

Issue: Group III Written Notice with Termination (falsification of records and abuse of State time); Hearing Date: 09/20/13; Decision Issued: 09/23/13; Agency: VCCS; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 10161; Outcome: No Relief – Agency Upheld.

COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 10161

Hearing Date: September 20, 2013
Decision Issued: September 23, 2013

PROCEDURAL HISTORY

Grievant was an administrative and program specialist for the Virginia Community College System (“the Agency”). On June 28, 2013, the Grievant was charged with a Group III Written Notice for falsification of records and abuse of time from February 14, 2013 through May 31, 2013, with job termination.

Grievant timely filed a grievance to challenge the Agency’s disciplinary action, and the outcome of the resolution steps was not satisfactory to the Grievant and the grievance qualified for a hearing. On August 22, 2013, the Office of Employment Dispute Resolution, Department of Human Resource Management, (“EDR”) appointed the Hearing Officer. During the pre-hearing conference, the grievance hearing was scheduled for September 20, 2013, on which date the grievance hearing was held, at the Agency’s office.

The Agency submitted documents for exhibits that were accepted into the grievance record, and they will be referred to as Agency’s Exhibits. The Grievant also submitted documents for the grievance record. The hearing officer has carefully considered all evidence presented.

APPEARANCES

Grievant
Representative for Agency
Advocate for Agency

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?

Through her grievance filings, the Grievant requested rescission of the Group III Written Notice, reinstatement, and back pay.

BURDEN OF PROOF

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as claims of retaliation and discrimination, the employee must present his evidence first and must prove his claim by a preponderance of the evidence. *In this disciplinary action, the burden of proof is on the Agency.* 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.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . .

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 which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

The Agency relied on the Standards of Conduct, promulgated by the Department of Human Resource Management, Policy 1.60, which defines Group III Offenses to include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination. This level is appropriate for offenses that, for example, endanger others in the workplace, constitute illegal or unethical conduct; neglect of duty; disruption of the workplace; or other serious violations of policies, procedures, or laws. Agency Exh. 22. Specific examples of Group III offenses include absence in excess of three workdays without authorization and falsification of records. An example of Group I offenses includes abuse of state time; and example of Group II offenses includes leaving work without permission.

Va. Code § 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 § 2.2-3005.1 provides that the hearing officer may order appropriate remedies including alteration of the Agency's disciplinary action. Implicit in the hearing officer's statutory authority is the ability to determine independently whether the employee's alleged conduct, if otherwise properly before the hearing officer, justified the discipline. The Court of Appeals of Virginia in *Tatum v. Dept. of Agr. & Consumer Serv.*, 41 Va. App. 110, 123, 582 S.E. 2d 452, 458 (2003) (quoting Rules for Conducting Grievance Hearings, VI(B)), 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."

The Offense

After reviewing the evidence presented and observing the demeanor of each testifying witness, the Hearing Officer makes the following findings of fact and conclusions:

The Written Notice described the nature of the offense as follows:

Falsification of records and abuse of time from 2/14/13 through 5/31/13

Attached documents include:

- DGS reports from 2/4/13 through 5/31/13 (Four reports in all)
- Record of Hours Worked forms from 2/1/13 through 5/30/13
- Reconciliation of DGS Cardholder Transaction History to Employee Completed Timesheet, February 4 – May 31, 2013 (2 pages)
- Signed Reconciliation of DGS Cardholder Transaction history to Employee Completed Timesheet, April 15 – May 31, 2013 (1 page)

Agency Exh 21. As for circumstances considered, the Written Notice, in Section IV, stated: “Considered years of service and records.” The Grievant had 22 years of service with the Agency.

The Agency’s witness, the Grievant’s direct supervisor and the Agency’s Audit Director, testified consistently with the charge in the Written Notice. The supervisor testified that she instructed the Grievant, a non-exempt classified employee, to keep and submit accurate time records for each work day on a weekly basis, and there is a form for this purpose. The Grievant’s prior supervisor issued a counseling memorandum to the Grievant on February 3, 2013, for unacceptable attendance. Agency Exh. 23.

The supervisor held several conferences or meetings with the Grievant regarding the expectations of attendance, notification of changes in hours, and for taking approved leave. From a series of the claimant’s actions and time submissions that raised questions, the supervisor requested the DGS cardholder transaction reports to compare to the Grievant’s actual time records. Through a review and comparison of the records, the supervisor compiled a spreadsheet showing the discrepancy of reported work times of 19 hours, 25 minutes from February 4, 2013, through May 31, 2013. Agency Exh. 17. The supervisor testified that most of these hours occurred on at least 24 days the supervisor was away from the office for various reasons. The supervisor also testified that the online system only handled leave requests and not daily time reporting.

The Grievant testified that she was aware of her timekeeping responsibilities, but that the online system should have been used for daily time reporting. The Grievant also testified that she believes she made up any missed time during lunches and breaks, although she had no timekeeping record of such additional worked hours. The Grievant did not specifically refute the accuracy of the comparison of the DGS timecard data to her own timesheets. The Grievant also asserted that her supervisor and human resources director were unfair to her, and that the punishment exceeded the offense.

