed to present any credible evidence that the Agency took disciplinary action against her as a form of retaliation.

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.[21]

[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

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

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 10057 / 10101 / 10102-R

Reconsideration Decision Issued: January 13, 2014

RECONSIDERATION DECISION

The Office of Employment Dispute Resolution Director issued Ruling 2014-3748 remanding the matter to the Hearing Officer and stating, in part:

> However, there is also evidence to show that the grievant may have been performing work tasks between 11:22 a.m. and 12:19 p.m. on January 8, 2013. For example, the grievant presented evidence that she used a work-related website between 10:53 a.m. and 11:47 a.m.; that she sent emails between 10:53 a.m. and 11:37 a.m.; that she may have met with co-workers between 11:22 a.m. and 12:19 p.m.; and that the document addressed to EDR and found on her computer was substantially different from the document actually submitted to EDR later that day.
>
> Based on our review of the hearing record, it is unclear how the hearing officer evaluated and weighed the evidence presented by the parties. The hearing officer could have found that the grievant spent approximately one hour on January 8 working on human resources matters, and that she failed to report that work to her supervisor. Likewise, the evidence could have also supported a finding that the grievant had not spent a significant portion of time performing non-work-related tasks on January 8. The hearing officer did not directly address much of the evidence presented by the grievant that could have led to this conclusion, and particularly that which is discussed above. In addition, the hearing officer seemingly concluded that the grievant claimed that she "was away from her desk working with other employees [between 11:22 a.m. and 12:19 p.m.]" and that this claim was "not believable." The grievant, however, argues that she did not make such a claim, and we have been unable to identify any evidence in the record to show that she was away from her desk between

> 11:22 a.m. and 12:19 p.m. In essence, we are unable to determine the factual basis for the hearing officer's conclusion that the grievant "drafted a memorandum to EDR on January 8, 2013 during work hours" or his reasons for deciding that the facts supporting this conclusion were more persuasive than those that showed the grievant was working during that time.
>
> Consequently, the hearing decision must be remanded to the hearing officer for further consideration of what facts in the record support (or do not support) the parties' arguments and clarification of the hearing officer's findings of fact as they relate to the evidence presented at the hearing. If the hearing officer maintains the original determination of upholding the Group III Written Notice, which may be a reasonable conclusion here, the hearing officer must include in the remand decision a clearer explanation of his findings of fact as to what the agency has proven by a preponderance of the evidence that the grievant did on January 8 that was not reported and justifies a charge of falsification. For instance, if the hearing officer finds that the grievant's time during the period in question was split between work and non-work activities, the hearing officer must address at what point the grievant's non-work activities crossed the threshold to amounting to time that had to be reported to her supervisor such that a failure to do so would be falsification of a state record. In short, the hearing officer must more fully explain his findings of fact, consideration of both parties' evidence, and basis for the resulting determinations. [Footnotes omitted]

The Hearing Officer's practice is not to expressly address witness credibility unless necessary to do so to describe the basis for the hearing decision. In this reconsideration decision, it now is necessary to address witness credibility.

The Hearing Officer determines witness credibility using several techniques. Often credibility can be determined by comparing a witness's demeanor when the witness is answering questions about matters that are not in dispute and matters that are in dispute. A witness reveals his or her demeanor through words spoken, the tone used to express those words, facial expressions, and body movements. A witness is likely to be truthful regarding matters that are not in dispute. If a witness's demeanor differs significantly when answering questions about matters in dispute and matters not in dispute, the Hearing Officer may conclude that the witness lacks credibility with respect to matters in dispute. When a witness lacks credibility, that lack of credibility may range from exaggeration to outright deception.

In this case, Grievant answered numerous questions about the facts giving rise to the disciplinary action and offered explanations to justify her behavior. Several times during the hearing, Grievant's demeanor showed that she was deceptive.

Grievant's deceptive testimony was sometimes confirmed by the lack of logic within her written assertions. Grievant claimed:

> I had business conversations between 11:30 a.m. – 1:30 p.m. with [Ms. DS] and [Ms. RH] regarding accurate lists of trainers, with [Ms. RH] regarding the video editing project and with [Ms. KJ] about the upcoming curricula review and editing. Please contact [Ms. KJ] for validation of a conversation on curricula review and editing that took place between 1:00 – 1:30 p.m. and other staff mentioned.
>
> I also worked with [First Name B] and [Ms. PR] on video needs for the Train the Trainer series as noted in my Work Report. I have emails from [Mr. RC] on consistent messaging for January 8, 2013. There is an email inquiry from [Ms. RV] indicating some courses were missed from the Survey which was to be launched that day. I worked in Survey Monkey to finalize active course and trainer listings as noted in my Work Report for two (2) hours. My work email can account for my deliberations with staff for that day.[22]

The Agency's Chief Information Security Officer testified that he reviewed the activity on Grievant's computer and he could put the Grievant at her desk the entire time the document was open. He testified that there were thousands of time stamps in the log for the computer and that he could place Grievant at her computer the entire time the document was open. The auto-save feature of Word would not have generated a time stamp in the log. The Chief Information Security Officer testified that there was "no internet activity" during the relevant times. The testimony of the Chief Information Security Officer was credible and more believable than significant parts of Grievant's testimony.

The Hearing Officer concludes that Grievant created the Broadcast document at 11:22 a.m. on the hard drive of her Agency issued computer. The document related to human resource issues because it involved her allegation of retaliation by her Supervisor.

Grievant claimed she drafted the document at home and brought it in on a thumb drive. She claimed she copied the document from her thumb drive into a document she created from a template called Broadcast. In particular, Grievant claimed, "I used the template for "Broadcasts" to serve as a memo layout when I got to work, saved drafts throughout the earlier morning, and finally saved my final draft before 8 a.m. on my thumb drive. I took a break late morning and printed my document for EDR." If Grievant had actually saved her final draft of the document at 8 a.m. there would not have been a reason for her to create the Broadcast document at 11:22 a.m., modify the document, and then close and save the document. Grievant wrote, "In order to account for the document found saved on my computer at 11:22 a.m., I may have opened it and

[22] Grievant Exhibit 1.

inadvertently saved it when I was looking for my final draft to print for EDR. I most likely opened and closed it again at 12:19 p.m. when I was doing my research on the Broadcast about Reengineering." The document appearing in the Broadcast document was not the final draft Grievant delivered to EDR at 2:40 p.m. If Grievant had opened "it" on the thumb drive and saved it to the Broadcast document on her computer, the version she delivered to EDR would have matched the version appearing on the Broadcast document on her computer.[23]

Grievant only worked on one Word document from 11:22 a.m. until 12:19 p.m. She did not work on any spreadsheets or Adobe documents as well. Grievant's email account was open.

On January 8, 2013, at 11:24 a.m., Grievant sent an email to Ms. RH regarding "FW: Family Services Video". At 11:37 a.m., Grievant sent an email to Ms. RH regarding "Family Services Video Editing Project." If the Hearing Officer assumes for the sake of argument that Grievant did not work on the Broadcast document after she created it at 11:22 a.m. until 11:37 a.m., the amount of the remaining time have been enough that Grievant should have reported that time on her weekly report.

Grievant saved and closed the document at 12:19 p.m. Grievant had the document open for 57 minutes. The document was approximately three pages. A time of approximately 57 minutes would be sufficient for Grievant to draft a several page document.

At 1:43 p.m. on January 8, 2013, Grievant sent the HR Manager an email stating that she was "leaving in 5 minutes" to drop of materials at EDR and "will return to work accordingly.[24] If Grievant left as she described, she would have left her office at approximately 1:48 p.m. The Agency asserted and Grievant testified that she left at 1:57 p.m. Grievant delivered the document to the EDR Secretary at 2:40 pm. She returned to her office at 3:11 p.m. This return time is supported by the Sonitrol record showing that she swiped her identification badge at 3:11 p.m. at the entrance to her office.[25] Thus, Grievant was away from her office for approximately 74 minutes. She described this as her "lunch hour." She exceeded her 60 minute lunch break by at least 14 minutes. She did not record this time as HR time on her weekly report.