As previously stated, the agency’s burden is to show upon a preponderance of evidence that the discipline of the Grievant was warranted and appropriate under the circumstances. The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth’s employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).

The grievance hearing is a *de novo* review of the evidence presented at the hearing, as stated above. The Agency has the burden to prove that the Grievant is guilty of the conduct charged in the written notice. Based on the evidence presented, including the progressive counseling of the Grievant, I conclude that the Agency has met its burden of proof of the offense and level of discipline—Group III, pursuant to the Standards of Conduct, which provides:

Employees who contribute to the success of an agency’s mission:

- Report to work as scheduled and seek approval from their supervisors in advance for any changes to the established work schedule, including the use of leave and late or early arrivals and departures.
- ...
- Use state equipment, time, and resources judiciously and as authorized.
- ...
- Utilize leave and related employee benefits in the manner for which they were intended.
- ...
- Meet or exceed established job performance expectations.

Agency Exh. 22, p. 2.

The Agency presented a reasonable, credible basis for calculating the number of unauthorized hours taken by the Grievant. The evidence preponderates in showing that the Grievant did not work the hours reported on her time sheets. Such behavior violated the applicable policy and expectations of a state employee. Assuming the Grievant could show that she made up the missing time, that still would not satisfy the obligation to notify her supervisor when she was arriving late or leaving early.

Mitigation

The Agency had leeway to impose discipline along the continuum less than Group III with termination. However, the Agency expressed its inability to mitigate the discipline to less than termination because of the repeated and severe nature of the timekeeping discrepancy and aggravating circumstances. For aggravating circumstances, the Agency points to the counseling for unacceptable attendance issued by the Grievant's prior supervisor on February 3, 2013 (Agency Exh. 23), and an incident of unacceptable workplace behavior on May 21, 2013, involving an altercation with a co-worker (Agency Exh. 24). The level of discipline in this situation is fairly debatable. While the Hearing Officer may have reached a different level of discipline, he may not substitute his judgment for that of the Agency when the Agency's discipline falls within the limits of reasonableness.

Under Virginia Code § 2.2-3005, the hearing officer has the duty to "receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Office of Employment Dispute Resolution." 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. The Grievant produced no such evidence to support mitigation to a lesser discipline.

The agency has proved (i) the employee engaged in the behavior described in the written notice, (ii) the behavior constituted misconduct, and (iii) the discipline was consistent with law and policy. Thus, the discipline must be upheld absent evidence that the discipline exceeded the limits of reasonableness. *Rules for Conducting Grievance Hearings* (“Hearing Rules”) § VI.B.1.

On the issue of mitigation, EDR has ruled:

Importantly, because reasonable persons may disagree over whether or to what extent discipline should be mitigated, a hearing officer may not simply substitute his or her judgment on that issue for that of agency management. Rather, mitigation by a hearing officer under the *Rules* requires that he or she, based on the record evidence, make findings of fact that clearly support the conclusion that the agency’s discipline, though issued for founded misconduct described in the Written Notice, and though consistent with law and policy, nevertheless meets the *Rules* “exceeds the limits of reasonableness” standard. This is a high standard to meet, and has been described in analogous Merit System Protection Board case law as one prohibiting interference with management’s discretion unless under the facts the discipline imposed is viewed as unconscionably disproportionate, abusive, or totally unwarranted.

EDR Ruling #2010-2483 (March 2, 2010) (citations omitted). EDR has further explained:

When an agency’s decision on mitigation is fairly debatable, it is, by definition, within the bounds of reason, and thus not subject to reversal by the hearing officer. A hearing officer “will not freely substitute [his or her] judgment for that of the agency on the question of what is the best penalty, but will only ‘assure that managerial judgment has been properly exercised within tolerable limits of reasonableness.’”

EDR Ruling 2010-2465 (March 4, 2010) (citations omitted).

Regarding the third, the Agency has the management prerogative to act within a continuum of discipline as long as the Agency acts within the bounds of reasonableness. The Standards of Conduct allow agencies, under certain circumstances, to consider an offense typically associated with one category to be elevated to a higher level offense. Under the EDR’s Hearing Rules, the hearing officer is not a “super-personnel officer.” Therefore, the hearing officer should give the appropriate level of deference to actions by Agency management that are found to be consistent with law and policy, even if he disagrees with the action. Here, the multiple counseling and multiple offenses support the Agency’s decision. Finally, I find that the discipline was not tainted by improper motive, such as retaliation or discrimination. In this case,

the Agency's action in assessing a Group III offense and termination is within the bounds of specific policy.

DECISION

For the reasons stated herein, the Agency's Group III discipline with termination 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 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.¹

I hereby certify that a copy of this decision was sent to the parties and their advocates shown on the attached list.

A handwritten signature in blue ink, appearing to read "Cecil H. Creasey, Jr.", written over a horizontal line.

Cecil H. Creasey, Jr.
Hearing Officer

¹ Agencies must request and receive prior approval from EDR before filing a notice of appeal.