The EDR Ruling states:

> In addition, the hearing officer seemingly concluded that the grievant claimed that she "was away from her desk working with other employees [between 11:22 a.m. and 12:19 p.m.]" and that this claim was "not believable." The grievant, however, argues that she did not make such a

[23] It is unclear why the document on Grievant's PC differed from the document she submitted to EDR.

[24] Agency Exhibit 3.

[25] See, Grievant Exhibit 2.

claim, and we have been unable to identify any evidence in the record to show that she was away from her desk between 11:22 a.m. and 12:19 p.m.

Grievant's attorney questioned the Chief Information Security Officer regarding whether it was possible that Grievant was working on a survey website with another employee while the document was open. The Chief Information Security Officer testified that the Agency did not have an Agency account and password with Survey Monkey. He testified that the Survey Monkey site was accessible from another account and that it was possible Grievant was working on another survey site account on another computer. His responses came from the questions asked by Grievant's counsel.

If Grievant is now asserting that she was not away from her desk working with another employee from 11:22 a.m. to 12:19 p.m., the conclusion that she was working primarily on the Broadcast document becomes more certain. The Chief Information Security Officer testified that Grievant did not have any internet activity from 11:22 a.m. until 12:19 p.m. using the Agency's network security software. If Grievant did not move away from her desk, she did not access the internet during that time period and, thus, devoted her time to drafting the Broadcast document.

Grievant asserted that she met with Ms. RH for half an hour from 11:00 a.m. until 11:30 a.m. Ms. RH initially testified she met with Grievant in Ms. RH's office from 11:00 a.m. until 11:30 a.m. regarding the video clip project. This could not have been true because Ms. RH sent Grievant an email at 11:24 a.m. She would not have been at Grievant's desk when she sent the email to Grievant. Ms. RH later testified that the half hour period from 11 a.m. until 11:30 a.m. was a tentative time and that they could have met in the early afternoon. She said the meeting could have taken place no later than 1 p.m. If true, the meeting could have occurred from 12:30 p.m. to 1 p.m. Ms. RH also testified that she did not know if the meeting could have taken place prior to 11 a.m. Based on Ms. RH's testimony it is unclear when she and Grievant met. There is little reason to believe that Grievant and Ms. RH met at Ms. RH's office during the time period of 11:22 a.m. to 12:19 p.m. when Grievant was working on the Broadcast document.

Ms. KJ testified that she met with Grievant on January 8, 2013 for 45 minutes to an hour. She said the meeting was mid-morning but that she believed the conversation was sometime before 2 p.m. because she had to leave the office for a doctor's appointment and probably left the office between 2 p.m. and 2:15 p.m. She testified that she sent Grievant a follow up email. The follow up email was sent at 1:29 p.m. Based on Ms. KJ's testimony, it is unclear when Grievant met with Ms. KJ. If the meeting occurred mid-morning, it would have begun around 10 a.m. and not between 11:22 a.m. and 12:19 p.m. It was clear to the Hearing Officer that Ms. KJ was unsure when she met with Grievant on January 8, 2013.

The testimony of the Chief Information Security Officer was that Grievant was at her desk from 11:22 a.m. until 12:19 p.m. His testimony was credible. Grievant's assertion that she was working on something other than the document was not credible. The testimony of Ms. RH and Ms. KJ was not sufficient to show that Grievant met with them from 11:22 a.m. until 12:19 p.m.

When the evidence is considered as a whole, Grievant created the Broadcast document at 11:22 a.m. she drafted that document until 12:19 p.m. when she saved and closed it. She was asked to report this time on her weekly report and she knowingly failed to do so thereby falsifying her weekly report.

APPEAL RIGHTS

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by DHRM, the hearing officer has issued a revised 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. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

/s/ Carl Wilson Schmidt

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Carl Wilson Schmidt, Esq.
Hearing Officer